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

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

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This is a Key-Numbered Volume

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

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

GENERAL ORDER IN BANKRUPTCY

SUPREME COURT OF THE UNITED STATES [1]

October Term, 1916.

Order: It is ordered that General Order in Bankruptcy No. XXXII be amended so as to read as follows:

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge.

(Promulgated June 4, 1917.)

[1] For other orders, see 18 Sup. Ct. iii, 89 Fed. iii, 32 C. C. A. iii; 36 Sup. Ct. vi, 230 Fed. v, 143 C. C. A. v.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FREDERIC DODGE, Circuit Judge.....Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge.....Concord, N. H.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
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Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

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Hon. ALFRED C. COXE, Circuit Judge[1].....New York, N. Y.
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Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
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Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York.....New York, N. Y.
Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. MARTIN T. MANTON, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont.....St. Johnsbury, Vt.

THIRD CIRCUIT

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

[1] Resigned August 1, 1917.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
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Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
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Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
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Hon. ROBERT LYNN BATTS, Circuit Judge .....Austin, Tex.
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Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. BEVERLY D. EVANS, District Judge, S. D. Georgia[2] .....Savannah, Ga.
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Hon. GEORGE W. JACK, District Judge, W. D. Louisiana .....Shreveport, La.
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Hon. GORDON RUSSELL, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas .....San Antonio, Tex.
Hon. W. R. SMITH, District Judge, W. D. Tex..... .....El Paso, Tex.

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Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....Toledo, Ohio.
Hon. D. C. WESTENHAVER, District Judge, N. D. Ohio .....Cleveland, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT

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Hon. FRANCIS E. BAKER, Circuit Judge..... .....Goshen, Ind.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[2] Appointed August 8, 1917.

Hon. SAMUEL ALSCHULER, Circuit Judge ..... Chicago, Ill.
Hon. EVAN A. EVANS, Circuit Judge ..... Baraboo, Wis.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois..... Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois..... Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois[3] ..... Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois..... Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana..... Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin..... Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin..... Madison, Wis.

EIGHTH CIRCUIT

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

NINTH CIRCUIT

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

[3] Died October 7, 1917.

*

CASES REPORTED

CASES ON REHEARING

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

FOURTH CIRCUIT.

Orion, The, 239 F. 301. Rehearing denied Feb. 28, 1917.

FIFTH CIRCUIT.

American Lumber Co. v. Continental Lumber Co., 239 F. 1020. Rehearing denied March 20, 1917.

Bernal v. United States, 241 F. 339. Rehearing denied June 15, 1917.

Illinois Cent. R. Co. v. Brooks-Scanlon Co., 241 F. 445. Rehearing denied July 13, 1917.

NINTH CIRCUIT.

Norma Mining Co. v. Mackay, 241 F. 640. Rehearing denied Oct. 8, 1917.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

BALTIMORE & O. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 2911.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EXCUSES.
In an action for penalties for keeping a freight train crew on duty more than 16 hours, where the weather was extremely cold, with deep snow and a bad storm, the jury might have found that delays caused by the breaking of a knuckle, the freezing of the air hose and a broken knuckle lock were due to unavoidable accidents or causes which could not have been foreseen, within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 3, 34 Stat. 1416 (Comp. St. 1916. § 8679), that the provisions of such act shall not apply to delays so caused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EXCUSES.
Under Hours of Service Act, § 3, providing that such act shall not apply to any case of unavoidable accident, nor where the delay was the result of a cause not known when the employé left the terminal and which could not have been foreseen, while the circumstances may make it imperative and lawful that a crew should continue at work until the train reaches a relay point, the carrier cannot arbitrarily add to the specified 16 hours the amount of any delay arising from the excepted causes, nor arbitrarily keep the crew on duty until the end of the run, or the nearest regular relay point.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EXCUSES.
Under the proviso of Hours of Service Act, § 3, the prescribed penalties do not accrue for such excess service as is the proximate result of the unavoidable accident, but the suspension of the statute exists only to the extent that the unavoidable accident was and continues to be the moving cause of the excess service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

4. APPEAL AND ERROR ⟸1064(4)—HARMLESS ERROR—INSTRUCTIONS.
In an action for penalties for keeping a freight train crew on duty more than 16 hours, defended on the ground that delays were due to unavoidable accidents and causes which could not have been foreseen, where the issue was close, instructions which were not wholly clear, and might have been misunderstood by the jury, concerning the degree of diligence required to avoid keeping the men on duty longer than 16 hours and the effect of delays due to excusable causes, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224.]

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5. MASTER AND SERVANT ⊂⊃17—HOURS OF SERVICE—PENALTIES—QUESTION FOR JURY.

A freight train crew went on duty at 11:30 a. m., and left Newark for a run of 87 miles to Chicago Junction, usually requiring about 8½ hours, at 12:45 p. m. The weather and other causes delayed the train, so that it did not leave L., 53 miles from Newark, until midnight. At A., the next station, there was a delay of 1½ hours, at N., 63 miles from Newark, which the train reached at 2:47, a delay of 50 minutes, and at S., 10 miles further, which it reached at 5:10, a delay of 2 hours, during which the crew was relieved by a crew sent out from Chicago Junction on the regular train, leaving at 5:20. The delays at A., N., and S. might have been found to be excusable. *Held*, that defendant's motion for an instructed verdict was properly denied, as the jury might have found that, in the exercise of a high degree of diligence, it was the carrier's duty to send relief by a special train, without waiting for the regular train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16.]

6. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—EXCUSES.

Under Hours of Service Act, § 3, where there is a delay from unavoidable accident, or a cause not known to the railroad's agents when a freight train leaves its terminal, and which could not have been foreseen, the railroad is entitled to add to the 16 hours permitted by statute all the delay, and only such delay as occurs as the result of this cause, provided it exercised reasonable diligence from the beginning of the trip to avoid delays, exercised a high degree of effort or extreme diligence to get the train through to the end of the run within the time limit, when it became or should have become apparent that there was danger of not getting through on time, used that same high diligence to prevent excess service by laying up the train, sending relief, or any other practicable way, as soon as excess service became fairly probable, and continually and until the service ended used the same high diligence and by the same means to make the excess service as short as possible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Action by the United States against the Baltimore & Ohio Railroad Company for penalties. Judgment for the government, and defendant brings error. Reversed, and new trial awarded.

S. H. Tolles and R. C. Hyatt, both of Cleveland, Ohio, for plaintiff in error.

Philip J. Doherty, of Washington, D. C., and E. S. Wertz, U. S. Atty., of Cleveland, Ohio, for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. In the court below, the government alleged that the defendant, the railroad company, had violated the Hours of Service Act (34 Stat. p. 1415) by keeping on duty more than 16 hours, on December 25 and December 26, 1914, the crew of a freight train bound from Newark to Chicago Junction. The crew consisted of 2 engineers, 2 firemen, a conductor, and 2 brakemen. The defendant admitted that more than 16 hours service had been rendered by the employés, but claimed that the delays which caused the excessive service resulted from casualty, unavoidable accident, or the act of God.

The issues were submitted to a jury, which found for the government. The railroad company alleges that there was error in the reception of evidence and in the instructions to the jury.

The case involves a construction and application of the proviso of section 3 of the act, which is:

"That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

This makes it necessary to state the facts somewhat fully. The distance from Newark to Chicago Junction was 87 miles. This train was scheduled to leave Newark at 10:35 a. m., and arrive at Chicago Junction at 7 p. m.—a regular running time of about 8½ hours. On this occasion, the crew went on duty at 11:30 a. m., but did not leave Newark until 12:45 p. m. The train was heavy, having 82 cars with 2 engines, there was a bad storm and it was very cold, the work at the stops was difficult and slow and other trains had to be waited for. The result is that this train did not leave Lexington, 53 miles from Newark, until midnight, after the men had been on duty 12½ hours, and about 11 hours after it left Newark. It cannot fairly be claimed that any delay which had occurred up to this time is within the proviso in question. At the next station, Alta, there was a delay of an hour and a half, caused by the breaking of a knuckle and in the necessary replacement and repairs. The train left Alta at 2 a. m., and reached the next station, North Siding, 63 miles from Newark, at 2:47. The crew had then been on duty 15¼ hours. Here there was a delay of 50 minutes, caused by the air hose freezing, and the necessary repairs. Leaving North Siding at 3:57, the train reached Shelby Junction, 10 miles further, at 5:10. Here there was a further delay of 2 hours on account of a broken knuckle lock, the breaking in two of the train and the necessary repairs and clearing the track; but at about 6 o'clock, after 18½ hours of service, the crew was relieved by a crew which had been sent back from Chicago Junction on the regular train leaving there at 5:20.

[1] Under the circumstances of this case, and considering the extent to which the extreme cold and deep snow and storm would aggravate occurrences otherwise less serious, we are inclined to think that the described delays at Alta, North Siding, and Shelby Junction might have been found by the jury to result from unavoidable accident or from a cause which could not have been foreseen by the agents in charge when the train left Newark. We think this conclusion not out of harmony with our holding in No. 2910 (a case of the same title, opinion filed herewith) that the disabling of the water pipe could not be such an accident. Not only is there in that case nothing tending to show that ordinary inspection and care would not have prevented the trouble, but in making concrete application of the term "unavoidable accident," there is a necessary distinction between a fixed water pipe in a tank and freight car apparatus subjected to severe strains of transportation under difficult conditions. We find, then, that the evidence tended to show that at the end of the 18 hours and 30 minutes of actual service, delays amounting to about 3 hours and 30 minutes had occur-

red, which were attributable to unavoidable accident—delays of the class which, for convenience, we hereafter call "excusable"—and that since, when the train left Lexington, it had 34 miles to go, and had less than 4 hours of the 16 remaining in which to make that distance, including several stops, it should then have been apparent to the train dispatcher that there was a serious danger, if not a probability, that the 16 hours would be exceeded before Chicago Junction could be reached. In this situation, defendant requested two instructions. One was that the defendant was entitled of right to add to the 16 hours the time of whatever delay was attributable to an unavoidable accident, and the other was that when the unavoidable accident happened causing delay beyond 16 hours, the defendant was entitled to keep the crew in service until the end of the run or the nearest regular relay point. The refusal of these instructions is alleged as error.

[2] We cannot think that defendant was entitled to either instruction. It is true that the Interstate Commerce Commission, soon after the enactment of the law, ruled that an employé so delayed might be continued on duty to the end of the run ("The proviso quoted removes the application of the law to that trip." I. C. C. Conference Ruling 88, June 25, 1908); but when read in connection with other administrative rulings (see discussion of same in San Pedro R. v. United States, 220 Fed. 737, 744, 136 C. C. A. 343, and in Atchison Ry. v. U. S., 220 Fed. 748, 136 C. C. A. 354 [1]) we doubt whether it was intended to lay down any general and universal rule. At any rate, since such a construction of the act would not infrequently remove altogether the time prohibition and permit unlimited service to be exacted, it would be so in conflict with the general purpose and scope of the act so often declared that we cannot be satisfied to adopt it, although it is plain enough that the circumstances of a given case may make it imperative and lawful that the crew should continue at work until the train reaches a relay point.

Nor can we think that the statute carries any arbitrary and certain permission to add to the specified 16 hours the amount of any delay arising from the excepting causes. It is contrary to the spirit of the act to suppose that if there had been 3 hours excusable delay in the early part of the trip and there still remained ample time to finish the run within 16 hours, the railroad could arbitrarily or unnecessarily allow additional delays, so as to call for 19 hours' service. On the other hand, it seems equally clear that, through lost connections or impossibility of relief or the necessity of paying due regard to the public right to the operation of other trains, that very same delay might make necessary excessive service of more than 3 hours. To adapt the spirit of the statute to all these varying circumstances, some other rule must be found than the mere addition of a time equal to the period of excusable delay.

[3] The application of the proviso undoubtedly develops ambiguities, but the prevention of excessive service was the substantial thing at which the statute was aiming, and when the proviso says that in case

[1] Affirmed by Supreme Court, June 4, 1917. 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. —.

of unavoidable accident "the provisions of this act shall not apply," we think it must mean that the penalties will not accrue for such excess service as is the proximate result of the unavoidable accident, and that the suspension of the statute exists only to the extent that the unavoidable accident was and continues to be the moving cause of the excess service. Since the duty of obeying the statute as far as possible must be always present, this construction requires that the railroad company should be diligent to prevent and to minimize excess service, and the questions will be what degree of diligence is required and when it begins.

Complaint is made that the trial court charged that the railroad must exercise a high degree of diligence to this end. We think this instruction was correct. No ordinary occurrence will suspend the operation of the statute, but it must be such as could not have been foreseen; and this very language surely imposes a high degree of diligence upon a railroad as a condition of permitting it to allege the occurrence of the suspending incident, even if the same inference did not come from the term "unavoidable." That being so, it is most appropriate that the same degree of diligence against the continuing effect of the cause of delay should be required as is demanded against its inception.

When does the railroad become charged with the duty to use this extreme diligence in avoiding or minimizing excess service? It cannot be merely when the unavoidable accident occurs, for there may still be remaining apparently ample time to recover from the accident and complete the trip, or it may already have become apparent that excess service cannot be avoided. The duty can hardly exist from the beginning. The schedule of this train called for only about half of the 16 hours, and since 16 hours' service is lawful, it is difficult to see how there is any duty to use extraordinary, high or extreme diligence to avoid excess service, so long as apparently ample time remains and there is no reason to apprehend the trip will not be finished within the time. Concretely, it does not seem that it could have been intended to impose a penalty as the ultimate result of a delay of (e. g.) 3 hours in waiting for a connection or for a shipment (a delay convenient, but not necessary) in the early part of the trip, when there still remained to finish it twice as much time as was apparently necessary and when the casualty happened in the latter part of the trip. While we do not question that railroads should keep the statute in view even from the beginning of the trip, and that the immunity of the proviso may not safely rest upon the arbitrary or reckless disregard of the schedule before the casualty happens, yet we see no warrant for requiring in this earlier period more than ordinary or reasonable diligence, such as would be dictated by due regard for all the duties of the railroad both as a carrier and as an employer. It must follow that the duty in question to use high diligence begins when the railroad becomes chargeable with notice that such diligence may be necessary to prevent or to minimize excess service. We have not the benefit of any former constructions of this act in this particular, but what we deem its general purposes and the applicable principles of construction lead to the conclusion we have stated. It must be observed that we are not now dealing with the prohibition of the statute and adopting a construction

which can rightly be thought to weaken that prohibition by an inquiry regarding diligence. We are considering a proviso or exemption which, taken literally, goes further than we think could have been intended, since, so taken, it would destroy the statute pro tanto; and we are inquiring only what diligence ought rightly to be exacted from the railroad as a condition of allowing it to invoke this proviso.

It follows, also, that the practical and efficient thing for the railroad to do after it must be deemed aware that the train will not get through within the time limit, and in cases which cannot be otherwise met, is to send relief. Just how and when it should be sent must depend on the particular situation; but we agree with the Circuit Court of Appeals of the Ninth Circuit that such a duty may arise so as to be a condition without the performance of which the railroad may not invoke the benefit of this proviso. San Pedro Co. v. United States, supra, 220 Fed. at page 737, 136 C. C. A. 343; Newport Co. v. United States (C. C. A. 6) 61 Fed. 488, 9 C. C. A. 579.

[4] The instructions to the jury were not wholly clear on these subjects. It was told that the railroad must exercise a high degree of diligence to avoid keeping the men on duty longer than 16 hours, and that otherwise its conduct was not excused. It was not told that diligence, after the 16-hour period had passed, was important, or could justify any part of the excessive service. Parts of the charge indicated that the necessary high diligence must have existed from the beginning of the run, other parts that its necessity only arose after the unavoidable accident or unforeseen event, and still other parts fixed the origin of the duty at the time which we think the right time. Again, it was instructed in effect that (e. g.) the 1½-hour delay at Alta could not add more than 1½ hours to the allowable time, and that the delay at Shelby Junction, which did not begin until after the 16 hours had passed, could not be credited, unless the railroad company, after the Shelby accident had happened, was diligent to keep within the 16-hour limit. Considering the whole charge, the record permits the inference that the jury may have believed that 3 hours' delay was from causes specified in the proviso and yet have found for plaintiff because defendant had not been highly diligent in the first part of the trip before any necessity appeared or because diligence after the 16-hour period was immaterial. We must regard the charge in this respect as erroneous; and, owing to the closeness of the issue, as below pointed out, we think it prejudicial.

[5] At the conclusion of the trial defendant moved for an instructed verdict, and error is assigned upon the denial of this motion. In this action there was no error. In order to justify granting the motion, it must have conclusively appeared, not only that the causes of delay were among those specified in the proviso (and this was for the jury), but that after it became aware, or should have been aware, that there was a substantial probability of not completing the run within 16 hours, the defendant exercised a high degree of diligence, first, to avoid any excessive service, and, second, if that could not be done, to make it as small as possible. Whether such diligence was exercised can be intelligently considered in a concrete case only by determining what was omitted which might have been done. In this case, the railroad certain-

ly should have been aware of the impending necessity when the train reached North Siding. There remained less than one hour in which to make 25 miles. The necessity had become fairly clear at Alta (not a telegraph station), and we think, as before stated, it would have been within the rightful scope of the jury's judgment to find that the necessity should have been apparent on leaving Lexington at midnight.

Only three things are suggested which might have been done. The first is for the dispatcher to have instructed that as much of the train as was necessary be sidetracked and abandoned and that the two engines with the crew and part of the train hasten on to Chicago Junction. The second is that at some time before 3:30, when the 16 hours expired (and this practically means at North Siding), the train could have been laid up and the men laid off. Whether the appplicable measure of diligence allowed the jury to find the existence of a duty in either of these respects was not specifically submitted, and we need not now stop to consider. If not, we come to the third and remaining suggested duty, viz. to send a relief crew to meet this train. It is fairly inferable that this relief must come from Chicago Junction, that a regular train upon which it could be sent left at 5:20 a. m., which could meet and relieve this crew at Shelby Junction, and that between midnight and 5:20 there was no way to send relief, except by special train. The practical question, and the determinative one on this branch of the case, therefore, was whether there was such a breach of duty in not sending this relief earlier. Certainly, after midnight, in a winter storm and at a mere junction point, it is not to be assumed that a relief crew can be assembled and started at once, and, when due allowance is made for the inevitable delay, the existence of any duty to save a short time by sending a special instead of waiting for the regular is by no means clear. We are not prepared to say that a finding by the jury that such duty did exist would be without support. On the contrary, even upon the present record, the jury might have been of the opinion that there was such a duty and that it was not observed; but, under such circumstances, it is important that the nature and extent of the legal duty should be most carefully explained to the jury, and any confusion or conflict in the instructions is much more difficult to regard as clearly nonprejudicial, than in a case where the violation of the law is reasonably clear.

While we apply here the same rule of legal duty to send relief which we applied in No. 2910, yet the facts are sufficiently different so that we may well say there was an apparent and a clear breach of that duty in No. 2910, while in this case the proof of breach does not put it so beyond doubt that we may take it as an established fact. In that case only one man was needed, there were three employés available for relief, and it would have been necessary to send an engine 5 miles at the end of the afternoon. In the present case, six men were necessary to make a relief crew, it does not appear that any were available before they were sent, the distance was 24 miles, and the time was after midnight. More than that, at least upon the subject of sending relief, this case involved only the alternative between sending a special train or waiting for the regular, possibly for only a short time after the

special could have been sent, while in No. 2910 there was no such alternative.

[6] To summarize what has been said, and for the aid of the court below upon another trial, we construe the proviso in this way: If it is found that there was delay from an unavoidable accident, or from a cause not known to the railroad agents when the train left Newark, and which could not have been foreseen, then the railroad was entitled to add to the 16 hours all the delay, no more and no less, which thereafter occurred as the result of this cause; but it was entitled to do so only if the jury found the existence of all these conditions: (a) That from the beginning of the trip, and even before it became apparent, or should have become apparent, to the train dispatcher that there was danger of not finishing the trip within the time, the railroad used reasonable diligence to avoid delays; (b) that as soon as it became apparent, or should have become apparent, that there was any danger of not getting through on time, the railroad used a very high degree of effort or extreme diligence to get the train through to the end of the run within the time limit; (c) that as soon as it became fairly probable that excess service would otherwise be necessary, the railroad used that same high diligence to prevent excess service, either by laying up the train or by sending relief or in any other practicable way; (d) that continually and until the service ended, the railroad used the same high diligence and by the same means, to the end that the excess service, if any, should be as short as possible.

It must be understood that what we have said regarding the diligence required, after the trip begins, in order to get and to keep the right to excessive service, has been said with reference to a case where "the delay was the result of a cause * * * which could not have been foreseen" when the train left the terminal. Only upon the hypothesis that the jury finds the existence of this preliminary extreme care does the exempting clause of the proviso require construction.

Since there must be a new trial, and the questions of evidence probably will not arise again in the same shape, we do not think it necessary to pass upon them. The two telegrams and the circular were received as bearing on the company's diligence; but, since the practical question was whether the relief was sent early enough, these matters were at most somewhat remote. So, too, the record, as it is brought here, leaves us in doubt whether certain adverse comments upon some of the evidence were wholly justified; but these matters alone would not, in any event, justify reversal.

The judgment is reversed, and a new trial awarded.

BIWABIK MINING CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 2938.

1. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX—"INCOME."
That Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, does not impose a tax upon the income of corporations, but an excise tax measured by their income, cannot affect the meaning of the word "income," as used therein.
[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—CORPORATE EXCISE TAX—TAXABLE INCOME.
The receipts and accumulations of a business corporation, representing the sale or conversion of its capital, do not constitute taxable income, under Act Aug. 5, 1909.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

3. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—TAXABLE INCOME.
Where iron mines are located in a district where the mining is done by simple quarrying after the overlying surface has been stripped off, and the quantity of the ore in the ground can be measured with substantial accuracy, the selling price of ore mined and sold in any year, so far as it represents the actual value to the mining company of the ore in the ground on January 1, 1909, is not income, within Act Aug. 5, 1909, whether the value of the company's interest in the ore in the ground is based upon the amount paid therefor, or upon a subsequent appreciation of its market value before the taxing law went into effect.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

4. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—TAXABLE INCOME.
That the company was not the owner, but only a lessee, did not affect the application of this rule, where its interest could have been bought and sold, and was salable on January 1, 1909, for the amount adopted as representing the value of the ore in the ground, and where at the rate the ore was being mined it would all be removed before the expiration of the lease; the fact that the lease might be forfeited or given up not making income of what would otherwise be capital.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Action by the United States against the Biwabik Mining Company. Judgment for the United States, and defendant brings error. Reversed, and petition dismissed, conditionally.

The Biwabik Company is an operating iron mining company. In 1910 the company made its return to the collector of internal revenue, for the year 1910, as required by the excise tax law of August 5, 1909 (36 Stat. p. 112, § 38), and paid the tax indicated by the return. In 1915 the United States brought this action, alleging that the return for the year 1910 wrongfully omitted from income the sum of $265,372, and asking a judgment for 1 per cent. of this amount. Judgment for the United States was rendered in the court below, and the company assigns error. The case was submitted to the District Judge without a jury, upon an agreed statement of facts, and presents only questions of law.

The company was lessee of the property, on which it was operating, under a mining lease, and under a method of business which has become familiar to us through many cases which have come to this court. In these contracts, the

lessee is privileged to remove ore upon the payment of a certain price per ton, called "royalty." The leases run for long periods of years (in this case 50 years), and they contain many provisions for regulating the rights of the parties. The royalty is usually fixed for the whole period at some standard rate per ton, and if the market conditions at the time indicate a higher value for the ore in the ground than the standard royalty, the lessee pays, at the time of taking the lease, a bonus in cash designed to meet so much of this advanced value as is thought to be sufficiently permanent. When the lessee sells to another operator his interest in the lease, the price is determined by fixing the bonus to be paid, and thereupon the purchaser steps in to the position of the first lessee.

In 1898 the owner of certain iron ore lands upon the Mesaba Range, in Minnesota, executed a mining lease of this character. The lessee's rights thereunder, after some mesne transfers, were duly purchased by the Biwabik Mining Company, in June, 1898, in consideration of $612,000 cash. This consideration also covered certain other personal property of the assignor. From 1898 to and including 1910, the Biwabik carried on the operation, paying to the lessor the prescribed royalty of 30 cents per ton.

It is also familiar that the iron ore deposits of the Mesaba Range are of a different character from those in (most) other iron mining districts. The ore is not found in veins, which incline more or less vertically, and which are of constantly changing thickness, shape, and quality, as is typically the case with the precious metals; nor does it lie, as coal does, in comparatively thin veins, approaching the horizontal. It lies in horizontal bodies, lenticular in form, comparatively near the surface, and the body of the ore, except at the edges of the deposit, is of a very considerable thickness. It is soft, and it is mined by stripping off and carrying away the overlying surface, and then excavating the ore with steam shovels. Such a so-called mine is, in truth, nothing more nor less than a quarry. The quality of the ore throughout such a deposit is substantially constant, and the quantity, by the use of diamond drills upon the surface and by simpler methods after it has been stripped, can be measured with substantial accuracy. This general situation has been applied to this case, by the stipulation of the parties as follows:

"(4) The iron ore body on said property lies in a flat or blanket formation from about 30 to 60 feet below the surface, and the ore is mined by steam shovels after the removal of the surface. The boundaries of said ore body and the depth, quantity, and quality of said ore is capable of determination with extraordinary accuracy by test pits, shafts, and drilling from the surface. Prior to the year 1909, there had been mined and removed from said premises 7,420,114 tons of iron ore, and in connection therewith, by drilling and by standard recognized methods, defendant had calculated the tonnage and the quality of the iron ore then still remaining upon the said premises, and had ascertained that said property contained 6,874,695 tons of merchantable iron ore, all of which was readily and easily minable and removable before the expiration of the date of said contracts, in the year 1948.

"(5) In the condition said premises were in on January 1, 1909, the contract of April 4, 1898, and the rights created thereby, exclusive of buildings and machinery on said premises, were of the actual value of $3,351,413.81, and the ore in said property, considering the entire deposit thereof en bloc, on January 1, 1909, was of the value of 48¾ cents per ton, exclusive of the royalty of 30 cents per ton provided for in the lease."

During the year 1910 the company mined and shipped, or otherwise disposed of, 544,353 tons of such ore at an average sale price of $3.10 per ton. Of this price, 30 cents represented the royalty, about $1.90 the operating and similar costs, 4 cents the original bonus paid to the assignor of the lease (plus interest and taxes), 44¾ cents the additional value which, according to the stipulation, the interest of the company was worth January 1, 1909, and about 40 cents the company's net profit over and above these items.

Shortly after the excise tax law was passed, the Commissioner of Internal Revenue, who was, by law, charged with that duty, promulgated regulations governing its collection. The presently material parts of such regulations, as first promulgated and as later modified, are as follows:

Regulation No. 31, Issued December 3, 1909.

Article 2, Gross Income.

The following definitions and rules are given for determining the gross income of the various classes of corporations:

* * * * * * * * * *

Sale of Capital Assets.—In ascertaining income derived from the sale of capital assets, if the assets were acquired subsequent to January 1, 1909, the difference between the selling price and the buying price shall constitute an item of gross income to be added to or subtracted from gross income according to whether the selling price was greater or less than the buying price. If the capital assets were acquired prior to January 1, 1909, the amount of income or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall be deducted from or added to the gross income for the year in which the sale was made. But for the purpose of determining the selling price, as provided in this section, there shall be added to the price actually realized on sale any amount which has already been set aside and deducted from gross income by way of depreciation as defined in article 4 and has not been paid out in making good such depreciation on the property sold.

Regulations 72–77, Issued March 29, 1910, by Treasury Decision No. 1606.

Depreciation.

72. Depreciation in value of mines by the removal of ore, if not otherwise ascertainable, may be prorated as in the case of sales of capital assets.

73. Depreciation in value of mines by the removal of ore, if in excess of 5 per cent. of investment, to be explained in return rendered.

75. Corporations leasing mines and paying royalties on ore mined not entitled to deduction for depreciation. But corporations owning mines are entitled to allowance for depreciation based on fair estimate, etc.

76. Removal of timber from timber lands, while depleting the lands to the extent of such removal, is regarded as a change in the form of assets and not a depreciation within the meaning of the act.

77. Deduction on account of depreciation of property must be based on lifetime of property, its cost, value and use.

Regulations 83–92, Issued February 14, 1911, by Treasury Decision No. 1675.

Depreciation in Minerals, Oil, Etc.

83. In case of corporations whose business consists in part or wholly of mining, producing and disposing of deposits of nature (ores, coals, gas, petroleum and sundry minerals) the conduct of such business will be understood to comprehend two classes of gains or losses, viz.:

(a) The gain or loss resulting from the sale of capital assets, i. e., either the increment, or the loss, arising through possessing over a period of time the investment in the same.

(b) The trading or commercial gain attached to the conduct of the industry, the employment of working capital, the effort and risk involved.

84. In the ascertainment of net income, deduction will be allowed for depreciation arising from exhaustion of deposits of ore, mineral, etc., and for depreciation and obsolescence of improvements in accordance with general regulations respecting depreciation allowances, on the basis of the original capital investment cost of the properties concerned to the company reporting.

85. A further deduction will also be allowed, through not including the same at all in the item of gross income (item 3, Form 637), for the unearned increment represented in such properties as at January 1, 1909, which will be determined in general as follows:

86. An estimate should be made as of January 1, 1909, of the fair market value at that date of the minerals, etc., in deposit. This estimate should be formed on the basis of the disposal value of the minerals in total and exclu-

sive of value of improvements and development work. This valuation should also be reduced to a unit value—per ton, barrel, etc.[1]

87. The unit value as of January 1, 1909, ascertained as above outlined, would indicate the value to be attached at that date to the capital assets disposed of during any calendar year succeeding, and should be used in determining the unearned increment at January 1, 1909, which may be excluded entirely from the item of gross income, as before explained, in following manner, viz.:

Value at January 1, 1909, determined in manner outlined, of minerals, etc., which may be removed and disposed of in any year subsequent thereto,..... $.....

Less the following:

(a) Proportion of depreciation charge applying to exhaustion of minerals disposed of, ascertained as first explained herein on basis of original cost.....$.....

(b) Royalty paid, if any, on minerals disposed of.....$..... $.....

Balance, being unearned increment at January 1, 1909, to be excluded from gross income item.....$..... $.....

88. The precise detailed manner in which the estimate of value of minerals, etc., as at January 1, 1909, shall be formed, must naturally be determined upon by each corporation interested, but formal record of such estimates, together with all sustaining information shall be carefully filed so as to be readily accessible for reference. Values as stated, as determined at January 1, 1909, should be used in compilation in all subsequent years' excise tax returns. The question as to whether it subsequently develops the property possessed a greater quantity of mineral, etc., reserve than was in the aggregate estimated as of January 1, 1909, is immaterial. Any excess which may be developed will be considered as possessing the same value at January 1, 1909, as that which then may have been known to be in the property.

89. Each excise tax return (Form 637) should be accompanied with memorandum setting forth the extent in amount of the exclusion made from the item gross income for unearned increment realized during the year, as above outlined.

90. As the amount to be deducted for depreciation (paragraph 2 preceding) is to be formed on basis of the estimated reserve of minerals, etc., it follows that, if it develops such estimate is understated, the cost investment in the capital asset may be wholly extinguished before all mineral reserves are removed. When this is reached, further deductions for exhaustion of minerals should be discontinued but in such event, it will be noted, the allowance for unearned increment which is to be excluded entirely from gross income will be correspondingly increased.

91. In case of corporations leasing mines and paying royalties on minerals, etc., removed, the royalties paid are to be treated as expenses and deducted in ascertaining net income, as provided in general regulations. Any leasehold investment which the operating corporation may have in such properties, either through a payment originally made for acquirement thereof or for improvements made upon the property, to be accounted for in accordance with regulations governing depreciation allowances and disposition of capital assets.

92. In respect to properties of the character in question which may be acquired by a corporation after January 1, 1909, a deduction will be allowed

[1] NOTE.—Values as aforesaid should not be estimated on the basis of the assumed salable value of the output under current operative conditions, less the actual cost of production, because, as hereinbefore stated, the selling price under such conditions comprehends a profit both for carrying the investment in minerals, improvements, and working capital, and for conducting operations in respect of production and disposal of product. The value to be determined as stated must be on the basis of the salable value of the entire deposit of the aggregate units of minerals considered en bloc if disposed of in that form. Nor must such valuation comprehend any speculative value which might attach to a sale of the minerals en bloc; i. e., a value which might be obtained on the ground that the future would develop a much greater reserve of mineral deposits than were believed to exist at the time estimate as of January 1, 1909, was formed. Any value of this latter character would attach obviously to such additional reserves when developed in future.

only as to depreciation arising from exhaustion basis on original cost; no exclusion from gross income can be made for unearned increment, as profit arising in sale of such capital assets applies wholly to the period subsequent to January 1, 1909.

These regulations of February, 1911, were again promulgated without material change, in December, 1911, as Nos. 96–105, and remained in force without change until February, 1913, at which date original Nos. 86, 87, 88, and 90 were slightly amended. In compliance with these regulations, the Biwabik Company made the estimates required, and entered upon a suitable record book the following:

January 1, 1909.

Estimated tonnage unmined	6,874,695	
Total appraised valuation of unmined ores	$5,413,822	
Appraised valuation per ton		.7875
General ledger or capitalized value	$ 267,081	
Fee owner's valuation as represented by royalty	$2,062,408	
Net increment value	$3,084,331	
Rate of general ledger or capitalized value		.03885
Rate of increment value		.44865

It thereafter maintained such book for each year, the entries for 1910 being as follows:

Tonnage unmined January 1, 1910	6,331,874
This company's capitalized value	$ 245,993
This company's net increment value	$2,840,795
Tons disposed of during the year 1910	544,353
Capitalized value thereof	$ 21,148
Net increment value thereof	$ 244,223
Tonnage unmined January 1, 1911	5,787,521

When the company made its return for 1910, it deducted from its annual receipts for the sale of ore the total of this capitalized value and this increment value, being $265,372, treating these two items as being, not income, but the selling price of capital assets, and entered the remainder as its gross income. From this gross income it made the deductions permitted by statute, thus arriving at the net income, upon which it computed and paid 1 per cent. tax. Upon these facts, the District Court was of the opinion that the capitalized value could rightfully be deducted before stating gross income, but that the increment value could not, and, accordingly, judgment was rendered for 1 per cent. computed upon the item of $244,223.

A. C. Dustin, of Cleveland, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio.

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

DENISON, Circuit Judge (after stating the facts as above). The proper application of this statute, to facts more or less analogous to those now involved, has recently been considered by the Supreme Court in a line of cases of which the Sargeant Land Co. Case (January 15, 1917) 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, is the latest, and by this court in Doyle v. Mitchell, 235 Fed. 686, 149 C. C. A. 106, and in Cleveland, etc., Ry. Co. v. United States, 242 Fed. 18, —— C. C. A. ——, this day decided. The facts of the present case differ considerably from any of the others, and the inquiry must be whether the principle of decision involved in these cases may control or indicate the result to be reached here. This statute measures taxation by net income. It declares the net income to be what is left after certain deductions

from gross income. Obviously, we can make no headway in applying this measure, until we define "gross income"; and, it is equally sure, we can only learn what "gross income" is by first defining "income."

[1] It is urged that we are not concerned with the meaning of "income," because, under this statute, income is not the thing taxed, but is the measure of taxation. We do not appreciate the force of the claimed inference. "Income" is a word capable of definition. Of course, its definition may cover a variety of specific meanings, and its context may determine which specific meaning should be accepted; but no reason has been suggested, and none occurs to us, why the mere fact that the term is used as a yardstick for measuring taxation or something else, rather than as describing the thing upon which the tax rests, should indicate that one or another specific meaning is the right one. It is well known that Congress was driven to tax the privilege (according to its value as indicated by its net income) because of the failure of the law taxing "income" directly; and—to say the least—there can be no presumption that, between the old law and the new one, Congress had changed its idea of what the word "income" meant. When reduced to final terms, to say that "income," in this law, does not mean, generally, the same thing as it does in income tax laws, is to say that levying upon the income of a company a tax of 1 per cent. will produce $10, while levying upon the franchise of that company a tax of 1 per cent. of its income may produce $12; and we cannot approve that proposition.

It would have been perfectly natural for Congress to decide that the tax which it was to impose upon the privilege should be measured either by the amount of business done thereunder or by the proved value of the privilege. Either would have been a logical basis for such taxation. If the former had been the adopted theory, the tax would have been measured by total receipts, or by total sales, or by total disbursements, or by some combination of these measurements, and any thought of profits would have been utterly foreign to the scheme of measurement. The most casual inspection of the law shows that this theory was not adopted. On the contrary, all ordinary expenses and losses in the conduct of the business were expressly to be deducted, and only the remainder was to be taxed. Whether this remainder happened to be called net income or net profits was a matter of no consequence; by either name it was the same thing. It is of the essence of the law that a corporation doing a business of $100,000 and making $50,000 profit, is to be taxed 1 per cent. upon that profit, less the exemption, or $450, while a corporation doing a business of $10,000,000 and making no profit is not to be taxed at all. It is clear to a demonstration that Congress deliberately intended to tax the franchise according to its actual value to the user, as determined by the annual profit derived therefrom, without regard to its value as indicated by the amount of business done.

So, too, it is urged that we should not be concerned with this definition, because the statute itself carefully defines what the tax upon income shall be. As has been pointed out, this idea rests upon a clear misapprehension of the statute; the law does not purport to do this or anything like this. The statutory computation rests upon the assump-

tion that we already know what income is as distinguished from other matters; otherwise, it would be impossible to state that gross income which is the foundation of that statutory computation.

[2] We therefore are confirmed in our opening statement that, to rightly interpret this law, we must interpret and define "income." It must, by certain attributes, be distinguished out of the mass, or from other things with which it is compared. Distinctive definitions involve contrast. Since the law specifies "income," and not "sales," or "receipts," or "capital and surplus," or any other standard of measurement which might have been named, what should be set over against "income" to bring out this distinctive character? In every case in the Supreme Court and in the lower courts, including and since the Stratton's Independence Case, it has been assumed that the receipts and accumulations of a business corporation are of two classes: One, those which constituted its gross income; and the other, those which represented the sale or conversion of its capital—and the controversy has always been as to the respective definitions of those two classes. We accept this as the rightful criterion, not only because it has been universally accepted, but because we think it must be right. The only alternative is to say that all receipts from the conduct of a business according to its intended plan are income. To say this is to destroy the effect of carefully selected words. It would involve the conclusion that, in case of a company organized to buy land and subdivide and sell lots, all receipts from the sales of lots were "gross income," even though the lots were all sold and the invested capital not realized, and that, since only disbursements made during the year can be deducted, the capital so invested in one year and realized the next year would be taxable net income. So far as words are concerned, it is impossible to say that the law did not intend to go to that very extent; but to say so would be such a departure from the administrative practice and rules which have prevailed from the beginning, and from what we think the law has always been assumed to mean that we are unwilling to take so radical a step.

[3] So we come to what we deem the decisive question, viz.:

"So far as the selling price of the ore in 1910 represented its actual value to the company in the ground on January 1, 1909, was it income or was it the sale price of capital assets?"

In its general aspect, this question is the same as that discussed in Doyle v. Mitchell. We may here refer to that opinion, without repeating it at length, for the matters there stated. Unless that case was wrongly decided, the question must be whether this case is to be distinguished in principle. Certainly there is no great difference in the inherent character of the assets transferred and sold. The ore below the surface and the trees above were interests in realty until they were severed. Upon severance and preliminary treatment, each became the raw material for further process of manufacture. The extent and quality of each before severance were determined by expert appraisal. Each, before severance, had a known and realizable market value. Each had been purchased in its unsevered form by the company taxed, and each, while still in that form, had increased in market value after

the purchase and before the law was passed, and had then further increased before severance, and in each case the market value when the law went into effect had been ascertained and stated accurately and in good faith. What are the distinctions urged?

The first is that the company was a mining company, and not a manufacturing company. The law makes no such distinction, and there can be no magic in the word "mining" as part of a corporate name. Where a mining business is of the character described in the Stratton's Independence Case, it is clear enough that there is great, if not insuperable, difficulty in ascertaining the value of the ore in the ground at a fixed date. The whole subject may well be thought too speculative to justify attributing to "depletion of capital" any ore which had been removed. The annual operations of such a mine are expected to and often do develop new ore bodies of even greater value than those removed. Not only are the value and the extent of the ore in place unknown, but the cost of removal is highly uncertain, since it will depend upon unknown and constantly changing conditions. The same considerations apply more or less perfectly to the gas and oil operations and to the coal mining which have been considered in decided cases. These things are so typical of mining operations, as a class, that perhaps we should apply to everything belonging in that general class a general rule which will prevent an appraisal of the ore in place as a capital asset at the beginning of the period. The present case does not belong in that class. The parties have stipulated to the extent and value of the ore in the ground on January 1, 1909. Nothing could be more definite or certain. As was said in the statement of facts, this was a quarrying operation. It involved no elements of uncertainty, except those future contingencies which affect the value of all raw materials. In spite of the name of the company, the business more nearly approximated manufacturing than it did mining, as the latter term is commonly understood.

[4] It is next said that the company was not the owner, but only a lessee—indeed, the internal revenue department made this the controlling fact, since, by its rules and regulations, it permitted mining companies who owned the fee of the lands in which the ore was located to treat as capital assets the value of their ore in the ground at the beginning of the year, if they were able to ascertain that value, but the depatrment refused to extend this ruling to cases where the mining company was only a lessee. (Regulation 75, supra; but see, also, regulation 91, supra.) It is difficult to appreciate the supposed distinction. This company was removing 500,000 tons per year. The deposit was 6,000,000 tons. There were 30 years remaining of the period permitted for removal. The lessee's interest could be and had been bought and sold, and it had been salable for the stipulated price at the beginning of the taxing period. Counsel for the government has not pointed out the reason for this distinction made by the department. We suppose it must lie in the thought that, since the lease may be forfeited or given up before the ore is all removed, the annual operations must be treated as an annual purchase from the lessor, at the royalty price, of the amount each year removed, and so all the value realized above the royalty must be income for the year. We doubt the force

of this construction. It comes to saying that what would otherwise have been capital at the beginning of the year must not be so treated, because the company might have elected or been compelled to forfeit to one who had an underlying claim, or to saying that the owner of mortgaged mining property could not consider the existing value of his equity as his capital, because, if conditions changed, he might lose it by foreclosure. We think that the lessee of such property and under such a lease is as much entitled as is the owner of the fee to treat the value of his interest in the ore in the ground at the beginning of the tax period as his capital—indeed, the lessee's right to do so, is, in some respects, the stronger of the two, as hereafter pointed out. Such a lease, as applied to this situation, is in every substantial way pro tanto a purchase.

Finally, it is urged that this case is controlled by the decision of the Supreme Court in the Sargeant Land Company Case. The mining leases involved in that case and in this one seem to be identical in substance, and it is now said with great plausibility that the ore in the ground and affected by such a lease belongs partly to the lessor and partly to the lessee, and that, if the interest of the lessor is not capital assets, no more is the interest of the lessee, and that, if the receipts of the former are income, so must those of the latter be. We are convinced that the analogy between the two cases is superficial and not substantial. In that case the Supreme Court had to determine whether the royalties received by the lessor were income or were a depletion of capital. Many considerations led to the conclusion that they must be treated as income. The contract was a "lease," the receipts were "royalties," and royalties, being rentals, are inherently income, and have been commonly so considered. All these things seem to have affected the conclusion of the court, but, after all, the dominating thought appears to be that, when land is devoted to mining, it is put to only one of those productive uses of which it is capable, and that the product of the use should be called income. The land itself is the chief thing; after the mining is finished, the land remains suitable for other uses; and the fact—if it is a fact—that the minerals are the greater part of its value cannot operate to make the incidental overshadow the principal. These reasons do not apply at all to the case of the lessee whose existing interest, at the beginning of the taxing period, over and above the royalty which he must pay, amounted to $3,000,000; his entire interest was each year, as far as he went, consumed and exhausted forever; he did not have remaining the principal thing, the land, which he could put to some other use; the receipt in 1910 of his January 1, 1909, interest in the ore was not the offshoot and income of his property; it was the transformation and eating up of the very property, and of the whole of it. We therefore think that applying the principle of the Sargeant Case results in holding that these receipts were from the sale of capital assets and not from income.

It results in our opinion that, as exemplified in its 1910 operations, the Biwabik's 40 cents a ton profit was income, upon which it was properly taxed, and which tax it has paid; but that its 4 cents per ton "capitalized value" and its 45 cents per ton "increment value," existing January 1, 1909, but realized during 1910, were not income, and that

these items were rightly omitted from its report. We see no distinction between that value of its interest in the ore as existing January 1, 1909, which was based upon the amount it had actually paid therefor, and that value of its other interest in the same ore at the same time, which had resulted from the appreciation of its market value before the taxing law went into effect.

The judgment below must be reversed. Ordinarily, a new trial would be awarded; but the record seems to indicate that there is permanent agreement upon all material facts, and, if so, a new trial would be unnecessary. Unless, before the mandate goes down, counsel for the government indicates a desire for a new trial, the order will be that the judgment be reversed, and the court below directed to dismiss the petition. This disposition of the matter will then be of such final character that the case will be ripe for review by certiorari, if the Supreme Court should think review advisable.

CLEVELAND, C., C. & ST. L. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 2929.

1. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX—"INCOME."
Where a railroad company purchased stock in another company prior to January 1, 1909, for investment, and not for sale, but sold such stock at a profit subsequent to January 1, 1909, such profit was not "income," within Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, except to the extent that the selling price exceeded the ascertained market value on January 1, 1909; but to that extent the selling price constituted income, it appearing that the stock had a regular fixed stock market value.
[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—CORPORATION EXCISE TAX—"INCOME."
The word "income," in the Corporation Tax Law, imposing an excise tax measured by income, means the same as in prior laws imposing a tax on income.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by the United States against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for the United States on a directed verdict, and defendant brings error. Reversed and remanded, with instructions.

George Hoadly, of Cincinnati, Ohio, for plaintiff in error.
Edward K. Bruce, Asst. U. S. Atty., of Cincinnati, Ohio.

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

PER CURIAM. In 1900 the railway purchased 30,000 shares of the Chesapeake & Ohio stock for $981,427.92. On January 28, 1909, it sold this stock for $1,795,719. The difference it credited on its books to profit and loss. It did not include any portion of this profit in its return for the year 1909, under the Corporation Tax Act (36 Stat. 112), and the government brought this suit to recover the tax of 1 per cent. The court below directed a verdict for the plaintiff, and the railway company assigns error.

[1] The proper construction of this statute in the respects now substantially involved has been considered by us in Doyle v. Mitchell, 235 Fed. 686, 149 C. C. A. 106, and in Biwabik Min. Co. v. United States, 242 Fed. 9, opinion filed this day. In those cases we have given the reasons for our conclusion that the sum received during 1909 for capital assets sold during that year cannot be considered as income under this act, excepting to the extent by which it exceeds the ascertained market value of those assets on January 1st of that year. The principles discussed and adopted in these cases necessarily lead to the reversal of this judgment, excepting with regard to the increased value which accrued after January 1st.

In the Doyle-Mitchell Case it was argued that the assets there involved were acquired for the purpose of sale, and we said that, with such assets, it was customary to take inventories at stated periods, and that only by so doing could we find any workable system of determining the net income of such a business. The assets now involved were not of that character. They were bought for investment, and not for current merchandising; but it appears by the stipulation of fact that the stock had a regular, fixed stock market value of $57 per share on December 31, 1908. This fact supplies the lack of inventory; and, in every general aspect, the impropriety of treating as income a gain which had occurred before the taxing period began is plainer with respect to property like this, bought for quasi permanent investment, than with reference to raw materials for manufacture. That this stock was capital assets, under any definition of that phrase, is too plain for question.

[2] The railway insists that the rule of Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, requires us to exclude from the income for 1909 even the gain that accrued during that year. The precise point decided in Gray v. Darlington was that the accretions in value during the previous years were not income for the year in which the property was sold; but, doubtless, some of the language of the opinion would indicate that such accretions were not income, even for the year in which they happened. We are not inclined to extend the real judgment of that case, so as to cover the gain on the Chesapeake & Ohio stock from January 1 to January 28, 1909. It is true that, as said in the Biwabik opinion, we see no reason for thinking in an abstract way that "income," in the Corporation Tax Law, does not mean the same thing as "income" in prior income taxing laws; but there is no practicable way of ascertaining the income, for a given period, of a business corporation with a great variety of assets, except by comparing market values at the beginning and end of the period, and, as

pointed out in the other cases, this has been the administrative interpretation of this law from the beginning.

The judgment is reversed, and the case remanded, with instructions to enter a new judgment, which shall include, on account of this Chesapeake & Ohio stock profit, the tax upon only the balance above $57 per share.

KAHMANN & McMURRY v. ÆTNA INS. CO. OF HARTFORD, CONN.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1917. Rehearing Denied April 28, 1917.)

No. 2993.

1. INSURANCE ⊂⊃481—MARINE INSURANCE—CONSTRUCTIVE TOTAL LOSS.
Whatever may constitute a constructive total loss under the terms of a marine policy, it is not incumbent upon the insured to raise and dock a vessel and have her repaired, in order to ascertain whether or not the repairs will cost the per cent. of her agreed value named in the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1259–1261.]

2. INSURANCE ⊂⊃484—EXTENT OF LOSS AND LIABILITY OF INSURER—MARINE INSURANCE.
A policy of insurance on a tug provided that in case of a loss the insured use every effort to safeguard, recover, and repair the vessel, and that if they did not the insurer might cause it to be recovered and repaired for the account of the insured, contributing its own part of the expense. The tug struck an obstruction and was sunk, resting on some stumps, which caused further injury by straining and twisting. A surveyor employed by the owners reported that the vessel was not worth repairing, and they gave notice to the insurer of abandonment. The insurer refused to accept the surrender, but proceeded to have the tug raised and repaired, and then tendered to the insured on condition of the payment of a sum claimed to be due from them for the repairs. Without waiving the right of abandonment, they requested a detailed statement of the account, and that a few days' test be made to determine whether the boat had been restored to as good condition as before the accident. These requests were not complied with, and they brought suit on the policy. *Held* that, whether or not they had the right to abandon in the first place as for a constructive total loss, their requests were reasonable, and they could not be required to accept the vessel, unless the conditions offered were complied with.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1251.]

3. INSURANCE ⊂⊃398—ACTS AVOIDING POLICY—WAIVER.
A claim by the insurer of a vessel that the policy had been avoided by its assignment after a loss *held* waived, where the insurer proceeded to raise and repair the vessel under the provisions of the policy and demanded contribution from the insured.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1083.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Kahmann & McMurry against the Ætna Insurance Company of Hartford, Conn. Decree for respondent, and libelants appeal. Reversed.

For opinion below, see 236 Fed. 430.

John D. Grace, of New Orleans, La., for appellant.
Percy S. Benedict and Frank Wm. Hart, both of New Orleans, La. (Bernard McCloskey, of New Orleans, La., on the brief), for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Kahmann & McMurry, appellants, instituted this suit upon a policy of marine insurance, issued by the Ætna Insurance Company, appellee, on the tug Greyhound. The policy was for $2,500, and fixed the value of the vessel at $3,000. For the difference between the value as fixed and the face of the policy the owners became coinsurers. Other pertinent provisions of the policy are hereafter noted. While plying in the Atchafalaya river, on January 23, 1908, the vessel struck an obstruction; a hole in the starboard bow resulting. She was put in to shore and lines were made fast to the bank. Syphons were rigged up, but she immediately filled with water. She settled on stumps amidship, listing outboard. After sinking, the roof of the cabin and the funnel could be seen; the water on the shore side being from 6 to 10 feet deep, and on the outside from 20 to 30 feet.

Libelants telegraphed the day of the accident to respondent's agents at New Orleans, notifying them that the boat had sunk, and thereafter that she was a total wreck. On the 26th day of January a representative of respondent viewed the vessel, and shortly thereafter operations to raise her were begun. On February 7th libelants made formal abandonment to respondent of all their rights in the wreck, and at the same time they indorsed on the policy an assignment to Capt. Victor Von Schoeler of all their rights, title, and interest in the policy, subject to its conditions. On February 12th agents of respondent addressed a letter to libelants, in which they stated that transfer of ownership had voided the policy, and notified them of "the cancellation of the policy in accordance with its terms." On the same day, however, the same representatives wrote the attorney for libelants, directing attention to section 5 of the policy, calling upon libelants to name a surveyor, and giving notice that, in default, a surveyor would be appointed by the respondent, who would cause the vessel to be surveyed at the expense of libelants. In accordance with this demand, Capt. Mark A. Morse was appointed inspector by the libelants, and on the 15th day of February, 1908, he made a report from which are taken statements as follows:

"The boat shows signs of having been severely strained, as the caulking is hanging out of her seams, which is evidence that the hull was and is strained and twisted. A complete survey cannot be made until the boat is dry-docked, and she should be cleaned of the sediment deposited over her and in her hull; but the examination made by me of her condition as she lies shows that she is worthless, and in my opinion not worth repairing. Her machinery is in such a rusted condition, and so covered with sediment deposited thereon while this vessel was sunk, that it will be necessary to take the machinery apart and clean it up, to determine whether it has sustained such damage as will impair its use."

He further reported:

"The cabin or upper works are destroyed, and must be rebuilt. There is a hole in her starboard bow, where a snag penetrated, causing the boat to sink."

This report was duly delivered to attorneys for respondent. None of the statements was at this time or afterwards disputed, but some of the conclusions were contested. It developed that employés of respondent intentionally destroyed the cabin to facilitate the raising of the vessel. This report of Capt. Morse was made after the vessel had been raised. Immediately thereafter the tug was taken from the scene of the wreck and docked in the yard of Drackett & Terrebonne, at Morgan City. On February 26, 1908, a survey was made by Capt. Albert Tourner, John R. Drackett, and T. J. Collins, and they detailed the repairs which they considered necessary to put the vessel in good seaworthy condition. On May 25th they made a report to the effect that the repairs indicated had been made to their entire satisfaction, and the opinion was expressed that the vessel was in a good and seaworthy condition. Libelants had no notice of these surveys. One of the surveyors was a member of the firm which repaired the vessel. One of the surveyors testified that the vessel was "river-worthy," as distinguished from seaworthy.

After the report of Capt. Morse had been received by respondent's agents, they wrote to their attorneys, who sent the letter to attorneys for libelants, stating that the damaged parts of the Greyhound would be duly repaired, and the boat put in as good condition as before the accident. This letter further stated that the expenses incident to the repairs would amount to only a few hundred dollars, and suggested that, under the terms of the policy, these repairs would have to amount to $2,250 in order to justify an abandonment. The letter further stated that, in accordance with the terms of the policy, the assured having neglected to recover or repair the vessel, they would continue the operations already begun, and cause the vessel to be repaired for account of the assured, and stating that due settlement would be made in accordance with the terms of the policy. In response, attorneys for the libelants wrote to attorneys for respondent:

"They [Mehle & Kausler, agents] made no mention of the fact that Capt. Morse reported that the hull was twisted and strained. If your clients understood what would be necessary to properly take out the twist and strain, they would not have suggested a sum, which will not be sufficient to even clean up and paint the boat in a proper manner, as a sum sufficient to rebuild this vessel."

The letter continued to the effect that the abandonment theretofore made was still insisted upon, and a claim for total loss persisted in, and gave notice that all costs and expenses incurred since the abandonment, and all costs and expenses which might thereafter be incurred, would be at the sole cost and expense of respondent.

After the repairs were made by Drackett & Terrebonne, a letter was addressed on March 31, 1908, by the attorneys for respondent to the attorney of the owners of the tug, in which they notified the latter that the Greyhound—

"is now lying at Morgan City, La., thoroughly repaired, in first-class condition, and that she is hereby tendered to your clients upon payment by them of the sum of $536.71, their proportion under the terms of this policy. The boat is in possession of Messrs. Drackett & Terrebonne, at Morgan City, and we stand ready at any time, upon the payment of the aforesaid amount of $536.71 to Mehle & Kausler, agents, to give a written order upon said Drack-

ett & Terrebonne for the delivery of said tug Greyhound. This notice is sent as a formal notice of tender of delivery, although you have heretofore declared an abandonment of the boat. In event we do not hear from you in 48 hours, we shall take such action in the premises as we deem expedient, in order to minimize any further damages, if any. We inclose a statement of how the amount of $536.71 is arrived at."

In response to this letter, attorneys for the libelants, on April 14th, wrote to attorneys of respondent:

"In the matter of the tug Greyhound, will say that my clients are advised that the tug Greyhound is not in substantially as good order and condition as immediately preceding the accident which resulted in wrecking her; that because of the fact that this vessel at the time of her loss was hung up over two stumps, situated about amidships, which sustained practically her whole weight, and resulted in hogging her to such an extent that, notwithstanding the repairs, such as they are, made by your clients, she will after a short time drop both her ends. My clients are desirous of learning if you will consent to a few days' test to satisfy you on that point. Still further, if the gross amount for which you seek to hold the owners is correct as to the cost of raising and repairing of this vessel, then the abandonment heretofore made was fully justified, even to the extent of the repairs already made which are by no means sufficient. I would like to have from you a detailed account of the amount you seek to charge my clients with."

In response to this letter attorneys for respondent wrote:

"We are willing to allow the tug Greyhound a dock trial, and a two hours' test in the river, provided that at test and trial we may be represented by Capt. Walter Thompson, of the New Orleans Drydock."

On May 26th attorneys for respondent sent to the attorney for the libelants the report heretofore referred to of the surveyors with reference to the repairs. Responding to this the attorney of the libelants wrote:

"This is the first knowledge of any kind that I or my clients have had of a survey had by the underwriters. We were not represented, and afforded no opportunity to be represented, as we were justly entitled to be. Therefore we refuse to recognize anything had or done thereby. As your clients declined to afford my clients a running trial of the boat, we will not consider the vessel in proper condition. Still further, as there has never been a formal adjustment of all the costs and expenses incurred, we do not concede that you have presented any account which we are legally bound to consider. I am instructed to say that, unless this matter is speedily settled without further unnecessary delay, I will be required to bring suit under the policy to recover the full amount of the policy as in case of total loss."

On May 28th the attorney for the libelants wrote to attorneys for the respondent:

"Your offer of a dock trial and a two hours' running test will not afford a sufficient test of fastenings, etc. My clients contend that because of the way in which the tug Greyhound was hung up amidships, with consequent fore and aft overhang and straining, that it would be impossible to make the vessel sufficiently strong and tight to enable her to retain her shape, but that the vibration of her engines is bound to cause the vessel to again drop her forward and stern ends, cause her to leak badly and prove, not only unseaworthy in the extreme, but absolutely worthless as a vessel. The trial my clients desire was one which would prove or disprove the foregoing contention. We are advised that even now the vessel is in such a leaky condition that the services of a watchman are necessary to keep her from sinking, and that she is so worthless as a vessel that, upon inquiry by the agents of the insurance company if the persons who repaired this vessel and retain its custody

for your clients could sell her for his bill, he was advised that she was not worth it. You offered to give a written order upon Drackett & Terrebonne for the delivery of the boat to my clients 'upon the payment by them of the sum of five hundred and thirty-six 71/100 dollars,' which you say is their proportion under the terms of the policy. My clients deny that the boat is in a condition to justify a tender of her, and that the abandonment made to you was and is justified; that if the abandonment was not justified that your clients have no right to impose the conditions insisted upon; and again that if it was possible to restore the vessel to the condition she was in before her loss, and that you have done so, all of which is denied, even then you would have no right to insist upon payment in the sum named by you, and direct the people in whose custody you placed this wreck to not give it up until said sum is paid to them."

Paragraph 8 of the policy is as follows:

"There shall be no abandonment as for a constructive total loss in consequence of any loss or damage, unless the cost of the necessary repairs required solely by the disaster (exclusive of the cost of raising or rescuing the vessel and taking her to the dock and any other general average charges) be equivalent to seventy-five per cent. of the agreed value of the vessel, as specified herein; nor shall there be any right to abandon on account of said vessel grounding or being otherwise detained."

It is insisted by respondents that the circumstances which would justify abandonment as for a constructive total loss did not exist; that the expenses of repair, excluding the cost of raising and docking the vessel, were less than 25 per cent. of the value of the vessel, instead of 75 per cent., as required by the provision as to abandonment. It is argued by libelants that the abandonment clause is in conflict with the English and American rules as to what constitutes a total constructive loss, and that, being at variance with the substantial purposes of the policy as a contract of indemnity, the clause is void. It is certainly true that, under the terms of this clause, a contract intended to be one of indemnification might become, instead, a substantial liability of the insured. Under its terms as written, the cost of raising and docking the ship might exceed the amount of the insurance or the value of the vessel, and yet the vessel not be regarded as a constructive total loss. As the case may be disposed of upon other issues, it is not necessary to consider the validity of this clause.

[1] Whatever may constitute a constructive total loss, it is not incumbent upon the insured to raise and dock a vessel and have her repaired, in order to ascertain whether or not the repairs will constitute 75 per cent. of the agreed value of the vessel. The effort at abandonment, or the intention to abandon, may be in entire good faith, notwithstanding it subsequently appear that the repairs might be made for a lesser percentage than that required by the policy as the measure.

[2] The facts in this case do not indicate a lack of good faith on the part of the owners in notifying the insurers that the property would be abandoned as for a total loss. No question has been raised as to the facts stated by Capt. Morse in his report upon the vessel. While his conclusions may not be accepted, his statement of facts is unquestioned. He reported (Record, page 179):

"The boat is in a very bad condition, almost a complete wreck; the cabin or upper works are destroyed and must be rebuilt. There is a hole in her starboard bow where a snag penetrated, causing the boat to sink. This hole

is covered by a patch put on by the wreckers while the boat was submerged, and is apparently tight; otherwise, the boat is in a leaky condition. As the boat lies, it is impossible to locate these leaks, which makes it necessary to keep a close watch night and day, pumping at intervals. The boat shows signs of having been severely strained, as the caulking is hanging out of her seams, which is evidence that the hull was and is strained and twisted. * * * Her machinery is in such a rusty condition, and so covered with sediment deposited thereon while this vessel was sunk, that it will be necessary to take the machinery apart and clean it up, to determine whether it has sustained such damage as will impair its use."

In addition to making this report, Capt. Morse testified as to what he saw upon the occasion of his survey:

"She had been hanging on some particular point, and the overhanging weight in the water had strained her so that the planking was twisted from the timbers, and the oakum was hanging out of her seams all around above water, that you could see. There was not a great deal of her above water, only three or four seams, and those seams showed that the planks were twisted from the timbers, and the oakum was all falling out." "It [the strained and twisted condition] started from one end, and it was a gradual twist from her bow to her stern—complete twist. It was more in evidence just around her immediate stern. Her stern hung way over, down, very much on her starboard side—starboard quarter, at least." "The planks were started from the timbers, the planking was started and loose, and on the inside, just immediately under her decks, her main room deck clamps showed signs of straining. You could not see anything below in the inside of the boat, because she was full of mud and dirt of all kinds; but, from what was in sight, there was evidence of her being badly strained." "It was a general twist and strain of the boat, so they [deck and stiffening clamps] were loosened from the timbers; the fastenings were all loosened." "She was making water very freely. The main hole in the starboard bow that snagged the boat had been patched up by divers from the outside, and it was comparatively tight; but the general condition of the boat below, under the boilers and around, was such that the water was coming through. You could see the water coming into her; she had to be pumped frequently, they could not leave her, day or night; she had to be pumped right along. They had to keep a man day and night to keep her from sinking."

In answer to the question as to whether it was possible, by putting this vessel on dry dock, straightening her, and caulking the seams hard, for her to subsequently retain a straight position when launched in the water, Capt. Morse replied:

"No, sir; she would go back and take that twist. If you took her out and caulked her as you describe, and put her back in the water, she would be comparatively tight, but it would not be permanent."

Capt. Morse had been selected to make this inspection under the terms of the policy, and the former report made by him, and the conditions found by him, would seem to have amply justified the libelants in giving notice of abandonment of the vessel as for a constructive total loss. Paragraph 5 of the policy provides for proceedings in case of loss:

"In case of loss resulting from any peril covered under this policy, the assured shall use every effort for the safeguard and recovery of said vessel, by employing such means as can be obtained for that purpose, and, if recovered, shall cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, or the agents or assigns of the assured, to adopt prompt and efficient means for the safeguard and recovery of said vessel, or to repair said vessel when recovered, then the said insurers are here-

by authorized to interpose and have said vessel repaired, if she has been recovered, or to recover said vessel and cause the same to be repaired for account of assured, to the cost of which, after making any and all reductions referred to in clause 6 of the printed part of this policy, said company shall contribute in proportion as the sum herein insured bears to the agreed value stated in this policy. * * *"

Whether the insured were justified in treating the wreck as a total loss, and refusing to have her repaired or not, the policy provided for the contingency of such refusal, and the insurers acted upon the authority given them in that contingency. Notwithstanding the very apparently bad condition of the vessel, and notwithstanding the fact that the mere raising of her and getting her to dock cost approximately one-third of the agreed value of the vessel, she was, under the provisions just mentioned, raised, taken to the shipyard, and repaired. These repairs were in accordance with the survey heretofore referred to, of which the libelants had no notice; and after the repairs were completed, what is called a tender of the vessel was made to the insured, conditioned upon the payment of $536.71. Prior to this tender another survey was made by the same inspectors, again without any notice to the insured. This report stated that the vessel was in a good and seaworthy condition. During the interval between the wreck and this tender the insured had persisted in their action of abandonment. The insurers, on the other hand, acted upon the assumption that the circumstances authorizing abandonment did not exist.

When the conditional tender was made, the insured asked for an opportunity of ascertaining whether or not the conclusion of Capt. Morse that the vessel had been so strained that it could not be properly repaired was warranted. This request for a test was based upon the assumption that the vessel, having been stayed by stumps amidships, her bow on the port side being held up by lines to the bank, and her stern being in deep water, all of the planks and fastenings of the vessel were strained from their proper position, and that the vessel was so seriously hogged that, while she might, after repairs, have the appearance of being seaworthy, the vibrations of the engine would cause the seams to almost immediately open, and that she would at once go down at both ends. The contention does not seem to be an unreasonable one, and the insured were certainly warranted in apprehending that the views of Capt. Morse (admittedly a person of capacity and experience) were justified by the facts. This request for a test was refused; the insurers proposing as a substitute to permit a dock trial and a running test of two hours on the river.

There was also, at the time of the tender, a suggestion by the attorney for the libelants that no proper statement had been made of the expenditures incurred, or said to have been incurred, by the respondent. The terms of the policy gave to the insurers, who acted under the provisions of paragraph 5, a lien upon the vessel for any amount which might be due as a result of the repairs made by them. In the alternative, it permitted them to have a personal claim against the insured. The insurers were amply protected in their expenditures; at least, they were amply protected, except upon the assumption that the vessel was incapable of being put in a proper condition by the

expenditures made by them, and that circumstances authorizing abandonment existed. The policy did not contemplate that, whenever the insurers, acting upon the authority given them by paragraph 5, had expenditures made, the insured, without opportunity to ascertain the extent or effect of these repairs, and without opportunity to ascertain the cost of the repairs, would have to pay any amount demanded and take the vessel. With characteristic solicitude for the insurers, the policy provides that, whenever repairs are made by the owner, all claims for repairs should be accompanied by vouchers, and by the oath or affirmation of the master that such repairs were actually made necessary by the accident. The policy contains no corresponding provision as to repairs made by the insurer; but certainly the insured in such case had the right to make the very reasonable demand expressed in the letter of the attorney of libelants, and certainly, unless some effort were made to meet this reasonable demand, the insured would be relieved from consequences which otherwise might result from the refusal to accept the vessel when tendered. Also the insured, warranted by the report of the inspector in the belief that the loss was total, and in the belief that such repairs as were possible (not involving entire reconstruction of the vessel) would not be permanent in their results, but that in a very short time the vessel would again be unseaworthy, were justified in demanding the test which they requested before taking over the vessel.

The reasonableness of the demands of libelants is further indicated by the facts developed after the conditional tender. It is now conceded that the demand as to the amount to be paid by the libelants was excessive. It is suggested that this was a mere mistake. This was doubtless the case, but the mistake was a substantial one, and one which would have been ascertained, and could have been corrected, if the reasonable request of the insured had been met. The insurers could very well have afforded to make an unconditional tender, inasmuch as they were amply protected by the lien upon the vessel, and by, in the alternative, a charge against the owners. There was no reason for the tender being at all conditional; and certainly, if a condition was to be imposed, it should have been one measured by the rights of the insured.

The request of the insured that they be permitted to make a test of the vessel was entirely reasonable, and the refusal to acquiesce in this request indicated a lack of confidence on the part of the insurer in the result of the work which had been done in the way of repairs. The subsequent history of the vessel strongly suggests that the views primarily expressed by Capt. Morse were correct, and the evidence indicates that after the repairs were made the effect of the strains of which he spoke was easily discernible. Capt. Morse testified to the following effect:

"I saw this vessel in the water after they had worked on her at the shipyard. I did not go aboard of her." "Q. At the distance from which you saw her, what was her condition in regard to the vessel's being in line? A. She was not in line. She still appeared to be dropped down at the stern and twisted; she still appeared to be hogged and twisted."

This statement referred to a condition existing very shortly after the repairs. Capt. Morse also testified that Mr. Drackett, the shipbuilder, stated to him that he would not take the vessel for what it cost to repair her. Asked as to the effect of running the engine on a vessel which had sustained injuries such as the Greyhound had sustained, which had been worked on to the extent she had been worked on, and which still had a twist or kink in the hull to the extent that he saw in her, Capt. Morse testified:

"Well, if her engines were running, and not in fit condition to stand the vibration, she would go right back into her former shape and leak. The caulking would not be tight."

Asked what would be the proper course for the shipwright to take out of the hull such a twist as he saw in the Greyhound, he replied:

"The course would be to put her on straight blocks, and take a twist out of her, shoe it out of her, or screw it out of her, whatever method would be adopted; there are different methods."

He stated that it would be necessary to probably renew the planking where it was strained, and put in new fastenings, new clamps, and new planking; that when a hull has such a twist as the Greyhound had, the fastenings are strained in every direction; that his impression was that it would be necessary to have a new stern and a new frame to make the Greyhound a strong boat; that the Greyhound was in such condition that she could not have been put in dry dock and her planking and timbers put in the condition in which they were originally; and that they would have to be taken out and new ones put in. He also stated that, after having seen the vessel after the repairs, he had no reason for changing his opinion, primarily expressed, to the effect that she was not worth repairing.

Capt. Thomas L. Morse testified that he saw the Greyhound while she was in the shipyard, and stated to the proprietor that—

"he has a pretty hard job to overcome, that the boat was pretty badly twisted, and that he would have to do a great deal of work on her, and that I did not think he could get her straightened out again."

He testified that after the repairs were made the Greyhound was laid up alongside an abandoned vessel belonging to his company. He noticed that she had water in her; that she was on a mud flat, and could not sink further, and stated:

"She was worth what she would bring for old junk—a couple of hundred dollars."

It appears from the evidence that after the repairs were made, and notwithstanding the fact that a watchman was kept aboard the tug, she sank as far as the mud would permit. Some year or more afterwards she became a total wreck by reason of a great storm.

To offset these specific statements of Capt. Morse and the actual experience of the Greyhound is the testimony of Mr. Drackett, who repaired her, and Mr. Collins and Mr. Tourner, who reported on her condition, that the vessel was, after repairs, in better condition than before the accident. It may be that the testimony is not conclusive as to the condition of the vessel after the repairs, and especially with reference to her condition as compared to the condition prior to the accident; but

it certainly indicates that the insured were not unreasonable in requesting that tests should be made of her.

Assuming that the abandonment was not, under the terms of the policy, justified as of a constructive total loss, and that the insurers were warranted in raising the tug and having her repaired, there was an obligation on their part to make a proper showing to the insured as to the amount of expenditures made, and the further obligation of turning the vessel over to the owners in as good condition as prior to the accident. While the duty is upon the libelants to prove their cause of action, this obligation would seem to be sufficiently met by proof that the accident occurred under conditions which imposed liability upon the insurance company; that the company, under the terms of the policy, took charge of the vessel; that the company refused to restore the vessel to insured, except upon payment of a sum in excess of what was due; that the company refused to give an opportunity to the insured to ascertain whether or not the vessel was in the condition in which it was prior to the accident; and that it is no longer possible for the insurers to restore the vessel.

[3] After the accident the insured made a transfer of the policy to Capt. Von Schoeler, indorsing this transfer on the back of the policy. A provision of the policy is to the effect that:

"This policy shall become void * * * upon any assignment of this policy, * * * unless notice is given to this company, and the same be approved and indorsed hereon in writing by an officer or duly authorized agent of the company."

The assignment having been made, notice was given to the company; without any suggestion of any injury resulting to the company from such assignment, and without assigning any reason for such action, the company declared the policy void because of the assignment made to Von Schoeler. It will not be necessary for us to consider whether such a provision in the policy can be arbitrarily used to defeat rights which have already arisen thereunder. It is enough to say with reference to the matter under consideration that, after having declared the policy voided by reason of this assignment, the insurers raised and docked the vessel and had her repaired, and made demands upon the insured for the costs of the repairs. They (the insurers) treated their cancellation as ineffective; and, since the insured had not complained of this, we see no reason why we should take a different view.

The judgment of the District Court will be reversed, and judgment here rendered for the libelants in the amount of their policy, with interest.

LANDON v. CLARK et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

No. 120.

1. JUDGMENT ⟸743(2)—MATTERS CONCLUDED—EVIDENCE CONSIDERED.
The judgment of a state court and the evidence in the record on which it was based considered, and *held* not to sustain the allegations of complainant that the title to certain real estate in controversy in the present suit was thereby adjudicated, and became res judicata as between the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1052, 1253, 1276, 1284.]

2. BOUNDARIES ⟸14—WATERS AND WATER COURSES—CONSTRUCTION OF LANGUAGE.
Under the law of New York, a deed which fixes a point in the western boundary of the land conveyed at the place where a ditch empties into a pond, "thence along the east shore of said pond," did not convey any part of the land under the waters of the pond, but the shore line constitutes the boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102–107.]

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

Suit in equity by Thomas Durland Landon against Elizabeth Clark and Mary F. Clark. Decree for defendants on cross-bill, and complainant appeals. Affirmed.

The plaintiff is a citizen of the state of New Jersey. The defendants are citizens of the state of New York. The plaintiff alleges that he is the owner in fee simple and in possession as sole owner of certain lands and water and lands under water in and under what is known as "Wickham's Pond," in the town of Warwick, in the county of Orange, and state of New York. He also alleges that the defendants without any right whatsoever claim an interest in the premises. The plaintiff asks that a decree be entered adjudging that the defendants and each of them have no estate, right, title, or interest whatsoever in the said lands and water and lands under the water, and that the title of plaintiff thereto is good and valid, and the defendants be forever restrained from asserting any claim whatsoever in and to the said lands and water and lands under water as described.

The defendants deny that the plaintiff is or ever has been in possession, and they allege that they themselves are and for more than 30 years last past have been owners in fee and in possession of the property. They declare that for more than 100 years last past they and their predecessors in title have owned the property in fee, and used, occupied, and held the same. They ask that a decree be entered denying title in the plaintiffs and establishing title in defendants.

The District Judge dismissed the bill and entered a decree upon the cross-bill. It adjudges that the plaintiff had no right, title, or interest whatsoever in the premises described, and that the title of defendants to the same is good and valid, and the plaintiff is enjoined and restrained forever from asserting any claim whatsoever in or to any of the said lands and water and lands under water so owned and possessed by the defendants.

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

This case now comes up upon a new bill and answer of the same sort as that before the Circuit Court of Appeals in 221 Fed. 841, 137 C. C. A. 399. The plaintiff again depends upon the judgment in Clark v. Durland, decided

in the Supreme Court of New York, but adds to his proof the evidence taken in that action, thus seeking to show that the defendant therein, Jesse Durland, had threatened an entry upon the present locus in quo, and that, this entry being undisputed, the complaint could not have been dismissed, except upon the findings in justification which were actually made. Therefore, the plaintiff says, he has at the present trial shown that the findings were necessary to the disposition of the controversy, and, if so, then of course they form a good estoppel. That such evidence is admissible for that purpose, so long as it does not contradict the record, no one disputes. Russell v. Place, 94 U. S. 606, 24 L. Ed. 214. The question therefore arises whether the evidence shows that Jesse Durland actually had threatened entries upon the present locus in quo. The complaint in the state court alleged that the defendant therein had committed trespasses upon "the premises above described," which included both the 8-acre piece and the locus in quo, and that he threatened to continue to do so; in especial that he took ice off the pond in January, 1893, and threatened to continue to do so. These allegations the defendant denied, except as to the cutting of ice at the time laid in the complaint which he justified, and which both sides agree was only upon the 8-acre piece.

Now, it is quite obvious that if Clark sued Durland to enjoin threatened entries upon both the 8-acre piece and the locus in quo, and was beaten, one only of four possible situations could have existed: First, Durland might not have threatened an entry on the 8-acre piece, and might have threatened one on the locus in quo, which entry he justified; second, he might not have threatened an entry on the locus in quo, and might have threatened one on the 8-acre piece which he justified; third, he might not have threatened an entry upon either lot; fourth, he might have threatened an entry on both, and justified as to each. Here it was expressly found that Durland did enter on the 8-acre piece (finding II), which entry he justified (finding I); therefore the first and third possibilities are eliminated. If the fourth possibility was the real one, the plaintiff here wins; if the second was the real one, the judgment is not an estoppel. As the plaintiff has the burden upon that issue, the evidence on the trial must therefore supply the omission in the judgment roll, by eliminating the second possibility and showing that Jesse Durland had in fact threatened an entry on the locus in quo if the plaintiff is to succeed.

That the Clarks interpreted Durland's position as covering both parcels of land appears beyond controversy in the complaint, but the answer traversed the allegations of past trespass and of threatened future trespass, except the entry of the 8th and 9th days of January, 1893, which was concededly on the 8-acre piece. The third article of the answer alleged most vaguely the ownership "of a certain portion of said Wickham's Pond," which would ordinarily be taken to include only so much as was necessary to justify the admitted entry, though it might have been actually meant to include the locus in quo. It is quite clear, therefore, that the cause went to trial upon the issue, among others, whether Durland had entered, and was threatening to enter, the locus in quo. In order that the findings in justification of such an entry may operate as an estoppel, it must appear that the issue of the threatened entry was decided in favor of the Clarks. The only express finding on the subject concerns, not any threatened entry at all, but a past entry upon the 8-acre piece (finding II). While this is not conclusive, it is significant that the Appellate Division (35 App. Div. 312, 55 N. Y. Supp. 14) on appeal from the first judgment expressly declined to consider the interpretation of the deed to the east farm, on the ground that it was not necessary to secure Durland the substance of his rights. The second finding of the decision under discussion, following such declaration, is significant.

Nevertheless the plaintiff is entitled to urge that the evidence shows that Durland was threatening entries upon the locus in quo and that this was not disputed. I agree that it is a fair inference from the evidence that Durland had entered upon the locus in quo in the past to cut ice wherever it became convenient for his icehouse and his tenant's (folio 88), to put boats upon the water (folios 131, 132, 201, 266), which he used for general farm purposes, to fish (folios 265, 283, 286), and to erect and maintain fences down into the water, so that the cattle might drink (folios 267, 275). This evidence is very

fragmentary and elusive in the mouths of the Clarks' witnesses; it is quite clear that to prove the threatened entry they relied upon the testimony of Landy (folios 190–196), who forbade Durland's cutting the ice in January, 1893. Durland's own testimony in his own case is better evidence for the estoppel than anything else I have found, yet after a most careful consideration of it I am left in some doubt whether, before that action was started, he had actually threatened any entry upon the locus in quo. He says: "I was forbidden to cut ice there by the Misses Clark three years ago, at the time this action was begun, for the first time; and if I need it in my business I shall continue to cut ice there until I am legally restrained. I needed the ice that I cut and took from the lake, and I intend to do so so long as I shall need it, and I told Miss Elizabeth Clark I would stop when I got my icehouse filled; and I, in substance, said that I intended to cut ice from the lake as long as I chose to" (folios 287, 288).

It is quite true that he here uses general language, and it is quite likely that he intended to include the whole pond; but it is also not free from doubt. The occasion of the dispute was an entry on the 8-acre piece, and the scope of his claim would naturally be limited to that occasion. If he meant to threaten an entry elsewhere, it can only be by inference from his past practices, which I have shown to include entries on the locus in quo. Yet the past practices are not to be necessarily taken as a measure of what the parties claimed as of right; as friendly neighbors they perhaps did not care to raise such an issue among themselves while the stake remained trifling. To keep boats for ordinary farm uses, or for fishing; to run the fences down into the water; to fill one's own or even one's tenant's icehouse—these are not things over which neighbors would generally raise a point of right. They might be actual trespasses; they might even form by gradual accretion an adverse user, but as they occurred they would ordinarily be tolerated until the matter became contentious. When the contention did arise, and the Clarks forbade Durland from cutting ice in January, 1893, his posture then for the first time was of one who claimed a hostile right and who proposed to continue its exercise. I think that the limit of his claim is to be found in what he then asserted, and that it is doubtful, to say the least, whether he asserted anything more than the right to cut ice as he was cutting it when he was stopped. If it be urged that at least he meant to assert the right to cut ice as he had cut it up till then, and that he had cut it everywhere, I must answer that, if he meant to claim the right to cut on the locus in quo merely because he may have gone there in years of bad crop, the proof of it does not appear, and nowhere in the evidence or the roll is such a fact suggested. I think, therefore, that the plaintiff fails in sustaining the burden of proof that the judgment in the case of Clark v. Durland is an estoppel upon the question here at issue.

The remaining question is whether the plaintiff can sustain his title independently of that judgment. His theory is that the deed executed by the daughters of Henry B. Wisner on May 4, 1863, purported to convey the locus in quo to Thomas E. Durland, from whom he derives his title. This deed proceeds by courses and bounds, "beginning at a cedar stake standing on the east bank of Wickham's Pond" (this stake is easily ascertainable upon the Taylor map, which was put in evidence upon this case); and it proceeds from monument to monument by courses and distances, "to where the said [Roy] ditch empties into Wickham's pond, thence along the east shore of said pond," then giving a series of other metes and bounds, "to the place of beginning." There is no mention in the deed anywhere of the course from the mouth of Roy's ditch across the pond north 88½ degrees west, 59 chains 25 links, which is indicated in the Taylor map; on the contrary, the deed described the north course of the lot as along the east short of the pond, which under principles too familiar for citation does not include any of the lands under water. In this respect the deed is quite different from the deed which conveyed the 8-acre piece, for the important course in that deed read as follows: "Thence across said pond north 11 degrees 57 minutes west, 17 chains 37 links, to a stake." The construction of the deed appears to me not to be open to any doubt. Furthermore, had the deed conveyed the lands claimed

by the plaintiff, it would in any case have been invalid for the greater portion The title of the grantors to Thomas E. Durland came from two sources: First, from their father, Henry B. Wisner, by will; and, second, from their mother, Mary Ann Wisner, who under the name Mary Ann Durland made a conveyance to them on the same day that they conveyed to Thomas E. Durland.

Let us take up these chains of title separately. The title of Henry B. Wisner arose as follows: The commissioners from whom both sides trace their title conveyed the whole pond to John Wisner on June 11, 1766. On September 8th of that year Wisner conveyed to William Wickham. Here there is a break in the title. We find no deed from Wickham to Henry Wisner, but there unquestionably was one executed on March 1, 1799, presumably conveying the east farm, by what description we do not know, except that it was said to contain 100 acres. This deed is recited in the will of Henry Wisner, in a deed by his executors, and in a deed by Bridget Wickham, all of which will be later mentioned. Henry Wisner, the grantee of this deed, made a will on December 19, 1807, which was probated June 13, 1812, by which he devised the old farm on which he lived and also the lot of 100 acres which he had bought of William Wickham, to his son Gabriel Wisner. On October 29, 1817, Henry Wisner's executors made a confirmatory deed to Gabriel Wisner to quiet his title. On February 3, 1835, Gabriel Wisner made a will probated May 20, 1836, devised all his lands in fee to Henry B. Wisner, and it is by virtue of this title that his daughters conveyed to Durland, by a deed excluding the locus in quo, as we have seen.

A complete understanding of the title, however, now requires consideration at this point of the defendants' title, necessarily involved in any case under the cross-bill. They go back to the title of William Wickham, conveyed to him by deed of John Wisner in September, 1766. Wickham's will was executed on November 30, 1812, and was probated on April 23, 1814. He devised all the residue of his estate to his three granddaughters, Frances Amelia Burrell, Carol Wickham Burrell, and Amily Burrell, and the remaining one-half of the residue to his son, George D. Wickham. George D. Wickham, by his will dated January 30, 1838, and probated December 29, 1845, created a power of sale in his executors, who exercised this by deed dated March 8, 1847, conveying to Bridget Wickham "all that tract of land, situated in the town of Warwick aforesaid, called Wickham's Pond, and the lands adjoining the same belonging to the said George D. Wickham at the time of his death." On May 5, 1849, Bridget Wickham conveyed to William F. Clark, the defendants' ancestor, a part of the locus in quo. This deed covers all of the lake northeast of a course described in said deed as follows: "To a stake on the edge of said pond opposite to the old outlet of the same, it being a corner of a tract of land conveyed by William Wickham, deceased, to Henry Wisner, deceased, on the 1st day of March, 1799; thence across said pond north 59 chains west to the mouth of a ditch on the west side of said pond, being a corner of the lots of said Henry W. Berthoff and said Mrs. Wisner." Six months later, on the 26th day of November, 1849, Bridget Wickham conveyed by quitclaim deed to Mary Ann Wisner the rest of the lake.

A fair inference from these two conveyances seems to be that the deed of March 1, 1799, from William Wickham to Henry Wisner, which has now been lost, conveyed to Wisner that portion of the lake southwest of the course mentioned, and that Bridget Wickham's quitclaim deed to Mary Ann Wisner later was intended only by way of confirmation. Obviously, Mary Ann Wisner neither had title nor could have title to any portion of the locus in quo north of that line, and if the deed from the Wisner heirs to Durland were held to include any portion of that it would in any event be void. The plaintiff's contention that the deed from William Wickham to Henry Wisner included any portion of this land not only rests wholly in supposition, but in addition is contradicted by what we know of the deed of March 1, 1799, by reference. That portion of the pond between the 8-acre piece and line in Bridget Wickham's deeds remained vested in Mary Ann Wisner, who conveyed it directly to A. Ruggles Holbert on June 1, 1881. A. Ruggles Holbert conveyed it to Elizabeth and Mary F. Clark on December 27, 1892. It follows from this that the

plaintiff's bill must be dismissed, both as regards its claim for an estoppel and as regards the inherent claim to title.

There remains the defendants' cross-bill. The foregoing discussion has shown that the title of Bridget Wickham is vested in the defendants. It has been urged that the conveyances of Bridget Wickham were champertous, because the property was then in the possession of the Wisners; but there is absolutely no warrant for this assumption, and it may be dismissed. There is, however, a defect in Bridget Wickham's title from the fact that the daughters of William Wickham, by his will heretofore mentioned, became coparceners in fee in one-half interest of all the residue of his estate However, one cotenant may file a bill quia timet without joining the rest as parties plaintiff (O'Donnell v. McIntyre, 37 Hun [N. Y.] 615, affirmed 116 N. Y. 663, 22 N. E. 1134; Goldsmith v. Gilliland [C. C.] 24 Fed. 154); and it is therefore unnecessary to consider how far a round century may have cured this defect. I do not mean to be understood as raising any question about it. It is true that, if the question is to be disposed of in this way, it must be on the assumption that the defendants are in possession, since possession is necessary to a bill quia timet. If the suit were in ejectment, the question of joinder would be very serious. Nevertheless, I think that the defendants are in possession so far as any one can have possession of the pond. They have a clear title from the colony, and have never, so far as appears, lost the possession to any one else. The acts of the Durlands did not, in my judgment, whether or not they were trespasses, amount to a taking of possession. Therefore possession will follow the title.

Bill dismissed; decree on cross-bill; costs to defendants.

M. N. Kane, of Warwick, N. Y. (Alton B. Parker and F. Granville Munson, both of New York City, of counsel), for appellant.

Thomas Watts, Elbert N. Oakes, and John Bright, all of Middletown, N. Y., for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. [1] An action was commenced in the Supreme Court of New York in 1893 by the present defendants against the present plaintiff to restrain the latter from trespassing upon Wickham's Pond or Lake. In that action the plaintiffs therein claimed to own the whole pond or lake, and the description set out in that complaint concededly included the whole thereof. The defendants obtained a judgment in their favor, which was reversed in the Appellate Division. 35 App. Div. 312, 55 N. Y. Supp. 14. The claim made upon the appeal that Jesse Durland owned to the center of the pond was not determined at that time by the Appellate Division which in referring to it declared: "But it is not necessary to consider this branch of the question." This eliminated the question of title to the so-called east farm of 159 acres, which was the only part involving the locus in quo here.

The case then went back for a second trial. The trial judge declared that he saw, nothing in the case "except the location of this 8 and a fraction acres." This eliminated the present locus in quo, if he was right. The only new evidence given on the second trial was devoted to an attempt to prove title to the 8 and a fraction acres. On the second trial judgment was again in favor of defendant. Another appeal was taken, and the Appellate Division declared that:

"The judgment for the defendant, rendered at Special Term, upon the second trial of this case, which now comes up for review, was required by the views expressed by this court upon the first appeal. * * * The learned judge at

Special Term rightly concluded that the new proofs did not justify a different result from that formerly reached in this court." 104 App. Div. 615, 93 N. Y. Supp. 249.

What that result was has already been pointed out. The Court of Appeals affirmed without opinion. 187 N. Y. 560, 80 N. E. 1107. It was thus established that the acts proven upon the first and second trials in the Supreme Court of New York were not a trespass because they were committed upon 8.7 acres to which the defendant had title. The only issue necessary and essential to the determination of the action was as to the title to that portion of the pond.

Thereafter the present plaintiff, who had been the defendant in the action in the state court, filed a bill quia timet in the United States District Court for the Southern District of New York against the present defendants, who had been the plaintiffs in the suit in the state court, in respect to the premises described in his bill which were the premises described in the bill filed in the suit in the state court, and not merely the 8.7 acres. He relied upon the judgment in the state court and claimed that it was res adjudicata upon the question of title to the locus in quo. He obtained a decree in his favor in the District Court. On appeal to this court that decree was reversed without prejudice. 221 Fed. 841, 137 C. C. A. 399. A rehearing was asked and denied.

Thereupon the plaintiff filed a new bill quia timet in the same court against the same defendants and in respect to the same property. He again relies upon the New York judgment, which he asserts is as to the locus in quo res adjudicata of the title. And in this second suit he has introduced evidence not before the court in the first suit. The evidence presented is that taken on the trial in the New York court and upon which the New York judgment was based. The purpose of bringing this evidence into the case is to show that the defendants in the New York action had threatened an entry upon the present locus in quo, and that, this entry being undisputed, the complaint in that action could not have been dismissed, except upon the findings in justification which were actually made. The District Judge dismissed his bill, filing an opinion in which he carefully considered the testimony and reached the conclusion that the plaintiff failed to sustain the burden of proof that the judgment in the case of Clark v. Durland was an estoppel upon the question here at issue. He also considered whether the plaintiff upon the evidence could sustain his title independently of that judgment and reached the conclusion that he could not. "I think," he says, "that the defendants are in possession so far as any one can have possession of the pond. They have a clear title from the colony, and have never, so far as appears, lost the possession to any one else."

There is nothing in the evidence upon which the judgment in the state court was based, and now presented to this court for the first time, which has served to convince us that the judgment in that action is entitled to be regarded as an estoppel between the parties as to the locus in quo involved in the present suit. We remain of the opinion, announced in the former suit, that that judgment is conclusive only as to the 8.7 acres. We need not traverse again the ground gone over

in the former opinion. We then stated at length the reasons which led us to our conclusion, and we find nothing in the evidence now presented which convinces us that the conclusion we then announced should not now be adhered to. It is sufficient at this time to point out that the complaint in the state court alleged that the defendant had committed trespasses upon the premises described, and that the premises described included the 8.7 acres and the locus in quo, and that he threatened to continue his trespasses on the same. These allegations defendant denied, except as to the cutting of ice at the time laid in the complaint, which he justified, and which both sides agree was only upon the 8.7 acres. If he had title to that tract, it was not necessary, so far as the actual trespasses are concerned, to determine who held title to that portion of the premises not trespassed upon, and which the evidence shows was not held under the same title. The title to the tract not trespassed upon could only have been involved, therefore, if the evidence disclosed that the defendant had threatened to commit trespasses thereon. This the evidence fails to disclose. It appears that on one occasion, when the plaintiff was cutting ice on the 8.7-acre tract, he was forbidden by the defendants to cut ice there, and he testified that he replied that he intended to cut ice from the lake as he chose to.

But this does not show that the plaintiff was threatening to cut ice anywhere upon the lake. On the contrary, if he was at the time cutting on the 8.7 acres to which he held title (and which defendants denied), and if he did not hold title to the locus in quo, we must assume, in the absence of evidence to the contrary, that he was not threatening to do what he had no right to do, and which would be a trespass if done, but that he was proposing to do what he had a right to do—to cut ice on his own tract. Moreover, the allegation in the complaint in the action in the state court was that the defendant Durland had trespassed upon the premises and "threatened to continue such trespass." The evidence shows that the premises he trespassed on were the 8.7 acres; the threat complained of to continue "such trespass" must have, therefore, been a threat to continue to cut on the 8.7 acres. There is no evidence that he "threatened" to cut anywhere else.

[2] In his brief in this court counsel for plaintiff says that the court below seemed to think that the locus in quo and the 8.7 acres are two separate parcels. That such they are is perfectly evident. The title to the 8.7 acres is not derived from the same common source, nor dependent upon the existence of the same facts, as the title to the remaining land. This brings us to consider whether the plaintiff has sustained his title independently of the judgment in the state court.

On May 4, 1863, a deed was made to Thomas E. Durland of what is known as the east farm, a tract of 159 acres. The plaintiff claims through that deed by a chain of title which need not be recited here in detail. A part of the description of that deed is, "thence along the east shore of said pond." The learned counsel for the plaintiff in his argument in this court insisted that the grantee under that deed took to the center of the lake, and in support of that view called attention

to the case of Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669. In that case the court declared that the presumption in the state of New York is that lands under the waters of small inland nonnavigable ponds and lakes belong to the proprietors of the adjoining lands, and that the same rule applies in the legal construction of grants of land bounded on them as is applied to conveyances or grants of land bounded on fresh-water streams. It held that, unless restricted by express words or by other facts implying a contrary intent, a conveyance of land adjoining such a lake or pond, describing it as running "to the pond," or to some monument on the land at the water, and thence along the pond to some other monument on the bank, carries the title to the center of the pond.

The decisions of the New York courts as to the title to land in this state are conclusive, and we do not doubt, and, if we did, would be obliged to adhere to, the doctrine announced in the case above cited. It has, however, no application to the facts of this case. In the case now before the court the deed fixes the boundary as "the east shore." And the rule in New York is that where, in a deed, the land is described as bounded on the bank or shore of the stream, the grantee does not take title to the center, but the bank or the shore is the monument, and not the stream. Babcock v. Utter, 1 Abb. Dec. (N. Y.) 27; Child v. Starr, 4 Hill (N. Y.) 369; Halsey v. McCormick, 13 N. Y. 296; Hall v. Whitehall Water Power Co., 103 N. Y. 129, 8 N. E. 509. In this respect the law of New York does not differ from what we understand to be the law elsewhere. See Eng. & Am. Encyc. of Law, volume 4, page 830. It is upon the description in this deed that the plaintiff's claim to the one-half of this pond rests. His claim appears to us to be without merit.

The question of plaintiff's title was very carefully considered by the District Judge, and we see no reason why his conclusion should not be affirmed. He thought that the defendants have a clear title from the colony, and that they have never, so far as appears, lost the possession to any one else. In that opinion and for reasons stated by him we concur.

Decree affirmed, with costs.

S. E. HENDRICKS CO., Inc., v. THOMAS PUB. CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 214.

1. COPYRIGHTS ⇐83—SUITS FOR INFRINGEMENT—EVIDENCE.

In a suit for infringement of a copyright, defended on the ground that plaintiff had infringed the copyright of an earlier edition of defendant's work, the testimony of a copyist formerly in plaintiff's employ, but in that of defendant until shortly before trial, in answer to a leading question, that copying had been done direct from defendant's work, was insufficient to sustain the defense, when positively denied.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76.]

2. COPYRIGHTS ⟸83—SUITS FOR INFRINGEMENT—EVIDENCE.
Such defense was in the nature of confession and avoidance, and defendant was obliged to make good the avoidance by a fair preponderance of credible testimony.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76.]

3. COPYRIGHTS ⟸87—INFRINGEMENT—DAMAGES—"ACTUAL"—"IN LIEU."
Copyright Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (Comp. St. 1916, § 9546), requires infringers to pay such damages as the copyright proprietor may have suffered, as well as all profits made from the infringement, or, in lieu of actual damages and profits, such damages as to the court shall appear just, and provides that, in assessing such damages, the court may in its discretion allow the amounts therein fixed, which in the case of books is $1 for every infringing copy made or sold, or found in the possession of the infringer, but further provides that such damages shall in no case exceed $5,000, nor be less than $250, and shall not be regarded as a penalty. *Held* that, where obvious and substantial pecuniary injury has been caused, the court is authorized to estimate the damages within the statutory limits, without being bound by legal proof, as "actual" means real, as opposed to nominal, or existent, without precluding the thought of change, while "in lieu" means in place of the thing modified.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81.

For other definitions, see Words and Phrases, First and Second Series, Actual; In Lieu of.]

4. COPYRIGHTS ⟸87—INFRINGEMENT—DAMAGES.
Where a substantial pecuniary injury has been caused, $250 is the minimum award.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81.]

5. COPYRIGHTS ⟸87—INFRINGEMENT—DAMAGES.
Where it appeared that defendant had sold 2,800 copies of its infringing work, which was sold in competition with plaintiff's work, an award of $2,500 as damages was not erroneous.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81.]

6. APPEAL AND ERROR ⟸984(5)—REVIEW—DISCRETION—ATTORNEY'S FEES.
Under Copyright Act, § 40 (Comp. St. 1916, § 9561), providing that in suits under that act the court may award to the prevailing party a reasonable attorney's fee, the allowance of counsel fees, being peculiarly within the discretion of the court, cannot be reviewed, unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3886.]

7. COPYRIGHTS ⟸90—SUITS FOR INFRINGEMENT—ATTORNEY'S FEES—AMOUNT.
Where a suit for infringement of a copyright covering a commercial directory required much labor to prove an infringement, and the trial lasted for several days, requiring an exhaustive comparison of the two books, and resulting in a judgment for plaintiff for $2,500, an award of $2,500 as attorney's fees was not an abuse of discretion.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 85.]

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

Suit by the S. E. Hendricks Company, Incorporated, against the Thomas Publishing Company. From a decree in favor of complainant, defendant appeals. Affirmed.

The action is to restrain infringement of the copyright of one of plaintiff's publications, a book known as "Hendricks' Commercial Register, 23d Edition." The infringement asserted consisted in defendant's copying from said Commercial Register certain matter inserted in a publication of defendant's known

as the "Thomas Register of American Manufacturers, 7th Edition." After a trial lasting for several days and an exhaustive comparison of the two books, contained in exhibits introduced in evidence and physically transmitted to this court, the trial judge found infringement. Although an appeal was taken which attacked the propriety of this decision, the question of defendant's infringement is not here raised, for (as stated in appellant's brief) "defendant does not ask this court to review the finding that defendant's work infringed upon plaintiff's."

The answer sought to raise the further defense that plaintiff was not entitled to equitable relief (notwithstanding admitted or proven infringement) because it did not come into court with "clean hands," in that plaintiff itself had copied out of the sixth edition of defendant's Register matter incorporated in "the several editions of Hendricks' Register, and more specifically in * * * the twenty-second, twenty-third and twenty-fourth editions of Hendricks' Register, instead of resorting to original sources for such information."

No effort requiring our notice was made to substantiate this allegation in respect of the twenty-second edition of Hendricks. As to the twenty-third edition (which plaintiff made the subject of this suit), the testimony of one copyist, formerly in plaintiff's employ, but in that of defendant until shortly before trial, was to the effect (in answer to a leading question) that copying had been done direct from the Thomas book into the twenty-third edition of the Hendricks publication. This testimony was positively denied, and is in our judgment wholly insufficient to sustain the defense as matter of fact.

Plaintiff's copying from defendant's sixth edition matter embodied in plaintiff's twenty-fourth edition is sought to be sustained by comparisons contained in exhibits, and tending to show that both plaintiff's and defendant's books contain the same errors. We have examined this testimony, although neither the sixth edition of defendant nor the twenty-fourth of the plaintiff is before us. The nature of the volumes published by both parties is suggested by their titles. They are directories and advertising media, arranged geographically and by occupation; each contains upwards of 1,000 pages and many thousand names, occupations, and addresses. The value of such books is to advise advertisers, customers, and sellers as to where persons and corporations can be found likely to be interested in most manufactured articles of commerce. It is amply shown that neither plaintiff nor defendant compiles its catalogue wholly by means of personal visits or correspondence, but with much assistance from lists of telephone subscribers, city directories, official registrations, and other similar publications.

Defendant's attack upon plaintiff's method of compiling its twenty-fourth edition is confined to three subdivisions of commercial activity: Millers, or makers of flour; dealers in foods (cereal, breakfast, etc.); and meat packers—an extremely small part of the lists published by both parties. It is said that in these selected portions of plaintiff's work there are found some 130 errors common to both plaintiff and defendant, from which it is urged that, since defendant's sixth edition was published before plaintiff's twenty-fourth, the errors of the later book must have been produced by copying from the former. These comparisons are the only evidence requiring mention. It is not only denied that plaintiff copied from defendant, but the origin of most of the matter complained of is given, viz. from such local or special publications as have been enumerated above, and in most (we cannot say all) instances the errors existed in the source of information sworn to on behalf of plaintiff. Nor were the exhibits of comparison introduced by defendants themselves free from error—as was developed upon cross-examination.

At the conclusion of trial it appeared that the pecuniary value of books such as those under consideration depended upon prompt distribution and use. Changes of address, business, etc., rendered new editions numerous and necessary, and by admission in open court it further appeared that defendant had distributed (presumably to subscribers) 2,800 copies of its seventh edition containing the infringing matter. Thereupon the trial court awarded $2,500 as damages under section 25 of the Copyright Act of 1909 as amended (U. S. Comp. St. 1916, § 9546), and an attorney's fee of $2,500 under section 40 of the same act (U. S. Comp. St. 1916, § 9561).

The refusal of the court below (1) to dismiss the bill because of plaintiff's alleged inequitable conduct, its action in awarding (2) so much or any damages, and (3) so large an attorney's fee, are the assigned errors here insisted on.

Hugo Mock, of New York City (Max D. Josephson and A. M. Wattenberg, both of New York City, of counsel), for appellant.

Schechter & Lotsch, of New York City (Jacob Schechter and John L. Lotsch, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. The trial court dismissed the defense of "unclean hands," because the inequitable conduct charged against plaintiff did not "affect the matter in litigation." If plaintiff did borrow from defendant's sixth edition for the benefit of its twenty-fourth edition, that act was not deemed so connected with the subject-matter of this suit, viz. infringement of the copyright of plaintiff's twenty-third edition by defendant's seventh edition, as to render the defence admissible. Bentley v. Tibbals, 223 Fed. 247, 138 C. C. A. 489. Appellant insists that this case is not within that decision, but is ruled by Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 926, 59 C. C. A. 148, 152 (62 L. R. A. 607), where we said that "an author who has pirated a large part of his work from others is not entitled to have his (own) copyright protected." Decisions are idle unless based upon the facts of the case in which they are rendered, and the facts in this case do not require consideration of the question whether the alleged wrongdoing of plaintiff herein debars it from equitable relief against the admitted wrong of defendant.

[2] Assuming the defense offered to be well pleaded (concerning which no decision is made), it set up new matter, and in the light of defendant's now admitted infringement was in effect a plea in confession and avoidance; therefore defendant was obliged to make good such avoidance by a fair preponderance of credible testimony. This has not been done. If this defense had been (as it might have been) pleaded as a counterclaim (under equity rule 30 [201 Fed. v, 118 C. C. A. v]), or been pressed by independent bill (as was also possible), such bill or counterclaim should have been dismissed on the testimony presented to us. This finding of fact disposes of the first heading of error.

[3-5] 2. That the language of the section (25) of the Copyright Act relating to the assessment of damages and profits, is "somewhat obscure" we have pointed out before. Mail & Express Co. v. Life Pub. Co., 192 Fed. at page 901, 113 C. C. A. 377, at page 378. The relevant words of the statute are that infringers shall pay "such damages as the copyright proprietor may have suffered * * * as well as all the profits which the infringers shall have made from such infringement * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just; and in assessing such damages the court may, in its discretion, allow the amounts" fixed by

the act, etc. The statute then specifies certain limits of assessment in respect of copyrighted matters not relevant to this case, and concludes:

"And such damages shall in no case exceed the sum of $5,000 nor be less than the sum of $250 and shall not be regarded as a penalty."

The same section gives plaintiff "one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés" in respect of books such as are here in question.

As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the Mail & Express Co. Case, supra, we held that, in respect of an infringing publication coming under the same general category as does the present one, $250 was the minimum amount to which a plaintiff could be entitled. In Gross v. Van Dyck Gravure Co., 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to "estimate damages" in place of the "old penalties, * * * but to estimate them within the sums given, without the limitations of usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof." On appeal from that construction of the statute, this court approved the method pursued.

That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5,000 in lieu of actual damages has also been held in L. A. Westerman Co. v. Dispatch, etc., Co., 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th). In Woodman v. Lydiard, etc., Co. (C. C.) 192 Fed. 67 (affirmed on another point 204 Fed. 921, 123 C. C. A. 243, and 205 Fed. 902, 126 C. C. A. 434), Alfred Becker, etc., Co. v. Etchison, etc., Co. (D. C.) 225 Fed. 135, and F. A. Mills v. Standard, etc., Co. (D. C.) 223 Fed. 849, several District Courts have asserted a larger discretion; so that, where little or no injury appeared, even nominal damages have been awarded for proven infringement.

There may be circumstances under which discretion revolts from any award, by reason of the trivial nature of the thing copyrighted, or the slight success of attempted infringement; but the facts of this case present no such problem. That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word, works some considerable injury, is a matter too plain to require more than statement. That assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious. We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2)

to give the new right of application to the court for such damages as shall "appear to be just," in lieu of actual damages.

These words present no difficulty in interpretation. "Actual" means "real," as opposed to "nominal." Astor v. Merritt, 111 U. S. 213, 4 Sup. Ct. 413, 28 L. Ed. 401. It means "existent," without precluding the thought of change. Osborne v. San Diego, etc., Co., 178 U. S. 38, 20 Sup. Ct. 860, 44 L. Ed. 961. "In lieu" means in place of the thing modified by the quoted phrase. State v. Bank of Commerce (C. C.) 53 Fed. at 736. Therefore what plaintiff is entitled to ask of the court in its discretion is something in the place of his real—i. e., legally existent and legally ascertained—damages. If it had appeared that, instead of distributing 2,800 copies, defendant had issued but one, the technical infringement would still have existed, and the question been presented whether plaintiff must have $250 for nothing. Such a case has never been before us, and in the present cause experience informs the court that $250 would not and could not compensate plaintiff for a damage obvious, but difficult of exact admeasurement. It covers the matter in hand to repeat what we held in the Mail & Express Case, supra, that, where obvious and substantial pecuniary injury has been wrought, $250 is the minimum award, and to approve the above-quoted language of Hand, J., that the intent of the statute (under circumstances such as the present) was to authorize the court to estimate the damages within the statutory limits, without being bound to or by legal proof.

No error was committed in the assessment of damages herein.

[6, 7] 3. It has often been held that allowance of counsel fees is a matter peculiarly within the discretion of the court awarding the same, because that court can (and always does) proceed upon its own knowledge of the value and extent of the professional service rendered. We have lately approved this rule in Central Trust Co. v. United States, etc., Co., 233 Fed. 420, 147 C. C. A. 356. Discretionary matters are reviewable only when abuse of discretion is shown. Certainly no abuse is here demonstrated, and, having ourselves examined this record, whereof the printed testimony is far less important than the enormous and ill-digested mass of exhibits, requiring much labor to prove an infringement now admitted, we are the less inclined to disagree. There is nothing in Universal Film, etc., Co. v. Copperman, 218 Fed. 577, 134 C. C. A. 305, especially applicable to this case. In both cases the trial judge inquired as to the value in a particular litigation of the professional services rendered, and fixed them by his own knowledge of the facts and professional custom. We decline to disturb the award of counsel fees.

The decree is affirmed, with costs.

BEN FRANKLIN TRANSP. CO. v. FEDERAL SUGAR REFINING CO.*

(Circuit Court of Appeals, Second Circuit. March 13, 1917.)

No. 173.

1. SHIPPING ⇐173—DEMURRAGE—CONTRACT FOR LIGHTERAGE.
A lighterage company, under a general contract with a sugar refining company to perform lighterage service, *held* not entitled to recover demurrage for detention of its lighters by vessels to which it transported cargo, for which the refining company was not in fault, and in the absence of any provision therefor in the contract.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 570.]

2. SHIPPING ⇐170—DEMURRAGE—GROUNDS OF RECOVERY.
Demurrage, strictly speaking, can only be recovered where it is expressly reserved by charter party or bill of lading, and where there is no such reservation the remedy is by an action for damages in the nature of demurrage for wrongful detention.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 565–567.]

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

Suit in admiralty by the Ben Franklin Transportation Company against the Federal Sugar Refining Company. Decree for libelant, and respondent appeals. Reversed.

The Ben Franklin Transportation Company, hereinafter called the Transportation Company, is a corporation organized and existing under the laws of the state of New York, and is engaged in the business of lightermen and transporting freight and cargoes and the like for hire. The Federal Sugar Refining Company, hereinafter called the Refining Company, is a corporation organized and existing under the laws of the state of New York, with its principal office in the city of New York, in the Southern district of New York, and is engaged in the business of manufacturing, selling, and dealing in sugar.

Bigelow & Wise of New York City (Ernest A. Bigelow and Carl E. Whitney, both of New York City, of counsel), for appellant.

Frederick W. Park, of New York City, for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. It may be remarked that the caption of of this case in this court is wrong, there being a reversal of the parties as at common law; and at the trial a number of the allegations in the libel as originally filed were found to be erroneous and were amended by consent. But no change was made in the allegation that the parties had entered into a contract for carrying freight at a certain agreed freight rate, which is specified, "plus demurrage per day while waiting at either or both ends of the route according to the prevailing rates on boats of that class for demurrage in the harbor of New York." The suit, as indicated, is in admiralty. The Transportation Company sues upon the contract to recover various sums of money, the whole aggregating $1,956.40, with interest on the various items, claimed to be due for demurrage, under circumstances hereinafter stated.

*Rehearing denied.

[1] It appears that the Transportation Company entered into a contract with the Refining Company for carrying freight, consisting of sugar and sugar products, from the refinery at Yonkers to wherever ordered by the Refining Company in and about the harbor of New York, at a certain agreed freight rate. The libel alleges that the Refining Company, in addition to freight, agreed by its contract to pay demurrage, as already stated, and that it has paid the freight charges from time to time as the bills were rendered, but in certain instances has neglected to pay charges for demurrage. It declares that bills for the demurrage were duly rendered both to the Refining Company and to the steamships to which the sugar was consigned and their agents and owners, and that in each instance where the delay was caused at the steamship end demands were made by it, in behalf of itself and in behalf of the Refining Company, but in no case has it been paid; the steamship in each case alleging that their contractual relations with the Refining Company were such that they would not pay demurrage.

The answer admits a contract and calls on the Transportation Company to produce it at the trial. It admits that it has paid the freight charges accruing under the contract and that it has refused to pay charges for demurrage, and alleges that no amount is due from it to the Transportation Company. The court has found in favor of libelant and entered a decree in the sum of $2,076.58. The transactions between the parties began in 1902 and ended in March, 1916. There was a written contract between them, and later an oral renewal thereof. The written contract merely set forth the prices to be paid and received for the carrying of freight. There is nothing in it in regard to demurrage or "charges for demurrage."

The traffic manager of the Transportation Company, after stating that his company had a contract with the Refining Company, was asked whether it provided for the payment of demurrage, and he replied that it did not, but provided simply for the payment of freight. Later the contract was introduced in evidence, and it showed that the above testimony was in accordance with the facts. He, however, stated that the Refining Company had agreed to pay his company for the time the lighters were held at the refinery end. He was asked whether that company had ever paid charges for delays at that end, and he replied, "They paid us $762 for that very thing." But an agreement to pay for delays at the docks of the Refining Company, and which were presumably due to the acts or omissions of the Refining Company itself, is clearly not an agreement to pay for delays at the vessel end, which were presumably due to the acts or omissions of the vessel to which the cargo was consigned. Nevertheless the court in its opinion declared that:

"The fact that the respondent paid this demurrage in some cases without protest leads me to the conclusion that there was a contract between the parties for the payment of the demurrage at the steamship end as well as at the refinery end."

If there ever was an agreement between these parties to pay for delays at the vessel end, it was not embodied in the written contract into which they entered, and is not disclosed in this record. The traffic manager of the Transportation Company fails to testify to the existence

of any such understanding, while stating that there was an agreement to pay at the other end. The traffic manager of the Refining Company explained the exceptional case in which his company had paid the demurrage charges at the vessel end by showing that in that case his company had collected the charges at the other end and paid over the sums so collected. In other cases he said his company had never considered itself responsible for demurrage charges at the vessel end, although it had paid such at the refinery end. He declared the Refinery Company had objected to every bill when presented for demurrage charges at the vessel end, except where it had itself collected such charges. When the representative of the Transportation Company called at his office three or four times a month, "he would speak of being unable to collect the bills from the steamship company," "but I would always tell him we were not interested in the demurrage bills." "You always told him you were not interested in the demurrage bills?" Answered, "Yes." It is evident to us from this testimony that there was no contract between these parties that the Refining Company should pay demurrage charges at the steamer end. Moreover, it is inconsistent with the existence of such a contract that the Transportation Company always presented its bills for such charges in the first instance to the steamships and then on their refusal to pay presented them to the Refining Company. Why should the Transportation Company have presented the bills to the ships, if there had been a contract with the Refining Company to pay? We can understand why in some cases the latter company should have interested itself in collecting demurrage charges from the vessels. The testimony of the traffic manager of the Refining Company makes that clear. He testified that he was in the habit of talking to the traffic manager of the Transportation Company three or four times a day and—

"when these boats were held up, for his accommodation, I said I would take it up with the people, to try and get the boats released, the same as I would with the railroad companies. Not because it was my duty to, but he thought I had a little influence."

We think his testimony also makes it clear why, in the absence of any agreement to pay demurrage at the steamship end, the Refining Company did not regard itself as responsible. He testified as follows:

"The sugar is purchased through houses here, who have European correspondents, and some pay cash against a dock receipt. We do not in any case secure room on any steamer, or ask it; the buyers of the sugar arrange with the steamer for their own room; we have nothing whatever to do with the steamer. They furnish us a permit for the shipment, which we in turn send to the refinery and hand to the lightermen; so the steamship people would not recognize us in any event, for we do not obtain the payment. Q. No one, though, really had any contract with the Ben Franklin Transportation Company except yourselves? A. No; we had a contract with them to carry our freight, but we had absolutely nothing whatever to do with the room of the steamer or the permit, except handling it from the purchaser to the lighterman."

[2] There being no express contract to pay these charges for delays in unloading at the steamship's end, we are brought to the inquiry as to the nature of the liability for demurrage charges, in the absence of an express contract. Demurrage is an allowance for the detention of

a vessel in loading or unloading beyond the time allowed for the purpose in the charter party or bill of lading. It is in the nature of extended freight, and is intended as a compensation to the vessel for the freight she might have earned during the period of detention. Ordinarily demurrage is expressly stipulated for by contract, and strictly speaking is only payable when so stipulated. In Scrutton on Charter Parties (3d Ed.) page 232, the writer defines demurrage as:

"A sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading."

And he goes on to point out that, when this is not fixed by agreement, the shipowner's remedy is to recover unliquidated "damages for detention." See 36 Cyc. 347, and cases there cited. In the absence of express contract, damages "in the nature of demurrage" are recoverable for a breach of the implied obligation to load or unload the cargo with reasonable dispatch. See Price v. Morse Ironworks, etc., Co. (D. C.) 120 Fed. 445; Empire Transp. Co. v. Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Wordin v. Beinis, 32 Conn. 268, 85 Am. Dec. 255.

Demurrage, strictly speaking, then, can only be recovered where it is expressly reserved by the charter party or bill of lading, and, where no such reservation exists, the remedy is by an action in the nature of demurrage for the damages for wrongful detention. The J. E. Owen (D. C.) 54 Fed. 185 (1893). And in 36 Cyc. 370, it is stated that, where the action is for damages in the nature of demurrage, "special assumpsit or other form of action, in which the implied promise is specially pleaded, is proper and necessary."

In the argument in this court the Transportation Company did not rely upon the contract which it pleaded, but on an implied contract which it did not plead. Counsel in his brief declares that the parties "had read into the contract between them a covenant on the part of the respondent to pay the libelant at the ship end of the route after the day of arrival and two lay days." In this case the libelant has sued upon a contractual obligation which he has not proved. The contract which he has proved does not support the allegations of the libel. The implied promise upon which he seeks upon the argument in this court to recover was not specially pleaded.

But we may add that the record fails to disclose any such implied promise. And in this connection we call attention to the case of Hagan v. Tucker, 118 Fed. 731, 55 C. C. A. 521 (1902), in the Circuit Court of Appeals in the Third Circuit. That case was somewhat similar to the one now under consideration. In that case the libelant furnished a number of barges for use as lighters by respondent's testator in his coal business in New York City and harbor. The use necessarily involved more or less delay of the barges while waiting for the transfers of their cargoes to steamships, which was a part of defendant's business. A suggestion by libelant that he should expect demurrage for such delays was met by a prompt denial of liability and notice by decedent that he would not keep the vessels on such terms. Thereafter

the business continued as before, monthly bills being presented and paid for the hire of the barges, which contained no charges for demurrage, nor were any such charges made on libelant's books until after decedent's death, when a large sum was charged against him on that account. The court below dismissed the libel, and on appeal the decree was affirmed; the court declaring:

"We agree with the conclusion that the libelant's claim for demurrage or damages for the detention of his barges is not satisfactorily established."

In the case at bar the Transportation Company began to do lighterage business for the Refining Company in 1902, and continued to do so until March, 1916, and made no demands for demurrage until October, 1916. It then began to send demurrage bills to the Refining Company. Even then it sent its bills first to the steamships, and when they declined to pay them it then sent them to the Refining Company, with the explanation that the steamships had refused to pay the charges. It has already been pointed out that, as these bills came in from time to time, the Transportation Company was informed that the respondent was not responsible for such charges and that they would have to be collected from the steamship companies. It seems to us that, if the Transportation Company thereafter continued in the service of the Refining Company, it is not in a position to assert that the latter was under any implied obligation to pay charges which it had expressly declared it would not assume. Neither is the position of the Transportation Company in this respect improved by the fact that in one instance at its request the Refining Company used its influence to collect the demurrage charges from a steamship for the Transportation Company, paying over to the latter the sum so collected.

The question whether the steamships were liable to the libelant for delays in the unloading of the cargoes from the lighters is not before us, and is not passed upon in this case. Nevertheless, we may call attention to the rule laid down in 9 Am. & Eng. Encyc. of Law, 255, where it is said:

"In courts of admiralty it seems to be settled that a contract will be implied on the part of the consignee or his assignee to unload within a reasonable time, when no time is specified in the contract, and that a libel in personam may be maintained against him for damages for breach of such implied contract. A consignee is certainly so liable, if he is also the freighter."

In this case the consignee was not the freighter. The Refining Company did not employ or enter into any contracts with the steamships. They were engaged by the buyers of the sugar, and the Refining Company had nothing whatever to do with them. In 9 Am. & Eng. Encyc. of Law, page 253, the rule as to the liability of a freighter for delay in unloading is stated as follows:

"In the absence of any express agreement as to the time for unloading, the law implies a contract on the part of the charterer or freighter to unload within a reasonable time, and if he fails to do so, through his own fault or that of his agent, he is liable for damages in the nature of demurrage for the detention of the vessel."

There is nothing in this record to show that any delays which occurred at the steamship end were due to the fault of the Refining Com-

pany, and if they were occasioned by the fault of the steamships the evidence not only does not disclose that the latter were the agents of the former, but, on the contrary, it affirmatively appears that they were not its agents.

Again, in the absence of an express agreement, damages, if properly pleaded, can only be recoverable upon proof that the delay complained of was due to some fault or negligence on the part of the respondent. The burden of proving this is upon the libelant. Riley v. Cargo of Iron Pipes (D. C.) 40 Fed. 605. And in this case there is not a scintilla of evidence to show that the Refining Company was at fault for delays at the steamer end.

Decree reversed, with costs.

McKINNEY v. UNITED STATES NAT. BANK OF CENTRALIA et al.* REINHART et al. v. SAME. LANGLEY v. SAME.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1917.)

No. 2879.

1. BANKS AND BANKING ⊂⊃39—ORGANIZATION—PAYMENT OF CAPITAL IN CASH.

The organizer of the O. bank, intending it to have a capital of $50,000, as required by the state law, procured $2,000 in cash and $11,450 in notes for stock, and delivered them to the vice president and manager of the C. bank, with his own note for the balance of the $50,000, whereupon the C. bank issued a certificate of deposit for $50,000, upon the credit of which the O. bank opened its doors and commenced business. It was agreed that, on demand, the organizer of such bank would charge off the credit given to it by the C. bank. *Held*, that the capital was not paid in cash as required by law, and the O. bank's authority to open its doors and engage in business was fraudulently obtained.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 44–48.]

2. BANKS AND BANKING ⊂⊃80(4)—INSOLVENCY—CLAIMS—PRIORITY.

Where deposits were made in the O. bank on the assumption that its capital was paid in cash, and by the O. bank were transferred to the C. bank, the money so received by the C. bank was a trust fund, and upon the insolvency of both banks the claim of the receiver of the O. bank therefor was entitled to preference over general creditors of the C. bank, as the O. bank had no right to receive such deposits, or to transfer them to the C. bank, and the C. bank, whose officers participated in the fraud, had no right to receive them.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 187, 188.]

3. BANKS AND BANKING ⊂⊃80(4)—INSOLVENCY—CLAIMS—PRIORITY.

Where moneys received by the O. bank from depositors were paid to other banks by direction of the C. bank, the claim of the receiver of the O. bank therefor was only a general claim, not entitled to priority, as such moneys were not traceable into the possession of the receiver of the C. bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 187, 188.]

4. BANKS AND BANKING ⊂⊃80(1)—INSOLVENCY—CLAIMS ALLOWABLE.

The manager and principal stockholder in the T. bank organized the O. bank, which was to be a feeder for the C. bank, and negotiated with

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

*Rehearing denied October 8, 1917.

the manager of the C. bank for the sale to him of his stock in the T. bank. The T. bank, having money due it from the C. bank, called on the C. bank therefor, which directed the O. bank to furnish the money, which that bank did. *Held* that, whether or not the negotiations for the sale of the stock had been completed, the O. bank properly charged the advances to the C. bank, and on the insolvency of both banks the receiver of the O. bank had a claim against the receiver of the C. bank therefor, though the T. bank did not credit all of the moneys received from the O. bank to the C. bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184, 193.]

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

Actions by Frank P. McKinney, as receiver of the Olympia Bank & Trust Company, in which C. S. Reinhart and another, stockholders of the Olympia Bank & Trust Company, for themselves and all other stockholders, intervened, and by Roy A. Langley, as receiver of the State Bank of Tenino, against the United States National Bank of Centralia and A. R. Titlow, as its receiver. From the judgment, the plaintiffs in each case and the interveners separately appeal. Affirmed in part, and modified and remanded in part.

Three banks of the state of Washington, all closely related to one another, closed their doors in the month of September, 1914—the State Bank of Tenino on September 19th, the United States National Bank of Centralia on September 21st, and the Olympia Bank & Trust Company on September 22d. The receiver of the Olympia bank brought a suit against the receiver of the Centralia bank for an accounting, in which suit C. S. Reinhart and C. W. Shaffer, stockholders of the Olympia bank, intervened. The accounting which was sought related to three claims: First, a claim for $36,550, for which sum credit was taken by the Centralia bank against the Olympia bank on the strength of two drafts, of date September 15, 1914, one for $12,500, and one for $24,050; drawn by Hays, the cashier of the Olympia bank, to the order of the Centralia bank, and drawn, as the complainant alleged, to pay the personal notes of Hays, and whereby he took the funds of the bank to pay his personal indebtedness to the Centralia bank, with the knowledge of the officials of the last-named bank, and at a time when that bank was insolvent; second, a claim for $10,000, a sum remitted by the Olympia bank to the Tenino bank at the request of the Centralia bank, for the purpose of paying money which that bank owed to the Tenino bank; third, a claim for $9,500, which the Centralia bank had on deposit of the funds of the Olympia bank and used to pay its own notes. The receiver of the Tenino bank brought a similar suit for accounting against the Centralia bank. The interveners Reinhard and Shaffer, stockholders of the Olympia bank, brought a bill on their own behalf and for all other stockholders, praying for an accounting between the Olympia bank and its receiver and the Centralia bank and its receiver, and that the cash balance found due the Olympia bank and all notes in the possession of the receiver of the Centralia bank obtained from the Olympia bank be decreed to be held in trust for the receiver of the latter bank, and delivered to his possession. The suits were consolidated, and upon the issues and the evidence the court below in its decree denied the claims of the receiver of the Olympia bank for $36,550 and for $10,000, but allowed and established the claim of $9,500 in favor of the Olympia bank, and as against the Centralia bank, and decreed that the Olympia bank be allowed a general claim against the receiver of the Centralia bank in the sum of $25,998.91, to be paid with other proved and allowed claims, and the court further decreed that a certain credit of $48,000, given the Olympia bank by the Centralia bank, be canceled and held void.

The facts in the case are briefly as follows: The Olympia bank, with a capital stock of $50,000, was organized on August 19, 1914, at the instance of W. Dean Hays, who prior thereto had been the manager of the Tenino bank. In July, 1914, Hays, who owned the majority of the stock of the Tenino bank, entered into an agreement with Gilchrist, the vice president and manager of the Centralia bank, whereby the latter was to purchase that stock, but the shares were never transferred. Gilchrist was also anxious to procure the organization of the bank at Olympia. At that time a large portion of the funds of the Centralia bank were loaned to lumbering concerns, and when the European war began the officials, in the anticipation of withdrawals, took steps to build up a larger reserve. They desired to start a bank at Olympia as a feeder. To secure the $50,000 capital required under the state law, Hays procured five subscribers to stock at Olympia to give him notes, aggregating $11,450, for stock, and other stockholders paid $2,000 in cash for stock. The notes were made to Hays, with the understanding that he personally was loaning the money with which to pay for stock. Gilchrist went to Hays at Olympia, and there Hays indorsed the notes, paid Gilchrist the $2,000 cash, and for the remainder of the stock gave his own notes, one for $12,500, and one for $24,050, aggregating $36,550, to the Centralia bank, and thereupon the latter bank, through its cashier, issued to the Olympia bank a certificate of deposit for $50,000. Upon the credit of that certificate the Olympia bank opened its doors and commenced business. With the understanding that the principal deposits of the Olympia bank were to be carried in the Centralia bank, Gilchrist furnished Hays $2,500 cash, and Hays subscribed for stock of the Olympia bank in the sum of $36,550. On August 15, 1914, Gilchrist went to Hays in Olympia and told him that the bank examiner, who was at Centralia to examine the Centralia bank, would object to the Hays notes for $36,550. Gilchrist then produced two drafts, one for $12,500, and one for $24,050, which he had prepared on the stationery of the Centralia bank, for Hays to sign. Hays testified that he signed the same with the agreement that, in case the examiner objected to his notes, Gilchrist would use the drafts, but that afterwards the prior agreement would be carried out, that the Centralia bank would carry the Hays notes, and that the drafts were not to be used unless the bank examiner objected to the notes. The drafts were not returned to the Olympia bank. One of them, the draft for $12,500, was found in the Centralia bank after it went into receivership. It was not marked paid. The other was not found.

No findings were made by the trial court. Its conclusion, as stated in the opinion, is in substance as follows: The stock of the Olympia bank was turned over to Gilchrist, manager of the Centralia bank, together with the notes of the stockholders of the Olympia bank. The notes of Hays were, and were recognized as, worthless. There was a fraudulent conspiracy between Gilchrist and Hays to organize the Olympia bank without having its stock paid in cash as required by law, and each concealed from his associates and directors the nature of the transaction. The action of Gilchrist constituted a fraud upon the Centralia bank. Hays deceived his associates, who subscribed for stock in the Olympia bank, into believing that he was loaning them money on their notes with which their stock was being paid, while in fact he was leaving their notes and stock with Gilchrist, with the understanding that, as the notes were paid, the stock would be returned. No part of the capital required to be paid in cash by the law of Washington before the bank could transact business was paid in cash, and all that was obtained was a credit in the Centralia bank, saddled with an agreement that Hays would, on demand, charge off the credit given to the Olympia bank. The $36,550 stock subscribed by Hays was in no sense paid, and the credit had no existence in fact, and was only a color of credit. The conclusion of the trial court was that, if there had been a genuine authorized credit, Hays would have had no authority to take the money of the Olympia bank and apply it to the payment of his own note, but that the credit in this case had no existence in fact, and was only a color of credit.

P. M. Troy and R. F. Sturdevant, both of Olympia, Wash., for appellant McKinney.

Frank C. Owings, Thomas L. O'Leary, and Thomas M. Vance, all of Olympia, Wash., for appellant Langley.

C. Will Shaffer, of Olympia, Wash., for appellants Reinhart and Shaffer.

Fredrick Bausman, Robert P. Oldham, and Robert C. Goodale, all of Seattle, Wash. (Walter L. Nossaman, of Seattle, Wash., of counsel), for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The account between the Olympia bank and the Centralia bank shows the following: That the Centralia bank, between August 20th and September 9th, and including those dates, received in cash from the Olympia bank $38,498.91, all of which was sent to Seattle and Tacoma banks at the instance of the Centralia bank, except $2,203.91, which was sent to the Centralia bank, and that between August 20th and September 17th the Olympia bank received from the Centralia bank $12,500. This result is reached after eliminating from one side of the account the fictitious charge of $48,000 against the Olympia bank, representing the color of credit obtained in the Centralia bank by that bank, and from the other side of the account $12,500 and $24,050, which took the form of drafts for the payment of Hays' indebtedness on his notes, and $9,500, representing the three Blumauer notes, which never came into the possession of the Olympia bank. With the elimination of these false items, the balance stands in favor of the Olympia bank in the sum of $25,998.91, as found by the court below.

[1-3] We agree with the court below that the authority of the Olympia bank to open its doors and engage in a banking business was fraudulently obtained, that its capital was not paid in cash as required by law, and that the cashier and manager of the Centralia bank participated in the fraud. The receiver of the Olympia bank represents, among other interests, the interests of the depositors therein. Those depositors placed their money in the Olympia bank in good faith, on the assumption that its capital was paid in cash. Hays knew that the capital stock was not paid, and so did the officers of the Centralia bank. Hays had no right to receive the deposits, and no right to transfer them to another bank; nor had the Centralia bank the right to receive them. It follows that the money which the Centralia bank did receive of those deposits, so far as it went into that bank and into the hands of the receiver is a trust fund entitled to preference over general creditors. But the difficulty in the way of the restitution of the money to the depositors of the Olympia bank is that out of their deposits but $2,203.91 were sent directly to the Centralia bank. All the remainder of the money was sent to Seattle and Tacoma banks under instructions from the Centralia bank. For that money, $23,795, the receiver of the Olympia bank is entitled only to a general

claim against the Centralia bank, since none of it is traceable into the possession of the receiver of that bank. United States National Bank of Centralia v. City of Centralia, 240 Fed. 93, — C. C. A. —; Titlow v. McCormick, 236 Fed. 209, 149 C. C. A. 399.

[4] The ground on which the court below disallowed the $10,000 claim of the Olympia bank is not disclosed in the record. The facts are these: On or about September 12, 1914, the Tenino bank called on the Centralia bank for money. The latter bank directed the Olympia bank to furnish the money, which it did. At that time, according to the decided weight of the testimony, the Centralia bank was indebted to the Tenino bank. It is true that Gilchrist testified that the Tenino bank's account with the Centralia bank was frequently overdrawn, and that, when the first call for $6,000 was made by the Tenino bank, he knew that that bank "had no $6,000 with us," and that Dysart gave similar testimony from hearsay. But on the other hand, the testimony of Blumauer, manager of the Tenino bank, is explicit and definite. He testified that the daily statements of the Tenino bank showed that on September 10th the Centralia bank owed the Tenino bank $8,000; on the 12th, $9,000; on the 14th, $7,299; on the 15th, $7,000; on the 16th, $11,000; on the 17th, $13,000; and on the 18th, $9,000; and that, according to the books of the Tenino bank, there never was a balance between September 10 and September 20, 1914, with less than $7,000 or $8,000 owing from the Centralia bank. The sums so sent from the Olympia bank were charged to the Centralia bank in the Olympia bank's ledger, September 12th, $6,000, and September 15th, $2,000 money sent to Seattle for the Tenino bank, and September 18th, $2,000 coin sent to Tenino, and the Tenino bank gave the Centralia bank credit for them, but they did not appear in any way on the books of the Centralia bank. No account with the Tenino bank was opened on the books of the Olympia bank. The request for the remittance of these funds came by telephone from Gilchrist, who asked that money be sent to Tenino. Gilchrist testified that, when Blumauer called for funds to protect drafts that were going to protest, he called Hays on the telephone and told him that it was "up to him" to see that the drafts were protected at once, and Gilchrist testified that Hays had no authority to charge the remittances to the Centralia bank, his testimony conveying the intimation that he considered that, inasmuch as Hays was the principal stockholder of the Tenino bank, it was "up to him" to look after the drafts of that bank. George Dysart, a director and the vice president of the Centralia bank, testified that he was present when Blumauer called for one of these remittances of $2,000, and that he told Blumauer that the Centralia bank would send him no money; "that they should call up Mr. Hays; that it was his bank, and for him to look after it." Dysart evidently was not informed that Gilchrist had agreed to purchase Hays' stock in the Tenino bank. Hays testified that:

> Gilchrist said "he would buy it at the price I mentioned, providing that, after an examination, conditions were found all right—note all right. He and Mr. Daubney came up there and made an examination of the records, and he said he would take it, and he sent Mr. Daubney up there, and I went to Olympia to organize this bank, and did organize it."

Again he testified:

"He and Mr. Daubney came up there, and looked over the paper, and didn't object to it. They thought that some of it might be slow, but they didn't refuse it, and it was after that examination that he agreed to take the stock."

Daubney took the place of Hays in the Tenino bank. For that purpose he left his employment in the Union Loan & Trust Company of Centralia, a company closely allied with the Centralia bank. Gilchrist testified:

"We had sent Mr. Daubney up to assist in managing the Tenino bank."

Gilchrist did not deny that he had agreed to purchase Hays' stock, but he said that the negotiations were pending, and not consummated. It thus appears that Gilchrist was interested in the welfare of the Tenino bank. However that may be, the controlling facts are that the Centralia bank was indebted to the Tenino bank. The Olympia bank was not. The Tenino bank called upon the Centralia bank for funds, and Gilchrist instructed the Olympia bank to remit funds to Seattle and to Tenino for the benefit of the Tenino bank.

It is true that on the books of the Tenino bank, according to the testimony of Blumauer, only the first $6,000 of the funds so furnished by the Olympia bank were credited to the Centralia bank. Blumauer testified that:

As the Tenino bank had money due it from the Centralia bank, it asked the Centralia bank to see that it got the money there, "and we got it through the United States National Bank of Centralia; they telling us that they would have it there to our credit, and have it sent by the Olympia bank, although the Olympia bank did not owe us the money."

He further testified that:

The $2,000 remittances were similar transactions, and when the money was sent he did not know how to credit it; "it was due from one bank, and we got it from the other, and I had to make some entry to offset that, so we wouldn't pay over that $2,000 and not know who to credit it to, I had to credit it to one or the other, without any instructions. I knew it would be straightened out between Mr. Gilchrist and Mr. Hayes. As long as we got the money it didn't make any difference to us who we got it from, but as I said before it wasn't due to us from the Olympia bank—it was due us from the Centralia bank."

The funds so remitted were properly chargeable against the Centralia bank, as evidencing an indebtedness from that bank to the Olympia bank, and it follows that the claim of the Olympia bank against the Centralia bank should be allowed as against its assets.

As to the suit of the receiver of the Tenino bank against the receiver of the Centralia bank, we find no error in the decree of the court denying the claim of the complainant based upon certain drafts, aggregating the sum of $2,500, which were issued by the Tenino bank to the Centralia bank, directing it to pay a Portland bank, and to charge the amounts thereof against the Tenino bank's account, nor in denying the claim in the sum of $5,000 charged to the Tenino bank by the Centralia bank on account of Hays' note to the Centralia bank.

We think that the decree of the court below should be so modified as to allow the claim of the receiver of the Olympia bank for $10,000 as against the assets of the Centralia bank, and the further sum of

$23,795 as against those assets, and the sum of $2,203.91 as a preferred claim to be paid in full, and to award said receiver costs in the court below.

The cause is remanded to the court below, with instructions so to modify the decree. In other respects the decree is affirmed.

BLAKE v. PERRIN.

(Circuit Court of Appeals, Second Circuit. April 24, 1917.)

No. 183.

1. APPEAL AND ERROR ⇐1002—REVIEW—QUESTIONS OF FACT.
   Plaintiff's assertion and defendant's denial that defendant employed plaintiff to render services as broker raised a question of fact, which was settled by the verdict for plaintiff.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937.]

2. BROKERS ⇐44—RIGHT TO COMMISSIONS—REVOCATION OF AUTHORITY.
   A letter written by defendant to plaintiff, if treated as a revocation of defendant's offer to pay plaintiff a commission for securing a purchaser of certain machinery, was ineffective, where it did not reach plaintiff until after he had reached an agreement with a purchaser.
   [Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45.]

3. BROKERS ⇐57(2)—RIGHT TO COMMISSIONS—NEGOTIATION OF CONTRACT ON DIFFERENT TERMS.
   An agreement which contemplates the production of a purchaser is not fulfilled ordinarily unless a purchaser is produced by the broker who is ready, willing, and able to purchase at the price and on the conditions named by the seller, and if a purchaser is produced who varies these terms the broker is not entitled to compensation, unless the modifications suggested are consented to by the seller, and a contract is entered into upon the altered basis.
   [Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72.]

4. BROKERS ⇐57(2)—RIGHT TO COMMISSIONS—NEGOTIATION OF CONTRACT ON DIFFERENT TERMS.
   Plaintiff was not entitled to commissions for procuring a purchaser for machinery for rifling the barrels of rifles, etc., where the purchaser's offer was to pay the price asked only on condition that the equipment would be sent to Canada and set up there and its capacity demonstrated, especially where the purchaser understood that the equipment was for the manufacture of rifles, and not merely for rifling the barrels.
   [Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72.]

5. BROKERS ⇐51—RIGHT TO COMMISSIONS—NECESSITY OF BRINGING PARTIES TOGETHER.
   While ordinarily a broker must produce a purchaser, it is immaterial that the proposed purchaser and the principal are never brought together, where the principal prevents the consummation of the contract.
   [Ed. Note.—For other cases, see Brokers, Cent. Dig. § 69.]

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

Action by Howell C. Perrin against Anna M. L. Blake, as executrix. Judgment for plaintiff, and defendant brings error. Reversed.

The action was commenced by the service of a summons, on January 20, 1915, in the Supreme Court, Westchester county, state of New York. It was removed to the United States District Court for the Southern District of New York on March 16, 1915.

J. Carl Fogle, of Lockport, N. Y. (S. Wallace Dempsey, of Niagara Falls, N. Y., of counsel), for plaintiff in error.

Kiernan & Moore, of New York City (John J. Dwyer, of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action is brought to recover for services which the plaintiff alleges that he rendered to the defendant at his request as a broker in procuring a purchaser for him of certain machinery. The allegation is that he was to sell certain rifling machinery with capacity of 20 rifle barrels per day, drop forgings for making small parts of rifles, stock patterns, etc., which if put into an established shotgun plant would be able to turn out 20 completed rifles per day, together with patents for the sum of $50,000, and that defendant promised to pay the plaintiff a commission of 15 per cent. on $50,000 amounting to $7,500 in case he procured a purchaser. The sale was not consummated, but the plaintiff alleges that "he did find and procure a purchaser ready, willing, and able to purchase said articles for the sum of $50,000." He alleges that his services were reasonably worth $7,500 and that no part of that sum has been paid.

[1] While the plaintiff asserts that defendant employed him to render the services, the defendant absolutely denies that he ever so employed him. That, of course, raised a question of fact, which the verdict of the jury has settled. The jury found a verdict in favor of the plaintiff for $7,500, and judgment for that amount was entered on May 24, 1916. The plaintiff is a real estate broker in the city of New York. The defendant is a manufacturer of rifles of all kinds, including infantry and army rifles. In 1914 his machinery was in storage in New York, and he was waiting for some occasion to arise which would cause a demand for rifles. The plaintiff and defendant had been acquainted for some years, and the plaintiff had leased to defendant office facilities from 1909 to 1912. The defendant having told plaintiff that he was waiting for an opportunity to sell rifles, it occurred to the latter in 1914 that defendant's opportunity had arrived on account of the war. At that time there was a great demand for rifles and equipment, which greatly exceeded the supply. The plaintiff wrote the defendant on November 16, 1914, as follows:

"There is a party in my office, now, who has orders for 1,000,000 rifles; but all the manufacturers are working day and night, and still unable to keep up with the demand. If you will take your machinery out of the storage, my people will provide a factory, ready to install it, and give you orders for all the rifles you can turn out. This is all I can write you in the letter; but it seems to me that, if you ever wanted an opportunity 'to take the tide at the flood,' now is the psychological moment. Please communicate with me immediately, as these people are red hot and ready to do business."

To this the defendant replied on December 4, 1914, as follows:

"Your letter in regard to doing business in the rifle line is received. We are making Washington our headquarters, and are, of course, willing to accept a good contract or sell out stock control in the company. We are sending out catalogues to some of the inquiries and people may communicate with you. If you can throw any business our way, we will give you a good commission."

On December 7th, plaintiff called defendant on the telephone, and it was arranged that the former should meet defendant at Bellerose, Long Island, and in a conversation at that time the defendant was informed that plaintiff had some parties who wanted to buy rifles, and that he could get a contract for as high as 1,000,000 rifles if defendant would manufacture them. The defendant replied that he did not want to go into manufacturing, but that he would sell his equipment. He informed the plaintiff that he had a rifling machine capable of rifling 20 rifle barrels a day, drop forgings for making all the small parts of a rifle, etc., that if put into a shotgun plant it would be able to turn out 20 complete rifles a day, and that he would sell it for $50,000 and pay plaintiff a good commission. The plaintiff informed defendant that he had never sold rifle machinery, and did not know what the commission was, and defendant informed him that it was "15 per cent."

The plaintiff then saw the parties who were to buy the rifles, and tried to get them to purchase the machinery, but they did not want to manufacture. He thereupon got in touch with one Cushman, who had a factory in Kingston, Canada. After an extended conversation about the matter, the plaintiff and Cushman came to an understanding. There is no question but that Cushman was a man of ample financial resources. After Cushman had agreed to buy, the plaintiff tried to get the defendant on the telephone, but did not succeed in reaching him until the next day, December 10th, when plaintiff said to him: "Hello, Mr. Blake; I have sold your rifle machinery." The defendant replied: "Is that so—good, for how much?" The plaintiff said: "For your price—$50,000. I would like to see you right away in regard to closing it up. Can I come over now, or can you come over here?" The defendant said: "I do not want you to come over here. I do not want to make my host's house a business office. I will come over and see you to-morrow morning about 11 or 12 o'clock." After some further conversation about the time and place of meeting, the defendant said: "I will come in Saturday morning, surely, between 11 and 12 at your office."

It appears that on December 9th, the defendant wrote the plaintiff, calling his attention to the fact that the government of the United States was at that time frowning upon the sale of arms to the belligerents, and informing him that, "in view of the serious penalty imposed for such breach of neutrality, it would be wise for me to proceed with all due caution, if it is wise to proceed at all."

[2] This letter the plaintiff thought he received on the morning of December 10th, but was not certain whether he received it before or after the conversation over the telephone. Neither does it appear at what hour the letter of December 9th was mailed. The envelope in which it was received was not preserved. This, however, would not be material. If it be conceded that the letter revoked the defendant's

offer to pay plaintiff a commission if he secured a purchaser, it could have no effect until it was communicated to the plaintiff. Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479. And it was not communicated to him until after the agreement with Cushman.

On December 11th, the day after plaintiff had informed him over the telephone that he had secured a purchaser, the defendant wrote:

"I must decline to conduct any negotiations in regard to the sale of arms or the disposition of my rifle business. I decline to do anything that might be construed as a breach of American neutrality. Please cancel my engagement to meet you Saturday, December 12th. We will drop the whole matter until the attitude of the American government is more favorable to arms manufacturers."

On December 16th, the secretary of the Blake Rifle Company, of which company the defendant was president, wrote plaintiff, saying, among other things:

"To attempt negotiations now would be a waste of your time. Neither you nor we are to blame because within one day of our talk this law against the supply of arms was introduced in Congress. In any case there is a misunderstanding about our supplying machinery for turning out 20 army rifles per day. This is probably due to the fact that you are a real estate agent, and not a machinery or armory expert. A plant to turn out 20 rifles per day would cost about $100,000 for machinery alone. We have no such plant. What we have is a Pratt Whitney rifling machine, whose capacity is about 20 barrels per day. We explained to you that if this machine was put into an established shotgun plant, like that of the Baker Gun Company at Batavia, in a few weeks they would be able to turn out about 20 rifles per day.

"We have no machinery to turn out 20 rifles per day; so, of course, your party will not do business, and surely we do not want him to lose money, even if he did. Our proposition only applied to this man Laughlin, who was supposed to represent the Canadian government, and we declined to sell him arms, and he declines to buy the patents and rifling machine, as he declined the latter propositions. All negotiations were off, and I notified you to that effect at once, and also in regard to antagonism of the American government. With all due respect, you seem unknowingly to persist in getting us to violate American neutrality, which would precipitate no end of trouble for us, as well as for yourself. Wait till the clouds roll by."

This letter defendant testified at the trial he wrote himself, although the secretary signed it. Cushman testified as follows:

The plaintiff explained "that Blake [the defendant], of the Blake Rifle Company, wanted to sell the Blake equipment—machinery, patents, etc., for the manufacture of rifles—and asked me if I was interested in it. I told him that I was interested. He said that it was a complete equipment—that it would manufacture 20 rifles per day. I immediately told him that, if such equipment could be obtained, I would pay the freight to Canada and have it set up, and if it would do as he stated—manufacture 20 rifles a day—I would give him $50,000 for it."

This occurred on December 9th.

[3] An agreement which contemplates the production of a purchaser is not fulfilled ordinarily unless a purchaser is produced by the broker who is ready, willing, and able to purchase at the price and on the conditions named by the seller. If a purchaser is produced who varies those terms, the broker is not entitled to compensation, unless the modifications suggested are consented to by the seller, and a contract is entered into upon the altered basis. In the case under consideration the original offer which the plaintiff says the defendant made was:

1. To sell for $50,000. This sum was acceded to by Cushman.

2. To sell an equipment which would turn out 20 rifles a day. And Cushman testified that was the proposition which was put up to him by the plaintiff, and which he accepted. The defendant says that he authorized the plaintiff to make no such proposition, but represented that his equipment was capable of rifling 20 barrels a day. The trial judge in his charge did not call the attention of the jury to the necessity of Cushman's acceptance of the exact offer made by defendant, and to this variance in the terms shown in the testimony. The difference between a plant that would turn out 20 barrels a day and one that would turn out 20 rifles a day was considerable of a difference. As defendant pointed out in his letter, a plant to turn out 20 rifles a day would have been worth $100,000.

[4] 3. But Cushman's acceptance of what he thought was defendant's offer was conditional, and not absolute. Cushman himself testifies that what he said he would do was that he would pay the freight on defendant's equipment to Canada and have it set up there in a factory, and if it was demonstrated that it would turn out 20 rifles a day he would pay $50,000 for it. This was a serious modification of the defendant's proposal. It involved a shipment of the equipment to a foreign country, beyond the jurisdiction of the domestic courts, and a considerable distance away from where it then was, where it was to be set up and tested, and no provision was made for its return in case Cushman found it unsatisfactory, and, if necessary to return it, there was no provision as to whether the expense should be paid by Cushman or by defendant. It cannot be said that the minds of Cushman and the defendant ever met on the same terms; and for that reason the broker never became entitled to his commission.

[5] We have said that ordinarily the broker must "produce" the purchaser. The cases to that effect are Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Massie v. Chatom, 163 Cal. 772, 127 Pac. 56; Baars v. Hyland, 65 Minn. 150, 67 N. W. 1148; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326; Grindstaff v. Merchants' Invest. & Trust Co., 61 Or. 310, 122 Pac. 46; Watters v. Dancey, 23 S. D. 481, 122 N. W. 430, 139 Am. St. Rep. 1071. In this case the proposed purchaser and the defendant were never brought together. This fact, however, is not material in cases in which the principal prevents the consummation of the contract. Van Orden v. Simpson, 90 Misc. Rep. 322, 153 N. Y. Supp. 134; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790.

As the purchaser the plaintiff found proposed to buy on conditions not contained in the defendant's proposal to sell, and besides misunderstood what was being sold, we must hold that the plaintiff is not entitled to the commission, which the defendant promised to pay if a purchaser was produced who would buy on the terms originally named. The motion to dismiss the complaint, upon the ground that no cause of action by the plaintiff against the defendant had been made out, should have been granted.

Judgment reversed.

HERRMANN v. BOWER CHEMICAL MFG. CO.

(Circuit Court of Appeals, Third Circuit. May 17, 1917.)

No. 2213.

1. SALES ⟸421—BREACH BY SELLER—ACTIONS—INSTRUCTIONS.
A contract for the sale of prussiate of potash, the principal ingredient of which was carbonate of potash, which defendant claimed it could not obtain because of the European war, provided that the sellers should not be liable for delays due to causes such as war, etc., preventing or impeding the manufacture or delivery of the merchandise. In an action by the buyer for breach of such contract, the court charged that, where a party contracted for the delivery of certain merchandise, he was obliged to use diligence to supply himself with sufficient quantities to carry out his contracts, if he could do it in the exercise of due diligence; that the questions for consideration were whether defendants used the diligence which a reasonably prudent man in good faith, desiring to carry out the contract, would exercise; that after the war broke out it was defendant's duty to take notice thereof, and after a German embargo was laid, and after a British Order in Council interfering with importations from Germany, it was their duty to take notice thereof, and if there was reasonable ground for apprehension that the supply of carbonate of potash would be cut off, and that they would be prevented or impeded in manufacturing or delivering under their contract, then it was their duty to provide themselves through other sources with a sufficient supply to carry out the contract, and if they failed in the exercise of that diligence and due care plaintiff was entitled to recover. *Held*, that plaintiff had no ground to complain of this instruction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214–1223.]

2. SALES ⟸421—BREACH BY SELLER—ACTIONS—INSTRUCTIONS.
An instruction that if the carbonate of potash which came into defendant's possession, and the prussiate of potash which was bought and sold, should, in the exercise of the diligence and reasonable prudence which a reasonably prudent man should exercise, be apportioned to the contracts made before the beginning of the war, then, as to any quantities which should have been devoted to the performance of the contracts with plaintiff, plaintiff was entitled to delivery of his proportionate share, and to the extent that he was deprived of those quantities he would be entitled to recover, was not erroneous, where it was plaintiff's contention that it was defendant's duty to apply such carbonate of potash as it could secure to plaintiff's contract, and not to prorate it with later made contracts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214–1223.]

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

Action by Morris Herrmann against the Bower Chemical Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Louis Marshall, of New York City, John G. Johnson, of Philadelphia, Pa., and Abraham Benedict, of New York City, for plaintiff in error.

James Piper, of Baltimore, Md., George Wharton Pepper, of Philadelphia, Pa., and Francis J. Carey, of Baltimore, Md., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Morris Herrmann, surviving partner of Herrmann & Co., a citizen of New York, brought suit against the Henry Bower Chemical Manufacturing Company, a corporate citizen of Pennsylvania, to recover damages for breach of contract. The trial resulted in a verdict for defendant. On entry of judgment on such verdict, plaintiff took this writ of error.

The proofs in this case tended to show that by written bill of sale, dated June 10, 1914, the defendant sold plaintiff 400,000 pounds of "prime yellow prussiate of potash (standard technical quality)," with an option for an additional 100,000 pounds, declarable April 1, 1915. The deliveries were to be "in equal monthly installments over the year 1915." The bill of sale further provided:

"Seller not liable for delays due to causes beyond their control, or for non-arrival of any shipment lost in transit, or for causes, such as strikes, lockouts, war and insurrection, fires, accidents, or the like, which may prevent or impede the manufacture or delivery of the merchandise herein contracted. In such event, shipments or deliveries may be suspended during the period required to remove the cause of or to repair the damage, or until there is a normal production again."

The proofs showed the seller made at its works in Philadelphia prussiate of potash, and that its principal ingredient was carbonate of potash, which is practically an exclusive European product, and almost exclusively one of German make and export. For that reason the fulfillment of the contract was largely affected by the European war, and defendant, as a result, did not make the deliveries provided by the contract. At the trial the court refused plaintiff's point that:

"The provision in the contract to the effect that the 'seller is not liable for causes, such as * * * war, * * * which may prevent or impede the manufacture or delivery of the merchandise herein contracted,' relates solely to a war in the United States, or in which the United States is engaged or directly concerned, and not to a war in which the United States is not thus engaged or concerned, between two or more other countries, from one of which is obtained a supply of materials needed in the manufacture of the merchandise sold."

We find no error in the refusal of the court to give this binding instruction as to the construction to be placed on contract. Assuming for present purposes, but without deciding, that the contract was for the sale of a specific article which was manufactured here in America, and that the strikes, lockouts, wars, fires, accidents, and the like, guarded against in the contract, were such as were incident to the manufacture of the article in America, and not to the ingredients, obtained elsewhere, from which such article was manufactured, we think that, in view of the construction given by the acts of both parties, it certainly did not lie in the plaintiff's power to ask the court to hold the contract did not apply to the European war.

[1] Without discussing in detail the other assignments of error, we may say they group themselves around the several positions taken by

the plaintiff, namely, that it was the duty of the defendant upon the outbreak of the war to secure all the carbonate of potash required to carry out all these contracts the defendant then had, and that as to such carbonate of potash as the defendant could secure it was its duty to apply it to the plaintiff's contract, and not to prorate it with later made contracts. The proofs tended to show that, soon after the war broke out, Germany placed an embargo on the export of potash, but that this was afterwards lifted to an extent which permitted such quantities of potash to come through that it was obtainable on the market. Later the British Order in Council was made which prohibited the exportation of German products made through neutral ports in neutral vessels, and there was proof that this ran the supply of potash to prohibitive prices. There was also proof tending to show that at all times the defendant could have procured carbonate of potash at advanced, but not prohibitive, prices. All of these proofs the court submitted to the jury, charging with reference to the defendant's duty to provide for a sufficient supply of carbonate to carry out the contract, as follows:

"Now, where a party enters into a contract providing for the delivery of certain articles of merchandise, he is obliged to use diligence to supply himself with sufficient quantities to carry out the terms of his contracts, if he can do that in the exercise of due diligence. * * * So that the questions for you to consider under all the evidence are whether you are satisfied from the evidence that the defendant did use the diligence which I have stated, that is, the diligence which a reasonably prudent man, in good faith desiring to carry out the terms of his contract, would exercise, in obtaining supplies necessary to proceed with the manufacture and delivery of the prussiate of potash. * * * Now, there are different degrees, perhaps, of diligence required of the defendant according to the circumstances at the various times. After the war broke out, it was the duty of the defendant to take notice that there was a condition of war, and after the German embargo was laid, and after the British Order in Council, it was its duty to take notice of those conditions, and at all times during the war, if you find that there was reasonable ground for apprehension on its part that the source of supply of carbonate of potash would be cut off, and that it would be prevented or impeded in manufacturing or delivering under its contract—if you find that there was ground for that reasonable apprehension, then you would be justified in finding that it was its duty to provide itself through some other source with a sufficient supply to carry out the terms of the contract, and, if you find that it failed in the exercise of that diligence and due care, then the plaintiff would be entitled to recover damages for the difference between the market price and the contract price which was named in the contract between the parties."

In laying down this measure of a seller's obligation of preparatory preparedness to fill a contract, certainly the buyer had no ground to complain.

[2] In regard to the obligation of the defendant to prorate among its contracts the court thus instructed the jury:

"If, from the evidence, you determine that the carbonate of potash which came into the defendant's possession, and the prussiate of potash which was bought and sold, should, in the exercise of diligence and reasonable prudence which a reasonably prudent man should exercise, have been apportioned in like manner to the contracts made before the beginning of the war, then as to any quantities of prussiate of potash which should have been devoted to the performance of the contracts with the plaintiff, the plaintiff would be

entitled to delivery of his proportionate share of prussiate of potash out of such quantities, and to the extent that he was deprived of those quantities he would be entitled to recover damages for the difference between the contract price which he was to pay for the prussiate of potash, and the market price at the time when such deliveries would have been due."

The verdict having been for the defendant, the facts are settled that, in the face of excepted cause of war to which the contract was made subject, the defendant, in providing against the conditions caused by the war, in preparing to fulfill the plaintiff's contract, and in prorating to the plaintiff such partial performance as it could, the defendant, as required by the charge, "did in good faith use all reasonable means to perform." Such being the established facts, we find no injury was done the plaintiff in the trial which warrants a reversal of this judgment.

It is therefore affirmed.

SIMON v. NEW ORLEANS, T. & M. R. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 28, 1917.)

No. 2973.

1. RAILROADS ⊂=192—FORECLOSURE OF MORTGAGES—SALE—PRICE.
Where a railroad, having approximately 900 miles of road, failed to pay operating expenses and interest on about $3,500,000 of receivers' certificates during a very careful and well-managed receivership, a bid of $6,000,000 by a reorganization committee was a fair price.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642.]

2. RAILROADS ⊂=192—FORECLOSURE OF MORTGAGES—OBJECTION TO SALE.
On the foreclosure of a mortgage on the N. railroad to secure bonds of the F. railroad company, it was not sufficient ground for refusing to confirm a sale to a bondholders' reorganization committee that such committee, in exchange for certain cash and securities, had agreed to forego any deficiency judgment against the F. company, where the facts did not indicate that, but for this agreement, the F. company, itself in the hands of a receiver, or its reorganization committee, would have been bidders, especially as the agreement could not deprive an objecting bondholder or the trustee of the right to a deficiency judgment.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642.]

3. RAILROADS ⊂=192—FORECLOSURE OF MORTGAGES—OBJECTION TO SALE.
Where the owners of 80 per cent. of the bonds secured by a railroad mortgage had joined in a plan of reorganization, and it was still open to an objecting bondholder, who was acting purely in his own interests, and not for other minority bondholders, to join in such plan, a confirmation of a sale to a reorganization committee would not be denied, and a resale ordered, merely for the purpose of coercing the committee, by repeated orders of resale, to pay such bondholder the par value of his bonds.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642.]

Appeal from District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the New York Trust Company against the New Orleans, Texas & Mexico Railroad Company. From certain orders denying him

leave to intervene, and overruling his objections to confirmation of a sale, Julius Simon appeals. Affirmed.

The following is the opinion of the District Court on opposition to sale, etc.:

On July 8, 1913, the New York Trust Company, as trustee under a mortgage securing an issue of bonds of the St. Louis & San Francisco Railroad Company, known as "New Orleans, Texas & Mexico Division first mortgage, gold bonds," of which $28,582,000 has been issued, filed its bill for the appointment of a receiver for the New Orleans, Texas & Mexico Railroad Company. A receiver was appointed and took over the operation of the property. Later, on July 31, 1914, a decree of foreclosure was entered. Owing to the extraordinary financial condition existing in the United States because of the European war, it was considered impracticable by all parties in interest then before the court, and by me, to order the sale of the road at that time. On September 17, 1915, the order of sale was entered, and the date of sale fixed for November 15, 1915. On October 29, 1915, Julius Simon, a resident of Milwaukee, Wis., and owner of 50 of the said bonds, of the par value of $1,000 each, asked leave to intervene to oppose the sale or to require the fixing of an upset price. On this petition an order to show cause issued and was heard on November 5, 1915, by me, and the relief prayed for was denied, but the petition was ordered filed and petitioner was allowed to intervene for the purpose of opposing the confirmation of the sale, if the price paid be considered inadequate, and his right to so do was reserved.

The New York Trust Company then filed a petition, suggesting error in allowing the filing of the petition of Julius Simon, and praying that the order be rescinded and set aside, and on this petition an order was entered on November 11, 1915, requiring Simon to show cause why his petition should not be disallowed and stricken from the files. It was also ordered, pending the determination of the rehearing, that the clerk be directed to refuse for filing any other paper presented by the petitioner. After the entering of the order of November 11th petitioner presented to the clerk what he termed an answer and cross-bill, setting up substantially the same issues as presented by his original pleadings, and asking, in addition to other relief, for the postponement of the sale and the fixing of an upset price, which had already been denied. On the day of sale Simon appeared through his attorney and protested, and his protest was disregarded, and the master proceeded with the sale, and adjudicated the property to Walter F. Taylor and Carl A. De Gersdorff for the price of $6,000,000, and received as a deposit a certified check for 3 per cent. of the bid.

The master reported the sale in due course, and his report was received on November 19, 1915. On November 27, 1915, the purchasers appeared through counsel and obtained an order for confirmation unless opposed in eight days. On December 7, 1915, Simon appeared and filed his opposition to the confirmation of the sale, setting up substantially that the sale was really to a reorganization committee of the bondholders, attacking the fairness of the plan of reorganization, alleging the bidding was suppressed, because of an agreement between the reorganization committee and the reorganizers of the Frisco Railroad, whereby, in exchange for certain cash and securities, the reorganization committee agreed to forego any deficiency judgment against the railroad, and also setting up, as he had previously done, that the value of the property sold was upwards of $41,000,000, but without praying that the sale be set aside and the property readvertised, but praying that the sale be not confirmed, except upon condition that the reorganization committee be compelled to pay him par and accrued interest for his bonds. It developed on the argument that this was expected to be done by the refusal of the court to confirm the sale, and the ordering of a new sale, and in turn the refusal to confirm that sale, and so on ad infinitum, until the condition imposed would be complied with.

[1] Regarding the value of the property sold, of course, it is utterly ridiculous to say that a railroad having approximately 900 miles of road, which during a very careful and well-managed receivership has failed to pay operat-

ing expenses and interest on about $3,500,000 of receivers' certificates, is worth $41,000,000. Evidently, petitioner's figures are largely based on first cost of the road and par value of stocks and bonds owned by the company, most of which are worthless. From my knowledge of the affairs and condition of the road, gathered from a careful and constant supervision of the receivership, I should say that $6,000,000 is not a vile price but, on the contrary, is a very fair figure, everything considered.

[2] With regard to the contention that the bidding had been suppressed by an agreement between the reorganization committee of the defendant company and the Frisco Railroad, while it is true that an agreement was entered into, substantially as set up in the petition, whereby the reorganization committee agreed to forego any deficiency judgment, it is not shown that, but for this agreement, either the Frisco road or its reorganization committee would have been bidders at the sale, and the inference to be drawn from the facts apparent in the record, of which I must take notice, is that under no condition would the Frisco Railroad, itself in the hands of a receiver, have been a bidder for its New Orleans, Texas & Mexico division, as the same had always been considered a liability rather than an asset. Nor could any agreement between these two committees operate to deprive the petitioner or the trustee of the right to a deficiency judgment. The question of deficiency judgment does not come up at this time, and need not be further considered.

[3] Regarding the alleged unfairness of the plan of reorganization proposed, without going into an analysis of same, it does not appear to me to be unfair. Necessarily, the road cannot be operated unless new capital is invested, and I am not prepared to say that the distinction made between the allotment of bonds and stocks to those participating in the buying of the first lien bonds and those not doing so is unjust. Furthermore, it is apparent that the organization of the committee is not a combination against the petitioner, for he was invited to join it more than two years ago, and this course is still open to him. If the combination is highly advantageous to those engaging in it, the petitioner may have all of these advantages by complying with the same conditions.

The petitioner has cited a great many cases in support of his contentions—none, however, in which the courts have granted anything approximately the relief he asks. He relies mainly upon the cases of Central Trust Company v. Chicago, R. I. & P. Railroad Company, 218 Fed. 336, 134 C. C. A. 144; Louisville Trust Company v. Louisville Railway Company, 174 U. S. page 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; Ballentyne v. Smith, 205 U. S. 289, 27 Sup. Ct. 527, 51 L. Ed. 803. In the first case cited the point considered was the right of an intervener to appeal from a decree denying him permission to file his intervention; but it may be noted that the action there being taken was at the instance of 40 per cent. of the bonds, and a majority of the bondholders were objecting. In Louisville Trust Company v. Louisville Railway Company the allegation of the bill was that the stockholders of the road and the bondholders had combined to sell the road and buy it in for their joint account, and so deprive other lien creditors of their rights. Nothing of that sort appears in this case. In the case of Ballentyne v. Smith the sale was set aside because it appeared conclusively that the property sold was worth seven times the amount of the bid. While such relief is not asked, I do not consider that the price here bid is sufficiently less than the actual value of the property to warrant the sale being set aside for mere inadequacy. It is not attempted to be shown that on a resale the property would bring any more, and the only relief in fact wanted is to compel the purchasers by coercion to pay the petitioner par and accrued interest on his bonds.

It is shown that the owners of $23,177,000 worth of bonds have joined with the reorganization committee—over 80 per cent. The petitioner is in court purely for his own purposes, and not on behalf of the other minority bondholders. I do not think he is entitled to any such relief in a proceeding of this character as he prays for. The original order was intended to preserve petitioner's rights to object to the confirmation of the sale for inadequacy of price or for any other legal reason. To that end it was perhaps unnecessary, but it certainly went no further. In my opinion, the rights of all parties will

be best protected if the order of November 5, 1915, be now recalled and vacated. Petitioner has not availed himself of his right to oppose the sale, but has attempted to engraft another form of action, sui generis, on the proceedings heretofore had.

His prayer for relief will be denied, and his pleadings dismissed and ordered stricken from the files, without prejudice to any rights he may have against the trustee, the St. Louis & San Francisco Railroad Company, any so-called reorganization committee, or any of its members, in appropriate proceedings.

Gustave Lemle, of New Orleans, La., and Walter L. Gold, of Milwaukee, Wis., for appellant.

Morgan M. Mann and Carl A. De Gersdorff, both of New York City, George Denegre, Victor Leovy, Henry H. Chaffe, Wm. C. Dufour, and H. Generes Dufour, all of New Orleans, La., and Frank Andrews, of Houston, Tex., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. We have carefully examined this record in the light of the oral argument and briefs, and we conclude that the trial judge correctly decided the case, and we concur with the reasoning in Judge Foster's opinion, found in the record.

The decree appealed from is affirmed.

GOELET v. MATT J. WARD CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 218.

1. LIMITATION OF ACTIONS ⟸46(2)—ACCRUAL OF CAUSE OF ACTION.

Where plaintiff found tenants to take defendant's property at the expiration of an existing lease, but it was specifically provided that such tenancy should not arise until and unless the existing lease terminated with all its terms fully complied with, plaintiff's right of action on a quantum meruit for its services did not accrue, and limitations did not begin to run, until the termination of the existing lease, as it had no cause of action presently enforceable until that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 241.]

2. TRIAL ⟸315—VERDICT—"COMPROMISE VERDICT."

In an action on a quantum meruit for services as broker, a "compromise verdict" means one the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 740–742.

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

3. APPEAL AND ERROR ⟸264—REVIEW—NECESSITY OF EXCEPTIONS.

A claim that the verdict was a compromise verdict need not be considered, where it rests upon no exception taken at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533–1535.]

4. APPEAL AND ERROR ⟸263(1)—REVIEW—NECESSITY OF EXCEPTIONS.

A ruling directing the jury to allow interest upon whatever verdict they should render could not be reviewed, where no exception was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1516.]

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5. INTEREST ⊜19(1)—RIGHT TO INTEREST—UNLIQUIDATED DAMAGES.
In an action on a quantum meruit for services as broker, interest should not have been allowed; the damages being unliquidated.
[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 Southern District of New York.

Action by the Matt J. Ward Company against Robert Walton Goelet. Judgment on a verdict for plaintiff, and defendant brings error. Affirmed.

Cary & Carroll, of New York City (Philip A. Carroll and Walter K. Earle, both of New York City, of counsel), for plaintiff in error.

Albert I. Sire, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. This case is between the same parties and was brought as the result of our decision in Matt J. Ward Co. v. Goelet, 230 Fed. 979, 145 C. C. A. 173. The facts shown by the bill of exceptions are the same as were before us on the previous writ; but the cause of action is different.

This suit is to "recover upon a quantum meruit for services rendered to and accepted by" defendant below. 230 Fed. at page 982. The complaint alleges that the Ward Company introduced as customers or tenants for his premises certain persons to Mr. Goelet, who thereupon entered into negotiations with them and "owing to [Ward Company's] efforts accepted said customers as his tenants." It is then alleged that the "services so performed" by plaintiff below were "fully accepted by said defendant and were fairly and reasonably worth * * * $5,550."

It cannot be denied that there was evidence sufficient to take the case to the jury tending to prove that the introduction alleged did take place; that Mr. Goelet did accept the services of plaintiff, executed a lease to the persons introduced by plaintiff, and was informed by plaintiff that a commission was expected to be paid. There was also evidence as to the customary rate for commissions on similar real estate transactions in the city of New York. This piece of business related to real property in Philadelphia.

Plaintiff below had a verdict for $3,000, upon which interest was granted in pursuance of a direction by the court to the effect that whatever verdict they should render would bear "interest from the date of September 1, 1910, when it was said this obligation accrued."

The errors alleged and relied upon in argument are: (1) That the action is barred by the statute of limitations; (2) that the result reached by the jury was a compromise verdict and therefore illegal; and (3) that it was error to grant interest upon the verdict.

[1] 1. Reference to our former opinion (in 230 Fed. 979, 145 C. C. A. 173) will show fully the facts on which the defense of the statute rests. Ward Company found tenants who would take Mr. Goelet's property at the expiration of an existing lease; but it was specifically provided that such tenancy should never arise until and unless the ex-

isting lease terminated, with all its terms fully complied with. In other words, there was to be no acceptance of the fruit of Ward Company's services as broker until the performance of several conditions precedent, which performance could not possibly occur before September 1, 1910.

It follows from this that plaintiff below had no cause of action presently enforceable until September 1, 1910, and we so held on the previous writ. This action was brought within six years from that date, viz. the earliest date when "the plaintiff first became entitled to maintain [this] particular action." The statute began to run when plaintiff became entitled to sue. Cary v. Koerner, 200 N. Y. at page 259, 93 N. E. 979. The act (sections 380 and 382, Code Civ. Proc.) is not a bar because the "cause of action accrued" within six years of summons served.

[2, 3] 2. Since plaintiff below sued, not upon an agreement to pay a specified sum of money, but for whatever the jury thought the services were worth up to $5,550, the expression "compromise verdict" must be taken as meaning "that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision." Simmons v. Fish, 210 Mass. at page 572, 97 N. E. 106, Ann. Cas. 1912D, 588. While we perceive no reason for imputing such impropriety to the jurors, we need consider the matter no further, because it rests upon no exception taken at the trial. There was a "failure to apprise the trial judge of the point now raised." Springer, etc., Co. v. Falk, 59 Fed. at page 712, 8 C. C. A. 224.

[4, 5] 3. It is also true that no exception was taken to the ruling of the court which in effect ordered interest on the verdict. Therefore we cannot review it, although, since the damages were plainly unliquidated, the instruction was error. Stephens v. Phœnix Bridge Co., 139 Fed. 248, 71 C. C. A. 374, and cases cited; also Excelsior, etc., Co. v. Harde, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493.

The judgment is affirmed, with costs.

JAFFE et al. v. PYLE et al.

In re STEELE, MILLER & CO.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1917.)

No. 2955.

BANKRUPTCY ⇐292—ACTIONS AGAINST TRUSTEE—JURISDICTION.

A trustee in bankruptcy brought ancillary proceedings in the Eastern district of Louisiana, claiming ownership of certain cotton, and obtained a preliminary injunction against its removal from the court's jurisdiction. Thereafter the cotton was delivered to certain foreign banks on forthcoming bonds. Plaintiffs sued the trustee and the parties to such ancillary proceeding to impress a trust on the cotton, on the ground that it was purchased with money obtained from them by the bankrupt by fraud, and the jurisdiction was sustained on the theory that it was in the nature of an ancillary suit affecting property within the custody of the court. *Held* that, while this had probably become the law of the

case, the court's jurisdiction could not be sustained, where the ancillary proceeding by the trustee had terminated adversely to the trustee; the bond having only been intended to take the place of the cotton, and the foreign defendants having done nothing to subject themselves personally to the court's jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 410, 413, 415, 416.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Max Jaffe and others against J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Co., and others. From a decree dismissing the bill, complainants appeal. Affirmed.

The following is the decision of the trial judge on demurrer:

In this case the plaintiffs set out in their bill that by certain fraudulent practices the bankrupt firm of Steele, Miller & Co. got from them upwards of $68,000; that same constituted a trust fund in the hands of the said bankrupts; that subsequently, out of the trust fund, they purchased certain cotton; and that this same cotton came into the possession of this court by virtue of ancillary proceedings in the said bankruptcy. The bill prays that the cotton be impressed with a trust in their favor to the extent of their claim.

In the other proceedings in this court, referred to in plaintiffs' bill, the trustee of Steele, Miller & Co. proceeded against the identical cotton, claiming the ownership, and a preliminary injunction against the transportation company issued, preventing its removal out of the jurisdiction of this court. This proceeding was in the nature of a stoppage in transitu, enforced by injunction, and to all intents and purposes the res was in the exclusive jurisdiction of this court, through its officer, the trustee in bankruptcy. Thereafter the cotton was delivered to certain French banks on forthcoming bonds.

On plaintiffs' bill, subpœnas issued by order of the court and were served on the solicitors of record of the trustee and of the French banks, and on the transportation company and its agent, all of whom were parties in the other proceedings. Service was made on the American Surety Company, surety on the forthcoming bond, through its resident vice president. The American Surety Company has filed a demurrer to the jurisdiction of the court ratione materiæ, and all other parties defendant have filed limited appearances, and subsequently pleas to quash the services, on the ground that they are not residents of, nor represented in, the district.

Plaintiffs are seeking to impress certain property in the custody of the court with a trust, and their bill is therefore in the nature of an ancillary suit. Consequently this court has jurisdiction to hear and determine the issues with regard to the property in question, and the subpœnas issued and served upon the solicitors for other claimants to the said cotton are purely in the nature of notices, and ample, in view of the specific relief prayed for. Nor does it matter that the actual property has been removed out of the jurisdiction of the court, as the forthcoming bond stands in its place. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Murphy v. John Hofman Company, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327.

The demurrer of the American Surety Company and the pleas of the other defendants will be overruled.

The opinion of the trial judge, dismissing the bill, is as follows:

In this matter I entertained jurisdiction originally only on the theory that if Pyle, trustee, recovered in the suit then pending, entitled Pyle, Trustee, v. Texas Transport & Terminal Co. (No. 14,240, D. C.) 192 Fed. 725, the court would have ancillary jurisdiction by virtue of constructive possession of the res. While it is probable that my decision has become the law of the case, notwithstanding, I have had occasion to change my views. See Knauth, Nachod & Kuhne v. Latham & Co. et al., 219 Fed. 721, 135 C. C. A. 419. That

litigation having terminated adversely to the trustee, the court has nothing tangible to support its ancillary jurisdiction. Complainant contends, however, that he is not concluded by the decision against the trustee, and can obtain relief against the bond and the foreign defendants if he proves his case.

With these views I cannot concur. The bond was only intended to take the place of the cotton, and the foreign defendants have done nothing to subject themselves personally to the jurisdiction of the court. The defendants have shown that they are at heavy expense to pay the continuing premium on the bond, and equity requires that the litigation be promptly terminated.

The bill will be dismissed without prejudice.

The foregoing are the papers mentioned in the præcipe filed by the complainants.

George T. Hogg, of New York City, and W. O. Hart, of New Orleans, La., for appellants.

Geo. Denegre, Victor Leovy, Henry H. Chaffe, and Geo. H. Terriberry, all of New Orleans, La., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. We concur with the trial judge in the disposition of this case.

The decree appealed from is affirmed.

In re F. & D. CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 227.

BANKRUPTCY ⊂=120—APPOINTMENT OF TRUSTEE—ELIGIBILITY.

Under Bankruptcy Act July 1, 1898, c. 541, § 45, 30 Stat. 557 (Comp. St. 1916, § 9629), providing that trustees may be individuals competent to perform the duties of the office, and residing or having an office in the judicial district within which they are appointed, or corporations authorized to act in such capacity, where no candidate for the office of trustee received the votes of a majority of creditors in number and amount, and the appointment of a trustee thereupon devolved upon the referee, a person otherwise qualified was not ineligible because he was one of the unsuccessful candidates voted for by the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 185.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the F. & D. Company, bankrupt. On petition by Marshall S. Hagar to revise an order (237 Fed. 895), reversing an order of the referee appointing him as trustee. Order reversed, with directions.

Augustus H. Skillin, of New York City, for petitioner.

Bogart & Bogart, of New York City (Jacob J. Lesser, of New York City, of counsel), for respondent.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. At the first meeting five creditors, whose claims aggregated some $32,000, voted for Marshall S. Hagar as trustee, while seven creditors, whose claims aggregated some $1,600, voted for Jacob J. Lesser. No candidate having a majority in number and amount of claims voted, there was no election, and the referee appointed Hagar trustee, who thereafter filed a bond and entered upon the administration of the estate. Subsequently a creditor filed in the office of the referee a petition to review his order appointing Hagar, and, the same having come on for hearing, the District Judge reversed the order and appointed a new trustee.

Section 45 of the Bankruptcy Act provides:

"Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."

The District Judge expressly approved the character and integrity of Mr. Hagar, and stated as the sole ground for removing him that the referee should not have appointed one of the unsuccessful candidates. He said:

"What this action of the referee comes to is that he has appointed one of the persons whom the creditors have demonstrated that they are unable to select. Such an appointment by the referee is, in effect, overriding the clear intent of the statute. For this reason the order will be reversed, and the court will appoint a new trustee."

The intent referred to is probably that a majority of the creditors in number and amount is necessary to the election of a trustee, and, neither of the unsuccessful candidates having had such a majority, it is to be assumed that neither was acceptable to the creditors. But the provision of the statute applies to an election, and not to an appointment by the referee or District Judge. There is no presumption against the character or fitness of the unsuccessful candidates when there is no election by creditors, and while it may generally be wise not to appoint an unsuccessful candidate, we cannot assent to the proposition that they are ineligible. Such appointments were made in several reported cases, though no objection was raised on this ground. In re Richards (D. C.) 103 Fed. 849; In re Rosenfeld, Goldman & Co. (D. C.) 228 Fed. 921; In re Harry Rothleder (D. C.) 232 Fed. 398.

The order is reversed, and, as the original appointment was proper, and should have been confirmed, there is no vacancy within section 44 of the Bankruptcy Act (Comp. St. 1916, § 9628), and the court below is directed to reinstate the trustee appointed by the referee.

CHADELOID CHEMICAL CO. v. H. B. CHALMERS CO. et al.

(Circuit Court of Appeals, Second Circuit. April 5, 1917.)

1. MOTIONS ⊂=42—RENEWAL—RECONSIDERATION.
Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1916, § 1121), providing that, on appeal from interlocutory injunctions, etc., the proceedings in other respects shall not be stayed unless otherwise ordered by the District Court, or the appellate court or a judge thereof, where, pending an appeal from an interlocutory decree ordering defendant to assign certain patents and all rights to damages and profits for infringement thereof to complainant, enjoining defendant from using the inventions, or making, selling, or using the patented article, and ordering an accounting, the trial judge denied a stay, except upon the giving of a bond, a Circuit Judge will not reconsider the matter upon the renewal of the motion for a stay before him.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 53, 54.]

2. APPEAL AND ERROR ⊂=458(3)—INJUNCTION ⊂=134—STAY OR INJUNCTION PENDING APPEAL.
The injunction would not be stayed pending the appeal, nor would complainant be enjoined from bringing suits for infringement of the patents involved pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Injunction, Cent. Dig. § 303.]

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

Action by the Chadeloid Chemical Company against the H. B. Chalmers Company and another. From an interlocutory decree, defendants appeal. On application to a Circuit Judge for an injunction and stay. Motion denied.

William Houston Kenyon and Gorham Crosby, both of New York City, for appellants.

Frederick S. Duncan, of New York City, for appellee.

Before WARD, Circuit Judge.

WARD, Circuit Judge. Judge Manton in this suit entered an interlocutory decree requiring the defendant H. B. Chalmers to specifically perform certain covenants in an agreement between him and others of the one part and the complainant of the other part, and he further ordered the defendant H. B. Chalmers Company to assign to the complainant three patents and all rights to damages and profits for infringement of the same. This has been done. He further enjoined the defendant from using the inventions covered by the said patents, and from making, selling, or using the paint remover heretofore made under the said patents and sold by the defendants under certain trade-names; and he further ordered the defendants to pay over to the complainant all profits received by them, and damages sustained by the complainant by reason of such manufacture, sale, or use, and directed an accounting for the ascertainment of the same.

Upon an application to stay the accounting Judge Manton directed that it should be stayed upon the defendants giving bond in the sum

of $30,000 to pay anything that might be found due from them. The defendants have appealed to the Circuit Court of Appeals, under section 129 of the Judicial Code, from the interlocutory injunction. The section provides that:

"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."

The defendants now renew before me the motion to stay the accounting pending appeal, and further move that, pending appeal, the complainant be enjoined from bringing any action for infringement of said letters patent assigned to it, either against them or their customers, and finally that the injunction be stayed.

[1] I have, of course, nothing to do with the merits of the case, and must take the decree to be right in all respects; errors, if any, will be corrected on appeal. I think it bad practice to renew before me the motion to stay the accounting heretofore disposed of by Judge Manton, and his conclusion will not be reconsidered.

[2] The complainant having succeeded so far, I do not see any sufficient reason why it should be deprived, pending appeal, of its right to bring suits for infringement, or why the defendants should be relieved of the operation of the injunction until its appeal is decided, which may not be for six months. The hardships the defendants complain of, and which they wish to escape by help of the court, are the result of defeat.

The motion is denied.

STUMPF v. A. SCHREIBER BREWING CO.

(District Court, W. D. New York. March 16, 1917.)

No. 160–B.

PATENTS ⊂=328—VALIDITY—INFRINGEMENT.

Claims 1, 2, 3, 4, and 8 of the Stumpf patent, No. 1,042,168, for an improvement in steam engines, *held* valid and infringed, but claim 18 *held* not infringed.

In Equity. Suit by Johann Stumpf against the A. Schreiber Brewing Company. Decree for complainant for part of the relief sought.

Bartlett & Chamberlain, of Buffalo, N. Y. (John P. Croasdale, of Philadelphia, Pa., and Cleon J. Sawyer, of New York City, of counsel), for plaintiff.

J. C. Sturgeon, of Erie, Pa., and George E. Tew, of Washington, D. C. (Melville Church, of Washington, D. C., of counsel) for defendant.

HAZEL, District Judge. - The bill alleges infringement of United States letters patent No. 1,042,168, applied for April 18, 1908, and granted to Johann Stumpf October 22, 1912, for an improvement in steam engines. The patent is for a combination of old elements, consisting of an engine cylinder, piston, inlet ports, exhaust ports, and

heating jacket, which, as complainant claims, operated in a new way and produced a new and useful result.

The general defense is noninfringement; the specific defenses being that the claims have been improperly broadened, that the substance of the invention is disclosed in prior patents and publications, and that no practical improvement resulted from the combination and arrangement of parts. The defendant is a user of an engine constructed by the Skinner Engine Company of Erie, Pa., which complainant claims substantially embodies his invention.

The characteristics of single cylinder engines of the counterflow and uniflow types have, of course, been known and understood by the skilled in the art for many years. In counterflow engines the steam enters the cylinder at one end, and, after expansion, returns with the piston out into the air through exhaust ports located at the same end at which it entered, while in the uniflow engine—the type of engine with which we are herein concerned—the hot steam enters the cylinder at one end, and, always flowing in the same direction, exhausts at ports located at opposite ends, or at points removed from the inlet end, after its energy has been practically expended; the exhaust ports being opened by the piston stroke. In engines of the condensing type, the steam is usually exhausted into a chamber having pressure lower than atmospheric; but, when operating as noncondensing, the steam is discharged, either into the atmosphere or into a chamber having pressure greater than atmospheric. In compound or multiple engines, two or more cylinders are commonly used, through which the steam flows in series, with the result that initial condensation is greatly reduced. The object of the patentee herein was primarily to eliminate loss of steam from initial condensation in single cylinder engines, as distinguished from compound engines, and to entrap and compress the dry steam remaining after expansion, so as to improve the thermal conditions of such engines.

The first question is whether Stumpf discovered a new principle of operation. Upon the determination of this question depends the character of the patent and the interpretation and scope of the claims, in view of the file wrapper and the prior art. It is practically conceded that all the elements of the claims in controversy, separately considered, were old; reliance being placed upon the new combination by which beneficial results were attained. It should be understood that cylinder walls ordinarily are comparatively cooler than the entering steam, owing to the moisture which has adhered thereto and absorbed the heat, and that the cylinder in turn absorbs heat from the steam after admission and as it expands in driving the piston, thus producing initial condensation, which decreases the economic efficiency of the engine. The patentee designed to keep the inlet end of the cylinder, including the cylinder walls, absolutely dry at all times, during expansion, at the completion of the piston stroke, and while the expanded steam was exhausting, for at such times absorption of heat from the interior walls was most marked. To accomplish his object he placed heating jackets or chambers at the extreme inlet end of the cylinder, and exhaust ports around the center, away from the inlet end, to keep them cold and unaffected by the hot steam, and adapted an elongated

piston to isolate the moisture from the hot zone after the expanded steam has exhausted through ports opened by the piston stroke. The elongated piston, not only controls the outlet port, or ports, but serves to protect the cylinder walls from the effects of the expanded steam by failing to contact the cylinder walls in its traveling, owing to clearance, with the result that the dry steam remaining in the cylinder after the expanded steam and the wet steam have been exhausted is compressed, on the return stroke of the piston, against the hot inlet end, while the exhaust ports are covered by the piston, thus making it possible to intensify the steam heat at the inlet end, and almost entirely to prevent initial condensation. Of this the specification says:

"Means for bringing the working steam at the end of expansion into layers of decreasing dryness toward the exhaust while the piston uncovers the exhaust ports to let this wettest steam pass off, and then on the reversal of its motion covers the exhaust ports and retains them covered while the cylinder heated, drier steam is trapped and compressed up to the inlet end."

It is believed that the patentee by his adaptation improved thermal conditions in uniflow engines, secured increased expansion in a single cylinder, and made it practical to close the inlet valve before the piston reached the full stroke, and in this way minimized steam losses. The specification refers in detail to specific means for injecting steam into the annular chambers, or partial jackets, as they are called, *7* and *8*, connected with annular chambers *11* and *12* formed in projections from the cylinder covers to correspond in length to the distance of travel of the piston from the dead center to the cut-off. These partial jackets are unlike the jackets commonly employed to entirely surround the cylinder for the purpose of keeping both the inlet and exhaust ports heated, but they are distinctively heating jackets particularly for heating the end of the cylinder and the cylinder inlet. Chambers *11* and *12* are provided with valves for admitting steam into the cylinder proper, and there are specified means for creating a hot zone at the inlet end and a cold zone at the exhaust ports, the latter leading into an annular space around the cylinder, which is partitioned from the inlet and heating covers or jackets by an unjacketed or unheated portion to create a cooling belt or space "in the neighborhood of the exhaust."

The use of a long piston in an engine cylinder was not unknown in the art, but the piston of the patent in suit—an elongated piston—was particularly adaptable for controlling the exhaust ports to prevent the exhaust of expanded steam from circulating in the hotter space and for coacting with the essential features of engines operated upon the uniflow principle. The specification also refers to intermediate ports in the walls of the cylinder (*45, 46, 47,* and *48*) "for utilizing the exhaust steam," controlled by the piston and by automatic nonreturn valves (*55*, Fig. 2), and connected to pipes (*52* and *53*).

We may now refer to the claims in controversy. The first, second, third, fourth, eighth, and eighteenth are relied upon. They read as follows:

1. The combination with a steam engine cylinder having an inlet port and an exhaust port distant therefrom, of means for heating the steam within the cylinder near the inlet port, a relatively cold chamber into which the

exhaust port leads, and an elongated piston working in the cylinder and adapted to uncover the exhaust port as the piston nears the end of its working stroke and to keep said port closed and to cover and protect the adjacent interior portion of the cylinder during the remainder of its operating cycle.

2. In combination with a cylinder having an inlet port at its end and an exhaust port intermediate in its length, means for heating the steam near the inlet end during the expansion and compression comprising a hot partial jacket at the inlet end of the cylinder, means for bringing the working steam at the end of expansion into layers of decreasing dryness toward the exhaust. comprising a cold exhaust steam belt around the exhaust ports and into which said exhaust ports open directly, said hot jacket and cold belt being spaced apart with an unjacketed portion of the cylinder extending between and means for allowing said wettest steam to pass off unheated at the end of expansion and to trap and compress heated steam comprising an elongated piston working in said cylinder and adapted to uncover said exhaust ports at the end of expansion and retain said ports covered and the interior of the cylinder out of connection with the exhaust belt during compression, substantially as described.

3. In a steam engine, the combination with a working cylinder having an inlet port at its end and separate exhaust ports and a working piston in said cylinder adapted to uncover said exhaust ports at the end of the working stroke and also to retain them covered during expansion and compression of the steam, of means for securing graduation of the steam in zones of driest steam near the inlet end and wettest steam near the exhaust ports consisting of a partial jacket about the inlet end of said cylinder and from which jacket said cylinder inlet port leads, a live steam supply pipe to said jacket and a valve controlling the admission of live steam from said jacket to the cylinder through said inlet port.

4. In a steam engine in combination with a cylinder having exhaust ports therein and a piston working in said cylinder and adapted at and near the end of its working stroke to uncover said exhaust ports and during expansion and compression of the steam to retain said exhaust ports covered, means for securing graduation of the steam in zones of driest steam near the inlet end and wettest steam near the exhaust ports consisting of a hollow cover having a live steam inlet port therein leading to the cylinder, a live steam supply pipe to said hollow cover, and a valve in the live steam port leading from said hollow cover to the cylinder for controlling the admission of steam to said cylinder.

8. In combination with the cylinder of a uni-directional flow engine, a hot partial jacket on the inlet end of said cylinder and means for insulating said hot jacket from the cold parts of the cylinder steam space.

18. In a steam engine, a cylinder having steam inlet ports and also exhaust ports arranged at different points axially in the cylinder, a working piston adapted to uncover said exhaust ports in its travel and means other than the working piston for closing as desired all the said exhaust ports except the last ports uncovered by the piston in its stroke.

It will be observed that claim 1 broadly specifies means for keeping the steam hot near the inlet port, and includes the elongated piston for controlling the exhaust ports to protect the cylinder walls. Claim 2 includes in combination a hot partial jacket at the inlet end and a cold exhaust steam belt spaced apart with an unheated part of the cylinder. In claim 3 is emphasized the creation of temperature zones of driest steam near the inlet and wettest zones near the exhaust, while claim 4 is for a jacket or hollow cover having a valve leading to the cylinder. Claim 8 refers to means for insulating the partial jacket from the cold belt, and claim 18 to means, other than the working piston, for covering all the exhaust ports "except the last ports uncovered by the piston in its stroke."

Defendant claims that any novelty there may be in the patent resides, first, in the particular construction of the annular chambers *11* and *12* formed in cylindrical projections from the cylinder cover for the purpose of enlarging the space in the cylinder proper by counterboring, and which it was contended required a long piston to correspond thereto; second, in the auxiliary ports communicating with pipes between the inlet end and exhausts, and the feature of closing them with nonreturn valves and opening them when the piston moves forward to discharge a little of the expanded steam; and, third, that in other respects the engine operated similarly to uniflow engines of the prior art. It is not believed, however, that the patent in controversy is limited to the actual construction described in the specification.

As defendant's expert has pointed out, not only were uniflow engines well known to the art, but at the date of the invention it was old to place exhaust ports in the center of the cylinder of a double-acting uniflow engine and at the extreme end away from the inlet end in a single-acting engine. Nor was it new to admit the steam at the initial piston stroke and exhaust the same through ports located at a distance from the inlet so that it would not return thereto. In the patent to Eaton, No. 17,142, for example, there is shown a long piston for controlling a central exhaust operating to cover and uncover the same; but such patent disclosed no heating jacket at the cylinder head, and was utterly unable to achieve the results in suit.

The Westinghouse patent, No. 240,482, has a hollow air cylinder, but it was unheated, being used merely to prevent heat radiation; the steam being admitted through the hollow cylinder end. The principle of the patent in suit, however, was not disclosed or even suggested. While the drawings attached to the Westinghouse patent show a long piston for keeping the exhaust ports closed, except when the steam escapes, there nevertheless was a complete failure to appreciably decrease initial condensation, owing quite likely to the absence of a heated jacket at the cylinder head—an essential feature of the Stumpf patent.

The Willans patent approximates the patent herein considered, being provided with a steam jacket at the inlet and a cold exhaust belt connected with the jacket by the intervening walls of the cylinder; but it is not anticipatory, as the piston element in such construction was incapable of performing the functions of the elongated piston of the involved claims. The Willans engine piston was of a peculiar design. It had a central valve located inside of the piston rod, which, on discharging the steam, communicated with both sides of the piston during its reciprocation through the steam. The drawing, Figure 3, shows a single cylinder engine wherein a part of the steam is exhausted through middle ports, which are uncovered by the piston in its movements; but nevertheless the peculiar construction of the latter was such that it could cover the exhaust ports for only a brief time in its travel, and as it did not cover them for a longer period it was unable to accomplish the results of the Stumpf piston, which covered the exhaust ports and kept them covered in its travel long enough to prevent the cold or expanded steam from flowing back to the hot zone. Opening the exhaust ports to allow the wet steam to escape, and then

quickly closing them to entrap the drier remaining steam, and compressing the same for reuse or intensifying the heat at the inlet end, were not suggested. Willans did not disclose the Stumpf combination, and his engine, though highly praised by the skilled in the art, was nevertheless unable to attain the superior economy in steam per horse power that was subsequently attained by the patent in suit.

Neither Todd nor Brotherhood discloses the combination of elements which were of the essence of the Stumpf invention, each lacking an essential feature, Todd the heating element at the inlet end and the cold exhaust, while Brotherhood, by the use of a short piston, erroneously kept the exhaust ports open too long on the return stroke, and hence failed in his efforts to eliminate initial condensation.

Importance is attached to the Creuzbaur patent, No. 332,499, which describes a *two-cylinder* uniflow engine with a steam jacket on the inlet end of the main cylinder and exhaust ports in the center, yet the patentee failed to use or disclose a piston capable of operating like the elongated piston of the claims in controversy, and he was unable to keep the exhaust ports closed long enough to prevent the expanded steam from permeating the hot cylinder walls; something Stumpf succeeded in accomplishing by adapting the elongated piston to coact with the exhaust ports to separate the hot and cold zones.

Another citation is that of the Dawbarn British patent, No. 16,497, wherein the construction comprises a system of piping for heating the cylinder head and the annular chamber or jacket adjacent thereto; the heat being supplied from an outside water heater. The patentee wished to prevent initial condensation, but, assuming his patent to have been more than a mere paper patent, I think the principle he employed was different from that employed by Stumpf. By the former's adaptation the entire cylinder and the exhaust ports were heated, and the piston used was incapable of covering the exhaust ports on its return stroke, and of keeping the cooler exhaust from the hot zone. He utterly failed, because of the incapacity of the piston used by him, to successfully eliminate initial condensation.

No single prior patent discloses the combination of a heated hollow cylinder cover to create a dry zone coacting with central exhaust ports, to disperse the wet steam into cooler zones, in the intermediate space between the inlet and exhaust, and then with an elongated piston to control the exhaust ports during expansion and compression of the steam to protect the zones from each other. Accordingly, the combination of the claims was new and novel, and the fact that one, or more, or all, of the elements were old, is immaterial, as the patentee herein was the first to combine them for improving thermal working conditions in uniflow engines to enable a "high ratio of expansion to be carried out with maximum efficiency in a single cylinder," and he is therefore entitled to protection from infringement by uniflow engines operating in substantially the same way and accomplishing the same result.

Defendant's expert, practically admitting that the combination was new, denies that the claimed results were secured thereby; but the record fairly shows, I think, that the invention was not without merit, and that the claimed results were in fact attained. While it perhaps

has not actually eliminated initial condensation, it has nevertheless decreased it, so that it may be said to be almost eliminated, and the evidence shows that the improvement makes it possible to operate the uniflow engine as economically as compound engines under like conditions. Hence it was not limited to a piston with extensions and peculiar forms of annular chambers, or to an annular chamber requiring that the cylinder head be recessed or counterbored to receive the piston. These were simply matters of construction, and it makes no difference, in view of the scope of the claims, whether the cylinder head of the patent in suit was extended by counterboring, or whether the heating jacket was enlarged at the head, or decreased in size, or whether the piston was elongated by placing extensions thereon; it being obvious that the same results were attainable by mechanical modifications.

Defendant has adapted in its engine the essential elements of the combination under discussion, arranged in substantially the same way to get the same result as complainant when its engine is used as a condensing engine. Claims 1 to 4, inclusive, are for the basic invention, and are not avoided by adapting auxiliary valves on the under side of the cylinder to relieve compression, for even with such valves the major portion of the wet steam was exhausted through the central ports, and the drier part trapped on the return stroke of the piston. The said auxiliary valves are not opened in operating the engine as condensing, and all the steam in the cylinder after exhaust is compressed to assist in keeping the inlet dry.

Claims 2 and 3 are not limited to two partial jackets; but, even with such limitation, the defendant does not avoid infringement, as in its engine both such partial jackets or chambers are present conforming substantially to those of complainant. In defendant's engine the hot and cold zones are insulated by an air belt spaced apart from the major jacket or heated inlet end, and, as shown in the model, the cylinder head is recessed to give the piston clearance space, in its reciprocations, from the cylinder ends, precisely as in complainant's construction.

Claim 8 is perhaps not as definite as it should be, but still I think the words "means for insulating said hot jacket from the cold parts of the cylinder steam space" imply keeping the piston head clear of the hot jacket. The specification referring thereto substantially says that to further avoid loss of heat from the hot jacket the piston end is insulated from the hot surfaces and that "this is effected by providing heads *41, 42,* on the end of the piston, which heads are out of contact with the hot surfaces."

Defendant contends, inter alia, that this claim was anticipated by the Creuzbaur patent, No. 332,499; but though such prior patent has an insulated piston, the insulation separates the cooler parts only, and not the hot parts from the cold—the essential feature of complainant's patent. Even if the claim is limited to specific means, the defendant does not avoid infringement thereof, as its engine has substantially the same way of insulating the hot and cold parts, viz. by recessing the cylinder to surround a portion of the piston end.

Defendant also disclaims infringement of claim 18. It is shown

that in defendant's engine steam may be discharged in varying quantities through the auxiliary ports, instead of through the central exhausts in operating the engine as a semi-uniflow engine, or as a combined uniflow and counterflow engine. Of course, any modifying improvement, merely in the way of retarding compression, does not avoid infringement of the basic invention, as no new mode of operation resulted. I am impressed with the view, however, that the claim is lacking in definiteness, and that the specification does not seem to support it. The thermal working condition of the uniflow engine did not depend on valves disposed axially in the cylinder. Defendant's auxiliary exhaust port and its valve control are embodied in the Skinner & Williams patent, No. 1,033,280, dated July 23, 1912. Claim 18 of the patent in suit was inserted by amendment dated July 30, 1912, though prior thereto the file wrapper and contents show it originally as claim 15. Nevertheless I am of the opinion that such claim refers to ports with check valves for releasing only a small portion of the steam, possibly for feeding water heaters, as testified by defendant's expert witness Wadsworth. In any event the claim, in view of the prior patent to Schmidt for a somewhat similar valve, but one operating more like defendant's, must be given a narrow construction only, and, so construed, defendant's engine does not infringe it.

As heretofore pointed out, the defendant employs the combination in suit, and thereby establishes zones of dry and wet steam, the latter exhausting at ports removed as far as possible from the heated inlet, and a piston long enough to trap the dry steam, first covering the exhaust ports, and only afterwards opening the auxiliary ports merely to reduce the steam for compressing in noncondensing operations, and has, I think, appropriated the invention embodied in the major claims herein.

Exhibit 18 (Stumpf book), a copy of which was filed in the Patent Office during the pendency of the application, was received in evidence over objection by defendant to support the contention that the improvement in question was of great economic value and received immediate recognition by the skilled in the art. I have not attached much weight to it, for with regard to the usefulness and value of the improvement I have altogether relied upon the oral testimony of complainant's witness Brown and the defendant's exhibit catalogue.

A decree may be entered, with costs, in favor of complainant in conformity with this opinion, holding claims 1, 2, 3, 4, and 8 valid and infringed by the A. Schreiber Brewing Company in its use of the uniflow engine built by the Skinner Engine Company, and claim 18 not infringed. So ordered.

STUMPF v. A. SCHREIBER BREWING CO.

(District Court, W. D. New York. May 5, 1917.)

No. 160–B.

1. WAR ⟸10(2)—CIVIL RIGHTS AND REMEDIES—SUSPENSION OF PROCEEDINGS.
A plaintiff, who becomes an alien enemy, cannot continue an action at law or in equity, or institute further proceedings in the courts, until the war is ended, save in certain exceptional instances.
[Ed. Note.—For other cases, see War, Cent. Dig. §§ 31–36.]

2. WAR ⟸10(2)—CIVIL RIGHTS AND REMEDIES—SUSPENSION OF PROCEEDINGS.
A German subject, residing in Germany and owning a patent, authorized an American citizen to grant licenses for the manufacture, sale, and use of engines embodying the patented devices, and to receive for his services as sales agent one-half of the receipts from licenses and royalties; the agency to be irrevocable during the life of the patent. Thereafter he executed a power of attorney to such sales agent, authorizing him to sue for infringement of the patent. Suit was brought in the patentee's name, resulting in a decision in his favor, on which no decree had been signed or entered prior to the President's war proclamation. *Held*, that the sales agency agreement did not operate as an assignment of the patent, and a suspension of proceedings could not be denied on the theory that the sales agent was the real plaintiff, and the patentee only a nominal plaintiff.
[Ed. Note.—For other cases, see War, Cent. Dig. §§ 31–36.]

In Equity. Suit by Johann Stumpf against the A. Schreiber Brewing Company. On motion for suspension of proceedings pending the war with Germany. Motion granted.

Philipp, Sawyer, Rice & Kennedy, of New York City (Cleon J. Sawyer and J. J. Kennedy, both of New York City, of counsel), for plaintiff.

William Macomber, of Buffalo, N. Y. (George E. Tew, of Washington, D. C., of counsel), for defendant.

HAZEL, District Judge. The complainant herein, Johann Stumpf, resides in Berlin, Germany, and is a subject of the emperor of Germany. On March 3, 1913, he executed a power of attorney in writing to Edward N. Trump, a citizen of the United States, authorizing and empowering him to bring and conduct this action for infringement of United States letters patent No. 1,042,168 against the defendant corporation, a citizen of the United States residing at Buffalo, N. Y. Neither the power of attorney nor the prior agreement of November 15, 1912, between Stumpf and Trump, read on this motion, conveys any interest, title, or ownership of the Stumpf patent in suit, but merely comprehensively imparts the right to grant licenses for the manufacture, sale, and use in the United States, Canada, and Mexico of uniflow engines, embodying the patented improvements and including accessories, for which he or his assigns, the Stumpf Uniflow Engine

Company, was to receive for services as sales agent one-half of the total amount received from licenses and royalties, the remaining one-half to be paid to Stumpf until he had received one-half of the expense of bringing the patents to issue in the United States, Canada, and Mexico. The sales agency was to be irrevocable during the life of the patent. This suit was instituted by Stumpf in his own name, and the action was decided in his favor; the decision being announced prior to April 6, 1917, the date of the proclamation of the President declaring the existence of a legal war between the United States of America and the Imperial German Government. No decree has as yet been signed or entered.

The general rule of the common law of England is that an action is not maintainable during the continuance of a war by or on behalf of an alien enemy without the permission of a statute, proclamation, letters of safe conduct, or license from the king. This rule was rigidly followed for centuries before the War of 1812 between the United States and England. A few exceptions to this rule were later recognized and applied by the courts of England, as, for instance, where commerce was continued among the nations at war, or where the plaintiff in actions for debt became an alien enemy after verdict and judgment. In such cases, contracts and suits at law based upon them were permitted by international law, as distinguished from the common law, and the sole inquiry was whether the plaintiff was persona standi in judicio, and, if he was, according to the broad doctrine of Bynkershoek, the courts were open to him to redress his grievances.

In Crawford v. The William Penn, Fed. Cas. 3,372, Circuit Justice Washington in the year 1815 approved the strict rule of the common-law courts of England, and the syllabus states that an alien enemy, if beneficially interested in the suit, could not maintain it even by his trustee, who was not an alien. In Mumford v. Mumford, Fed. Cas. 9,918, decided in 1812, it was broadly held in a suit in equity that the complainant, a subject of the United Kingdom of Great Britain and Ireland, had become an alien enemy resident within the realm since the suit was begun, and that therefore the courts of this country were not open to him. In Hangar v. Abbott, 6 Wall. 532, 18 L. Ed. 939, an action brought after the Civil War on a debt, the defendant pleaded the statute of limitations, and the question arose whether the statute of limitations was suspended during the time the courts of the seceding states were closed to citizens loyal to the Northern States. The Supreme Court says:

"War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. Upon this principle of public law it is the established rule, in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation."

In Caperton v. Bowyer, 14 Wall. 216, 20 L. Ed. 882, the Supreme Court stated that the rule that, subsequent to the commencement of hostilities, enemy creditors were incapable of prosecuting *any action in the tribunals of the other belligerents until after the restoration of peace* was universal and peremptory. See, also, Levy v. Stewart, 11

Wall. 244, 20 L. Ed. 86; Hutchinson v. Brock, 11 Mass. 119; Bell v. Chapman, 10 Johns. (N. Y.) 183.

It is true, as contended, that in the year 1808 in England the court refused to stay a judgment and execution in Vanbrynen v. Wilson, 9 East, 320, which was an action at law, on objection that plaintiffs after verdict became alien enemies; but I do not understand from that decision that the principle of Le Bret v. Papillon, 4 East, 502, enunciated in 1804, that an action commenced by a plaintiff who afterwards becomes an alien enemy cannot be continued during the war, has been overruled. A number of analogous cases have arisen in England since the beginning of the present war, and it has been quite uniformly held that actions instituted by plaintiffs afterwards becoming alien enemies must be suspended until peace is declared. Actien Gesellschaft für Anilin. Fabrifation in Berlin and Mersey Chem. Works, Ltd., v. Levinstein, Ltd., [1915] W. N. 85; Porter v. Freudenberg, [1915] 1 King's Bench, 857. Complainant contends that the suspension of these cases, or some of them, after the declaration of war, was due to the enactment by Parliament of the Trading with the Enemy Acts and Orders in Council on September 9, 1914, but I do not so understand.

[1, 2] The decisions of the courts of this country herein cited seem to me explicitly to determine that a plaintiff who becomes an alien enemy cannot continue an action, either at law or in equity, or institute further proceedings in our courts, until the war is ended, save in exceptional instances, as, for example, where commerce is continued between the nations at war, or where it is shown that the alien enemy is only a nominal plaintiff, or the coplaintiff of a nonbelligerent, who is a substantial plaintiff, or a denizen or inhabitant of the United States. Actien Gesellschaft, etc., v. Levinstein, Ltd., supra. Hence, if Stumpf was merely the nominal plaintiff herein, and a citizen of this country was the actual plaintiff, this action should not be suspended. The argument upon this point is that the sales agreement with Trump operated as an assignment of the patent in suit, but with this view I do not agree.

The agreement plainly created an agency to grant licenses to manufacturer and vend the improved engines, nothing more. It makes no difference that by its terms it was irrevocable between the parties. It certainly did not carry with it the right to enforce a monopoly in equity in the name of an alien enemy and to prosecute an accounting for the recovery of profits, a proceeding which might necessitate communication with Stumpf, or even the taking of testimony in Germany. Besides, in my opinion, it is doubtful whether the agency agreement in question continues operative, regardless of the intentions of the parties thereto.

Fritz Schulz, Jr., Co., Inc., v. Raimes & Co., 164 N. Y. Supp. 454, an action for debt recently decided by Judge McAvoy of the City Court of New York, is distinguishable from the present case, as there the plaintiff was an American company. Suspension of the action was asked during the war on the ground that the shareholders of the company were mostly alien enemies, but the court properly held that, as the plaintiff was incorporated here, it was a citizen of the state in which it was incorporated, and an entity apart from its shareholders.

The motion is granted, and the proceedings herein are suspended until the United States of America shall establish a condition of peace with Germany. So ordered.

SMITH v. BARNETT et al.

(District Court, W. D. New York. March 21, 1917.)

No. 195–B.

1. REMOVAL OF CAUSES ⟸19(5)—CAUSES ARISING UNDER FEDERAL LAWS.

A suit by the receiver of a railroad company to enjoin defendants from carrying out a conspiracy to injure such company by diverting traffic from its road, etc., was not removable under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1916, § 1010), as a suit arising under the Constitution and laws of the United States, because the bill alleged a contract regarding the routing of traffic, the validity of which might depend upon Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as the relief demanded was not dependent upon any right given complainant by the Constitution or laws of the United States, and a federal defense is not a cause for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 41.]

2. REMOVAL OF CAUSES ⟸49(3)—SEPARABLE CONTROVERSY—JOINDER OF PARTIES.

In a suit by the receiver of a railroad company against individual citizens of New York and Pennsylvania corporations to enjoin the carrying out of a conspiracy to injure the railroad company by diverting traffic therefrom, in the absence of any substantial claim of a fraudulent joinder, there was no separable controversy between plaintiff and the Pennsylvania corporations, authorizing a removal under Judicial Code, § 28, where plaintiff had elected to sue the parties jointly, and had charged them with confederating together to injure the railroad company, thereby charging the individual defendants with a liability which they could not escape by relinquishing their office, employment, or agency in the defendant corporations.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 97.]

In Equity. Suit by Frank Sullivan Smith, as receiver of the Pittsburg, Shawmut & Northern Railroad Company and the mortgaged properties of the Shawmut Mining Company and the Kersey Mining Company, against James R. Barnett and others. On motion to remand. Motion granted.

Alton B. Parker, of New York City (Alexander Miller, of New York City, of counsel), for plaintiff.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. This action in equity was begun in the Supreme Court of New York to enjoin the defendants from carrying out or continuing a conspiracy to injure the Pittsburg, Shawmut & Northern Railroad Company (hereinafter called the Northern Company) in its transportation business by diverting traffic therefrom and by wrongfully lowering the value of its securities, thus causing irremediable

damage. The defendant corporations are citizens of Pennsylvania, while the individual defendants are citizens and residents of this state. The action was removed to this court, and the plaintiff now moves to remand.

The particular grounds for removal alleged in the petition are, first, that the existence of a federal question relating to an oral contract between the complainant Smith, as receiver, and one Hubbard, now deceased, which eventuated in a contract between said Smith and the defendant corporations by which traffic was to be routed over the line of the Northern Company, is shown on the face of the bill; and, second, that the individual defendants were not necessary parties, although the bill avers participation by them in a conspiracy to break such contract. It is unnecessary to give an outline of the paragraphs of the bill, as its object and purpose will, I think, be understood from what is stated herein. The contention by complainant is that the bill recites facts and circumstances which make the action one in tort and not in contract, and that, as there is no adequate remedy at law, the defendants should be restrained from carrying out and continuing the conspiracy, and, further, that the individual defendants be enjoined from violating the contract particularized in the bill.

[1] 1. The first question is whether the suit is one arising under the Constitution or laws of the United States, and removable on that ground under section 28 of the Judicial Code. Defendants contend that the Interstate Commerce Act substantially regulates the routing of traffic over railroad lines, and that therefor this cause is governed by such statute, with the result that the contract between Smith and Hubbard relating to routing of traffic over the Northern Company was void, as its effect was to deprive shippers of the right to direct the routing of their commodities, and that under the laws of the state of Pennsylvania, which forbid discrimination in transportation, the routing of coal from the mines is controlled by the shipper, and hence that the Pittsburg & Shawmut Railroad Company (hereinafter called the Southern Company) could not lawfully route the traffic over the lines of the Northern Company, as specified in the contract. I am unable to agree with the defendants as to the character of the bill. No federal question is presented by it, and a federal defense has never been considered to be a cause for removal from a state court to a federal court. Whether a statute or law of the United States is involved in an action must be ascertained from the allegations contained in the declaration. It does not appear from the bill that the relief demanded is dependent upon a right given complainant by the Constitution or the laws of the United States.

In Re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, it was expressly held by the Supreme Court of the United States that, though a defendant in a state court may set up a defense based on federal rights which, if denied, reserves to him the right of review by the former court, yet, unless such rights appear in the declaration, the case is not removable to the District Court of the United States. See, also, Arkansas v. Kansas & Texas Coal Co. and San Francisco Railroad, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144. Even if the action were brought under state statute, it would not be ground for removal. Ral-

ya Market Co. v. Armour & Co. (C. C.) 102 Fed. 530; Houston & Texas Central R. R. Co. v. Texas, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. Ed. 673.

It is quite likely that the act to regulate commerce and the rights thereunder reserved to an interstate shipper of commodities may have an important bearing on the trial upon the validity of the contract between Smith and Hubbard, but this probability does not constitute a ground of removal because of the presence of a federal question. Murray v. Chicago & N. W. Ry. Co. (C. C.) 62 Fed. 24; The Dalles & R. Ferry Co. v. Hendryx (C. C.) 189 Fed. 266. The rule is succinctly stated by Judge Taft in Shields v. Boardman (C. C.) 98 Fed. 455, wherein he says:

"It would seem that the plaintiff must claim a right under the federal Constitution or laws, and seek to vindicate it in the action brought, before it becomes subject to the federal circuit court jurisdiction."

Such is not the object of the bill under consideration.

[2] 3. Nor have we herein a separable controversy wholly between citizens of different states. By section 28 of the Judicial Code two concurrent conditions of removal are presented, to wit, that the controversy be wholly between parties of different citizenship, and that such controversy be capable of determination between them. The salient features of the bill have been carefully considered, and the conclusion is reached that this action is brought essentially in tort against corporations and individuals named as joint wrongdoers, that plaintiff has elected his remedy to sue jointly, and not separately, and that accordingly, in the absence of a substantial claim of a fraudulent joinder to prevent removal, no separable controversy is herein involved. Ala. Gr. So. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757. Although it is not absolutely necessary that all the parties confederating and conspiring to injure the plaintiff by their acts should be before the court, still, in view of the election to proceed against the conspirators jointly, the controversy cannot be removed to this court.

Defendants attach importance to Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, in support of the claim of a separable controversy. There the action was by a stockholder against a foreign corporation and certain of its creditors, to set aside a conveyance because of fraud and conspiracy. The case was removed to the United States Circuit Court, and remand was denied. Upon appeal to the Supreme Court, it was decided that the controversy was separable, as the transfer of properties by the corporation was distinct from the relief demanded by the individual defendants by way of an accounting. But that case is distinguishable, I think, from the case at bar. There the directors were obviously merely nominal parties as to the fraudulent transfer of property by the corporation, and the wrongful acts which they are charged with having committed were corporate acts jointly committed by them in their capacity as directors. The decision seems to have found logical basis in the fact that, if one of the directors were to resign after institution of the suit, he would

cease to be a proper party thereto, as his conspiring was done at the instance of the corporation. The Supreme Court, however, said:

"This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability."

So here the bill charges the defendants with confederating together to injure complainant in its business as a common carrier—a charge against all of the defendants jointly for the purpose of holding them liable for their wrongful acts, a liability personal in its nature—and the individual defendants cannot escape responsibility by relinquishing their office, employment, or agency in the defendant corporation with which they are connected. In this sense they are merely nominal parties, but their participation in the asserted wrongful acts is so interwoven as to render it proper that the controversy be decided as a whole. St. L. & S. F. Ry. Co. v. Wilson, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66.

3. This is not an action to enforce specific performance. Although this court is not called upon to determine the question, it is believed to be doubtful whether, in view of the asserted agreement between Smith and Hubbard, and the contract by estoppel with defendant corporations, an action for specific performance is at this time maintainable. The presumption is not entirely inapt that the pleader did not design to enforce specific performance of a contract created by estoppel. The acts to be performed under the contract were by their nature continuous, extending over a period of years, and were not possible of performance by a single defendant. Their performance required cooperation on the part of all the defendant corporations, together with acts by transportation mediums, demanding supervision and services of a peculiar character by individuals, to the end that the business of both the Northern and Southern Companies, the old and the new, should pecuniarily benefit the holders of the securities, as specified in the bill, and until the Shawmut Systems should be combined.

Defendants criticized the bill for indefiniteness and multifariousness, but with this we are not concerned on an application for remand. Some confusion, it is true, has arisen from the nature of the relief demanded by way of specific performance; but, if such relief was demanded, I am persuaded that it was incidental only to the general relief prayed for—a discontinuance of the conspiracy by the injunctive power of the court.

The motion to remand is granted.

STANDARD COMPUTING SCALE CO., Limited, v. FARRELL, State Superintendent of Weights and Measures.

(District Court, S. D. New York. January 8, 1916.)

COMMERCE ⟸57—CONSTITUTIONAL LAW ⟸207(2), 296(2)—WEIGHTS AND MEASURES ⟸2—STATE REGULATION—CONSTITUTIONALITY.

A rule promulgated by the superintendent of weights and measures of New York that all combination spring and lever computing scales must be equipped with a device which automatically compensates for changes in temperature, is not in violation of the constitutional rights of a nonresident manufacturer of scales which have no such automatic compensating device, and, assuming it to be authorized by the statutes of the state, its enforcement may not be enjoined by a federal court.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–76, 88, 90, 92–102; Constitutional Law, Cent. Dig. §§ 629–632, 825–829, 838; Weights and Measures, Cent. Dig. § 2.]

In Equity. Suit by the Standard Computing Scale Company, Limited, against John F. Farrell, as State Superintendent of Weights and Measures of the State of New York. Bill dismissed.

Herbert C. Smith, of Brooklyn, N. Y., for complainant.

The Attorney General of New York (Edward G. Griffin, Deputy Atty. Gen.), for defendant.

HOUGH, District Judge. Mr. Farrell, in his capacity as superintendent of weights and measures of this state, has promulgated the following rule:

"Automatic Computing Scales.

"All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance, and throughout the whole range of weight gradations."

The scale referred to is "spring," because the load of the article to be weighed stretches an elastic (usually a helical) coil of steel, which in turn operates an indicator that comes to rest over figures indicative of weight; it is "lever," because the spring is directly affected by a lever on which the thing weighed proximately operates; it is "combination," because the spring and lever are united in the mechanism; and it is "computing," because the indicator apparatus is so arranged that, within the limits of weights and prices for which it is contrived, one glance at a printed card, which is part thereof, shows, e. g., not only that the customer has obtained 9½ pounds of something, but what he owes for it at 8 cents a pound.

In any contrivance which depends for efficiency upon the elasticity of metal, there is an element of error introduced by changes of temperature. In such an apparatus as the scale under consideration a popular description of such capacity for error is to say that the spring "stiffens up" in cold weather and relaxes or loosens in warm weather. When a computing scale ultimately depends for its proper function upon such a spring, it is obvious that an erroneous weight produces an increasingly erroneous price, as the amount bought becomes greater.

Even if the percentage of error for all weights within the capacity

of the scale remains constant (which is not always the case), most springs will stretch more in proportion for the first few pounds of weight applied to them than for the last pounds for which they are designed. From this it follows that (for example), if a computing scale be designed for weights up to 40 pounds and prices up to $1 a pound, the lines on the indicator chart will grow closer together as the limit of weight or price, or both, is approached. Therefore, even with a constant percentage of error through the whole range of operations, the proportionate amount of indicated untruth may grow greater as the weight increases. There are many other reasons why a spring scale, or any other scale, may develop inaccuracy, besides changes of temperature. Upon them it is unnecessary to dwell. There is such a thing as automatic compensation for error induced by temperature variations. The only compensating method shown to the court is covered by a patent and owned by a scale manufacturing company. It functions by using the different rate of contraction or expansion of different metals to produce less or more tension upon the weighing spring as the condition of the thermometer may require; the scale being balanced and adjusted at a given temperature with the compensating metals in known positions.

So far as shown, this method of compensation is accurate, but slow; that is to say, it will take perhaps some hours to get a scale, which has gone wrong through a drop in the temperature of say 30 degrees, to again become accurate. But it is impossible to prevent the operation of this automatic corrector, except by such crude devices as inserting a bar or stick in the scale to prevent its operating at all.

The complainant has no automatic compensation upon its scale, but it has a mechanical compensator. The fact that the scale is no longer true is shown by an examination of the indicator card. If that error is caused by expansion or relaxation of the spring, it can be corrected by increasing or diminishing the tension upon that spring, by turning a screw. This correction can be made instantly, and in the hands of an honest and even reasonably intelligent owner I see no reason why complainant's scale is not as good, and more easily corrected, than a machine containing an automatic device of the kind above roughly described.

But it is also proven to be true that the same mechanical device with which an honest man will correct complainant's scale for variations caused by temperature can be easily used by a dishonest, or perhaps even an ignorant, owner to apparently correct inaccuracies of the scale which have no relation whatever to atmospheric change. The same turn of the same screw which properly produces correspondence between two marks on the indicator face after a sudden drop or rise of temperature will also produce an apparent correctness when the temperature has remained constant, but (for example) the spring has suddenly and permanently weakened.

It is therefore true (and this is found to be the basis or reason for defendant's action) that a spring scale without automatic compensation for atmospheric changes is more easily and with less likelihood of detection manipulated against a customer than is a similar scale with automatic protection.

The theory of this bill is simple, and single, viz.: That the superintendent's rule as above quoted is an invalid (i. e., unconstitutional) attempted exercise of the police power, in that it unjustly discriminates between the complainant's scale and the scales of other manufacturers. Section 10, art. 1, Constitution U. S. It is alleged also to violate the Fourteenth Amendment of said Constitution, and to interfere with interstate commerce. The prayer of the bill puts in a considerable variety of ways the demand that defendant cease to interfere with or prevent "county sealers" from bestowing approbation upon complainant's scales.

What has actually happened is this: There is a considerable body of statute law in New York relating to weights and measures. By that law the offices of county and city "sealers" are established. These officials are not appointed by the defendant, nor removable by him. They are charged with the duty (inter alia) of examining weights and measures within their cities or counties at stated intervals, and when the same are found to correspond with the state standards the sealers "shall seal and mark such weights and measures with the appropriate devices." General Business Law, art. 2, § 15, as amended in 1910 (Laws 1910, c. 187).

It is not obligatory upon the defendant to seal anything, though he must at least once in two years visit the various cities and counties of the state (either personally or by deputy) and inspect the work of the local sealers, and in the performance of this duty of inspection "he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation." Section 11. But no where in the statutes is there to be found any specific authorization conferred upon the state superintendent permitting him to give definite and detailed instructions to city and county sealers as to what particular form of weighing or measuring device they shall approve or shall disapprove.

It is proven (human nature being what it is) that the official seal placed by local sealers upon this or that weighing or measuring apparatus is looked upon with great respect by the purchasing community, whether that phrase means the persons who buy scales or those who buy what is weighed. It is a very serious handicap upon, if not almost a complete prohibition of, successful selling of any given scale in the state of New York, that it cannot obtain the approval of the local sealers.

Not all of the city and county officials have recognized the validity of the rule first above quoted, but most of them have done so, and they now refuse to seal any spring and lever computing scale that has not an automatic compensation for changes of temperature. This has become known, plaintiff's sales have fallen off, persons who bought scales on the installment plan are refusing to pay, and I think it is proven that what was prior to the promulgation of this rule a fair market for plaintiff's scales in this state has ceased to exist. The object of this suit is by some form of injunctive relief to correct or abolish the rule which has caused this business catastrophe.

Plaintiff is a citizen of Michigan, but at bar jurisdiction was not grounded upon diversity of citizenship, nor does the bill anywhere al-

lege that the amount in controversy "exceeds the sum or value of $3,000, exclusive of interest and costs." However unusual the foregoing facts may be, and however harsh is the rule which has apparently excluded from the most populous state of the Union one class of scale manufacturers in favor of another class, I do not perceive that this cause involves any new or uncommon question of constitutional law.

Unconstitutionality is usually tested by an examination of the language of a statute, but sometimes (even if that language be unexceptional) the action or practical application thereof may give rise to an unconstitutionality not inherent in the law, but arising from the unjust and extravagant application thereof by the human beings charged with its reasonable enforcement. Of this the best example is Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

It is here assumed (even by plaintiff) that the statutes of New York regulating weights and measures and creating and limiting defendant's office are fair upon their face. Let it be assumed (for the purpose of present argument) that these statutes authorize the rule in question. Making such assumption, the question is presented whether the regulation infringes upon any of the constitutional rights of any person.

It is said that the business of making and selling scales is an honest and lawful business. So it is generally speaking; but it is not true that, where a subject (as is the case in respect of weights and measures) is historically and essentially subject to government regulation, and indeed is one entirely created by governmental authority, that any particular style of scale, weight, or other instrument of mensuration is entitled either to governmental approbation or to be sold or used at all within the area of that government's sovereignty. It may be that the present generation will see an adoption by this country of the metric system. If that were accomplished by legislation, it is not doubted that the sale or use of any weight or measure not conformed to the metric system might be pronounced unlawful.

But, even if no attention be paid to the peculiar nature of weights and measures in their relation to statute law, it is still true that the Legislature may classify those things which it approves and recommends to the citizen and those which it does not; and if such classification is honest, and honestly enforced, without personal malice against any particular citizen or class of citizens, the judges may disagree with the expressed wisdom of the Legislature, but the courts are without power to interfere. The question is political, and not judicial.

Therefore, upon the assumption that the rule complained of is authorized by legislation, the final inquiry becomes this: Do the facts here shown furnish any reasonable ground for such a classification of scales as is shown by the rule? In my judgment such reasonable ground is found. It is at least a matter for debate, a question upon which the opinions of equally competent and fair-minded men may differ, as to whether the inherent nature of computing scales is such that automatic compensation should be made a vital test of approval.

It surely needs no citation of authority to prove that, where a discretion is lawfully vested in and honestly exercised by a duly appointed official, for the courts to interfere therewith is to substitute

their own discretion or opinion for that of the officer in whom the same was (in contemplation of law) vested by the electorate or executive appointing power. It results that (upon the assumption hitherto made) no unconstitutionality is shown in the rule, and the bill should therefore be dismissed.

Whether the action of any given official is unconstitutional is an entirely different question from the query whether it is illegal. As above set forth, I am clearly of opinion that what Mr. Farrell has done is constitutional, on the assumption that it is legal; i. e., warranted by the statutes of this state. Whether it is legal—that is, whether there can be found any statutory authority for the exercise of power that Mr. Farrell has assumed—is in my opinion a very doubtful question. Indeed, if I were asked to interpret as new matter and without the aid of authority the statutes of New York relating to weights and measures and the office of superintendent thereof, I should strongly incline to the opinion that neither the superintendent nor the county sealers were authorized to do anything more in respect of scales of any kind than to ascertain whether or not they weighed falsely at the moment of inspection, and if they did weigh false to institute a prosecution and seize the scale as a preliminary thereto, while, if they weighed truly when inspected, the sealers should signify that fact by an appropriate certificate, even if the very man who gave the certificate might be morally convinced that the scale would and could be willfully falsified the moment his back was turned.

It thus appears that the facts of the case raise this question, viz., whether in this court at the suit of a citizen of Michigan, an official of the state of New York can be restrained in respect of an exercise of power not inherently wrong nor opposed to any section of the federal Constitution, but unwarranted by the statutes of the state. However interesting and curious this point may be, it is thought not to be actually raised in this instance, because: (1) The bill does not ask for any such relief; (2) nor does it show facts necessary to ground jurisdiction on diversity of citizenship; (3) the view of the state statutes above indicated is opposed to the opinion of the Attorney General of the state which is pleaded by plaintiff as a correct exposition of the law; (4) without being bound by the opinion of the Attorney General (as this court would be by the views of the Court of Appeals) it is entitled to great respect and should not be departed from lightly, nor at all under pleadings such as these; and (5) if it be true (as I incline to think) that Mr. Farrell's action is unwarranted by statute, then he has no discretion, his act is an erroneous ministerial piece of conduct, and the remedy is mandamus and not injunction. Injunction is all this bill asks for; and (6) mandamus can issue out of the courts of the United States only as ancillary to a jurisdiction already existing; "in other words, the writ cannot be used to confer a jurisdiction which the (federal) court would not have without it." Bath County v. Amy, 13 Wall. 249, 20 L. Ed. 539; Rosenbaum v. Bauer, 120 U. S. 455, 7 Sup. Ct. 633, 30 L. Ed. 743.

It follows from these views that the bill must be dismissed.

PENNSYLVANIA R. CO. v. SWIFT & CO.

(District Court, E. D. Pennsylvania. April 10, 1917.)

No. 3822.

COURTS ⟸276—FEDERAL COURTS—DISTRICT OF SUIT—WAIVER OF OBJECTION.

The right of a defendant in a federal court to insist upon its privilege of being sued only in the district of its residence *held* to have been waived by delay in asserting it, where the motion to dismiss on that ground was not filed until a year after the action was commenced, and where the grounds of jurisdiction which gave defendant the privilege, in that the case involved the interpretation of laws of the United States, although not clearly disclosed by the pleadings when the action was begun, must have been known to defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815.]

At Law. Action by the Pennsylvania Railroad Company against Swift & Co. Sur motion to dismiss. Rule discharged.

John Hampton Barnes, of Philadelphia, Pa., for plaintiff.

R. D. Rynder, of Chicago, Ill., and M. Hampton Todd, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. There is really nothing more called for in disposing of this rule than to announce the conclusion reached and the ground upon which it is based. The motion is denied. The denial is based on the broad fact that to now allow it would result in a delay to the plaintiff of all the time which has elapsed since October, 1915, and that this time would have been saved by a prompt assertion by the defendant of the privilege now claimed.

It is, however, the due of counsel, who have presented the merits of a case with the fullness and clearness of argument with which we have been favored, to know that their point of view has been appreciated and considered. We owe, moreover, something to our profession and to those who must hunt for principles of law out of the multitude of single instances. It is further to be observed that, in this particular case, what is in effect a waiver has been found not based upon any one of the positive acts of defendant, nor upon all of them combined, but upon a consequence, the sole, or indeed the clear, responsibility for which cannot with an entire feeling of satisfaction be visited upon the defendant. These considerations compel us to express our views with a fullness which otherwise would be out of place. The findings may be summed up in this statement: The claim of right which the defendant sets up is a privilege rather than a right. The motion is essentially a plea in abatement, the price of which is the giving to the plaintiff of a better writ and the opportunity to promptly resort to it.

Motions of the general character of the present motion may be roughly classified as those founded upon a right or founded upon an appeal to the discretion of the court. Consideration of motions of this second class commonly ends in a contrast of the advantages or conveniences which flow to one side or the other from whatever dis-

position is made of the motion. Counsel are often better judges of these than the court can possibly be, and if (as sometimes happens) counsel disagree one principle upon which such motions can be determined is leave to the party who has the field the possession of it. The application of this principle would result in a refusal to dismiss this action. The motion before us, however, is not founded upon an appeal to the discretion of the court, but founded upon what is averred to be the right of the defendant. It is therefore to be so disposed of.

The question raised is often pressed as a question of jurisdiction. It is such in a sense, but a more accurate definition of it is a question of privilege to a litigant which must be accorded him as a right. Under the provisions of our Constitution, the judicial power of the United States extends to all cases at law arising out of either the Constitution or the laws in pursuance thereof, and extends also to all controversies, however arising, which exist between citizens of different states and involve in value the sum which gives jurisdiction to the court asked to determine the case. Congress, in pursuance of its constitutional power so to do, has created and constituted District Courts, and has defined the conditions under and upon which they shall exercise the jurisdiction conferred upon them. This court has jurisdiction (in the general sense of that term) of this cause, because it is a case necessarily involving the meaning, and because of this the interpretation, of the laws of the United States. We also have jurisdiction of the controversy between these parties, irrespective of how the controversy arises, because of diverse citizenship. Jurisdiction in its general, and perhaps in its strict, sense cannot, therefore, be successfully challenged.

By the provisions of the Judicial Code,[1] however, a party who asks the courts of the United States to take cognizance of a cause of action is himself given and is subjected to the grant to the other party of certain privileges which rise to the dignity of rights. If the sole ground of jurisdiction is diverse citizenship, then the party who has assumed the role of plaintiff may bring his action in the district of which he himself is a resident, provided, of course, he can secure service upon the party made defendant. On the other hand, when diverse citizenship is not the sole ground of jurisdiction, but the courts of the United States would have jurisdiction without this diversity of citizenship, then the privilege, which is likewise called a right, is given the defendant to be sued only in that district of which he is a resident. This statement brings to light, if not one of the points to be decided, one of the features of this case which directly bears upon what is to be decided. We have thus chosen our words, because we assume that, if the above feature of this case were the only one bearing upon the allowance of this rule, it would be conceded that it must be allowed. At all events, it has been authoritatively so decided. Macon v. Atlantic, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300.

The right referred to being, however, as has been intimated, not an absolute right, in the sense in which we are now viewing it, but partaking also of the nature of a privilege, it is one which the party

[1] Act March 3, 1911, c. 231, 36 Stat. 1087.

concerned may assert in a demand for its recognition, or may waive, and the real question in this case is whether or not the defendant has waived it. St. Louis v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. It is not asserted that there has been any direct or formal waiver. If, however, the defendant has asserted anv other right, or done any act, or made any move which necessarily involves or carries the necessary implication of a waiver, he is deemed to have waived his privilege as fully as if he had formally done so.

We will here summarize all the acts of the defendant which are asserted by the plaintiff to necessarily imply this waiver, in order that we may find whether any one of them or all together do carry this implication. One of the acts is that the defendant entered a general appearance to the action. It must be conceded that this might justify, or indeed compel, the finding of a waiver. It must also be conceded that under other conditions it would not have this meaning. Crown v. Turner (C. C.) 82 Fed. 337. This takes us into an inquiry into the conditions here. We find plaintiff to have filed its præcipe and to have had a writ issued which gave no other information than that the plaintiff was proposing to assert a cause of action of which this court had jurisdiction upon the ground of diverse citizenship. No statement of claim had at that time been filed, and because of this no other ground of jurisdiction appeared. On the face of the record as it then stood, the privilege which the defendant is now asserting did not belong to it, and because of this the defendant was not called upon to assert a privilege which did not exist. Another act of the defendant which is advanced is this: At the time the præcipe was filed, counsel for defendant was expecting to be away from his office for some time following the issuance of the writ. He, because of this, requested counsel for plaintiff not to require him to file an affidavit of defense during the period of his expected absence. With this request counsel for plaintiff promptly and graciously complied. A third act adverted to as carrying the implication of a waiver is the act of the defendant, after the statement of claim had been filed, in entering a rule upon the plaintiff for a more specific statement. It may be observed here, as well as later in the discussion, that the basis for this rule was that, although it appeared inferentially, or at least by way of suggestion, from the statement of claim as filed, that the cause of action as averred arose out of the shipment of cattle as a part of interstate commerce, there was nowhere in the statment of claim the specific averment that the shipments in fact were interstate shipments. The motive for taking the rule was, or at least may have been, to lay ground for it by having the record clearly show another ground of jurisdiction in this court, to wit, that it involved an interpretation of a law of the United States. From the conditions surrounding the act, it does not necessarily imply a waiver. The above, without further discussion, indicates the reasons for finding that neither the entry of an appearance to the action as brought nor the rule taken imply a waiver.

This leaves for consideration only the request for time and the combined effect of all the acts done, and also what was not done. We have discussed the question of implied waiver as one of a com-

pelled inference. The compulsion, however, is not limited to the logical, but may be in part ethical, and partake of the character of an estoppel. Out of this has sprung the doctrine that the privilege of the defendant is one which must be asserted promptly, or cannot be asserted at all. This is based upon the proposition that, if the plaintiff is to be put out of court, the right of the defendant to put him out cannot be so used as to unduly delay the plaintiff, or put him to any other disadvantage, and if such is the result the privilege cannot be asserted. This drives us to either absurdly fine distinctions or to a very broad view of the equities arising out of the results, without regard to how they came about. The action was brought October 13, 1915. This motion was made October 18, 1916. Without ascribing the delay to the fault of any one, and keeping far from imputing a motive to delay to any one, the result is that nearly two years must elapse between the two actions, if plaintiff is forced to bring another. This inevitable consequence results in a reluctance to dismiss, unless the refusal to dismiss involves the denial of a right of defendant. This we do not think is involved. We reach the conclusion indicated through the finding that the waiver of privilege was by the delay of the defendant itself, and not by the acts of counsel. They waived no right of their client. The entry of a general appearance has been discussed. The extension of time in which to file an affidavit of defense waived nothing except possible rights of the plaintiff. The rule taken was in line with and for the purpose of asserting the rights of defendant, and could not be construed as an act of waiver. There is nothing in the case, however, to suggest that the defendant did not know of the transactions (in which it had part) out of which this controversy has arisen. It therefore knew it possessed the privilege of being sued in its home jurisdiction. It should therefore have instructed its counsel to assert this right. If this instruction had been given, the plaintiff would promptly have been put on notice, and the delay which has arisen would not have resulted. We cannot now allow to defendant its privilege without serious disadvantage to plaintiff, and find the delay to operate as a waiver, and further find the defendant to have no right to reassert a privilege which has been waived.

The rule to dismiss is discharged.

PUDER v. AGLER.

(District Court, N. D. Ohio, E. D. June 13, 1917.)

No. 368.

1. EQUITY ⇐363—MOTION TO DISMISS—ADMISSIONS.
On motion to dismiss a bill in equity for insufficiency of the facts to constitute a valid cause of action, the facts alleged are admitted.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768.]

2. DESCENT AND DISTRIBUTION ⇐91(1)—RIGHT OF ACTION BY HEIR.
Though an administrator has filed his final account, and though the estate has been finally settled and closed, the title to stocks, bonds, and

securities belonging to the intestate and fraudulently concealed from the administrator remains in the administrator, and the intestate's sole heir cannot sue for their recovery, where they have not been distributed to him by the probate court, or filed in court for his benefit with the right to sue thereon, as is permitted by Gen. Code Ohio, § 10701, in the case of claims believed by the administrator to be desperate or uncollectible.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 359–361, 368, 375.]

In Equity. Bill by William A. Puder against Walter E. Agler. On motion to dismiss the bill. Motion granted.

Alexander H. Martin, of Cleveland, Ohio, for plaintiff.
Roscoe J. Webb, of Garrettsville, Ohio, for defendant.

WESTENHAVER, District Judge. This cause is before me on defendant's motion to dismiss complainant's bill for insufficiency of fact to constitute a valid cause of action in equity. The bill in substance alleges that complainant is a citizen of New Jersey, and the defendant a citizen of Ohio; that complainant is the nephew and the sole and only heir at law of Jesse Puder; that said decedent died about October 23, 1913, intestate; that administration was had upon such visible assets and property as came to his administrator's hands; that said administrator was duly appointed and acted under letters emanating from the probate court of Portage county, Ohio; that said administrator has filed his final account; that the same has been approved; that all debts of the estate have been paid; and that said estate is now closed. The bill further alleges that Jesse Puder, at his decease, was the owner of personal property consisting of money, stocks, bonds, a mortgage on real estate, and other securities to the value of $3,200 or more; that the defendant had in the lifetime of the decedent obtained possession of this personal property; that he has since fraudulently concealed the same, and has refused to account for and deliver up the possession thereof to said administrator; and that the same has since been converted to defendant's use.

[1] Admitting, as is required on this motion, the foregoing facts to be true, the question is whether a right of action is stated in the plaintiff. The answer to this question is to be determined by a simple inquiry as to who is the owner or holder of legal title to such assets not shown to or administered by the personal representative of the decedent.

[2] It is clear that this title is not in the plaintiff, but in the personal representative of the decedent, and that the allegation that such assets were fraudulently concealed by the defendant from the administrator, and that the estate has been finally settled and closed, does not show circumstances permitting plaintiff to maintain this action. It is elementary law that a personal representative succeeds both at law and in equity to the legal title to all personal property of his decedent. The property is question is personal property. See 18 Cyc. 172, 175, 944. At page 944 it is said:

"The personal representative in all cases represents the personal estate, the legal title to which vests in him absolutely, and both in law and equity he is considered as fully representing the rights and interests of all other persons who have ultimate rights in such estate."

To the same effect, see Tobias v. Richardson, 5 Ohio Cir. Ct. R. 74 (opinion, page 78, middle paragraph).

The title to the assets described remains in the personal representative, despite the fact that he may have filed what is called a final account, and an order made approving the same and discharging him. The allegations of the bill above summarized can amount to no more than this. It has been settled by several decisions of the Supreme Court of Ohio that, notwithstanding the filing and approval of a final account, the executor may thereafter sue and be sued respecting any assets not already administered, and that in effect the estate remains open and his power continues so far as necessary to the actual administration of all assets. See the following: Faran, Adm'r, v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617; Taylor v. Thorn, 29 Ohio St. 569; Lafferty v. Shinn, 38 Ohio St. 46; Weyer v. Watt, 48 Ohio St. 545, 28 N. E. 670. In Weyer v. Watt, supra, it is held:

"The probate court, for good cause, may remove an executor or administrator, or accept his resignation. But while choses in action, or other assets belonging to the estate, remain in his hands unadministered, his authority to administer the same is not extinguished by an order, made upon what purports to be the settlement of his final account, directing that he be discharged from his trust."

Complainant cites certain authorities and bases contentions thereon which require a brief comment. Cram v. Green, 6 Ohio, 429, is cited as authority for the proposition that a court of equity may entertain jurisdiction of a suit to compel an account by the representative and distribution of the estate among those entitled to it. The present action, however, is not of that character, but is one by an estate to collect and reduce to possession and administer assets, the title to which is in the personal representative. Moreover, Cram v. Green, supra, arose and was decided before the creation by the adoption of the Constitution of 1851 of probate courts, in which is now vested exclusive jurisdiction in the matter of settling and administering estates. It is therefore no longer the law of Ohio. See Constitution 1851, art. 4, § 8; Rockel's Complete Ohio Probate Practice, §§ 3, 19, 22, 27, G. C. § 10,492; Bowen v. Bowen, 38 Ohio St. 426; Robinson v. Williams, 62 Ohio St. 401, 57 N. E. 55.

An heir or distributee can obtain title to personal property not specifically bequeathed only by means of proceedings provided for the distribution and transfer to him, pursuant to the provisions of the Probate Code of Ohio. These provisions will be found in part in the following sections of the General Code: 10696, 10701, 10836, 10839, 10840. He may enforce distribution pursuant to the following sections: 10848, 10853, 10854, 10855, 10856, 10868, 10869, 10870, 10871. In compelling payment of a legacy or of a distributive share, the court of common pleas has concurrent jurisdiction with the probate court. G. C. § 10855; Bowen v. Bowen, 38 Ohio St. 426; Gray, Executor, v. Case School, 62 Ohio St. 1, 56 N. E. 484.

Complainant does not allege that decedent's right of action against the defendant, or any of the stocks, bonds, or choses in action in defendant's hands, has been ordered distributed to him in kind, or that under section 10701, G. C., the same has been filed in court for his

benefit with the right to sue thereon. On the contrary, the plain implication from the bill is that the title thereto still remains in the executor, and complainant's right to sue thereon is derived solely from the filing and approval of a final account by the personal representative.

Taylor v. Huber, 13 Ohio St. 288, is not in point. The legal title to the fund there was in the administrator, who, by the will, held it in trust during a life estate and was to pay it to two children of the life tenant after death. The remaindermen died first, leaving the life tenant, their mother, as their next of kin. It was held that a life tenant could compel the delivery to her of the estate thus held in trust, without the formality of passing title through the personal representative of the deceased remaindermen. Every person having a legal or beneficial title or interest in the property was before the court, and the matters involved were not within the exclusive jurisdiction of a probate court.

Brendel v. Charch (C. C.) 82 Fed. 262, is authority only for the proposition that a legatee or distributee may sue in the federal court to establish his right to a legacy or to his distributive share. It is expressly stated that the exclusive jurisdiction of the probate court to settle or administer estates cannot be taken over by the federal court. This is the general rule. See the following: Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80.

These authorities are against complainant's contention. They hold that the power and duty of a probate court to administer estates and settle accounts of personal representatives cannot be interfered with, and that, when jurisdiction is taken by a federal court to establish a legatee's or heir's right or title, complainant must then be remitted to the probate court for the purpose of participating in the administration and settlement on the basis of the right thus established.

An order may be entered sustaining this motion. An exception may be noted on behalf of complainant.

DU PONT v. DU PONT et al.

(District Court, D. Delaware. April 12, 1917.)

No. 340.

1. CORPORATIONS ⊜317(5)—OFFICERS—BREACH OF DUTY.

The president and largest stockholder of a large and prosperous powder manufacturing company on leaving for an extended absence on account of ill health left with the vice president, who then became acting president, a proposal to sell to the company a large block of his stock with a view to its resale at the same price to important employés. The vice president submitted the proposal to the finance committee, consisting then of himself and two others: but the others objected to the price and suggested a lower one, as the committee did also in its report to the directors, which was approved, requesting the vice president to take the matter

up further with the president. This he did by correspondence, but did not advise the president of the grounds of objection to his offer nor of the counter proposal, and after several letters had passed the president directed that his offer be withdrawn. The vice president did not show the correspondence to the other members of the committee, nor to the directors, even when requested to do so, nor did he inform them of the claim made by the president in his letters that because of large war orders for munitions already secured and to be secured, of which he was in position to know, the stock was worth considerably more than the price asked, which he made only because of his belief that at that time it was good policy to have the employés financially interested in the company, and that within a few months the value of the stock would still further increase, which proved to be the case. On being asked the progress of the negotiations, the vice president claimed that the offer had been unconditionally rejected by the company and had therefore been withdrawn. Shortly afterward the vice president and associates, through a corporation organized by them, and without the knowledge of the officers or stockholders of the company, other than those interested with them, bought all the stock of the president, who was still absent, paying for the common stock $40 a share above the price at which it was offered to the company. In order to finance the purchase, they borrowed several million dollars from banks in New York which were depositories of the company, and the deposits of such banks were on the next day largely increased from payments received on munitions contracts. *Held*, in a suit by stockholders against such purchasers, that the evidence sustained the allegations of complainants that the vice president while acting as representative of the company purposely withheld from it and from the president important information which it was his duty to disclose; that he and his associates also used the credit and funds of the company as an aid in financing their purchase; and that the company had the right at its election to take over the stock purchased, at the price paid, and to require an accounting for all dividends received thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1408.]

2. CORPORATIONS ⊜426(12) — FRAUDULENT ACTS OF OFFICERS — RATIFICATION.

Strong objection having been made by other stockholders after the purchase became known, the vice president and his associates, after having at first refused to sell the stock, stated that they would consider an offer to purchase by the company subject to certain specified conditions and a resolution that such an offer be made was referred by the directors to the finance committee for recommendation. A motion in the committee to recommend the passage of the resolution failed to carry, and it was reported back without recommendation, and on a vote of the directors was defeated. Two of the four members of the committee, however, and nine of the nineteen directors voting on the resolution, were members of the syndicate or otherwise interested in the purchase, and the others were still ignorant of the circumstances which preceded it. *Held*, that such action was not binding upon the corporation as a ratification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1716.]

3. CORPORATIONS ⊜426(1)—FRAUDULENT ACTS OF OFFICERS—RATIFICATION.

No action taken by the stockholders of a corporation can operate as a ratification of prior disloyal acts of its officers or individual stockholders, where such action is brought about by their own votes, or where information as to the acts for which ratification is claimed has been withheld from other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702.]

4. CORPORATIONS ⊂=376—POWERS—PURCHASING CORPORATION'S OWN STOCK.
The directors of a New Jersey corporation *held* to have power under its charter and the laws of the state, to purchase outstanding shares of its own stock, where it had at the time current quick assets more than sufficient, after making such purchase, to pay all of its indebtedness, including its funded debt, without impairing its capital paid in.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530.]

5. CORPORATIONS ⊂=313—DIRECTORS—FIDUCIARY RELATION TO CORPORATION.
A director of a corporation stands in a fiduciary relation which requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote, not his own interests, but the common interest, and he cannot directly or indirectly derive any personal benefit or advantage by reason of his position distinct from his coshareholders. If he acts for himself in matters where his interest conflicts with his duty, the law holds the transaction constructively fraudulent and voidable at the election of the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1387.]

In Equity. Suit by Philip F. du Pont, wherein Eleanor du Pont Perot and others intervened, as plaintiffs, against Pierre S. du Pont, Irenee du Pont, Lammot du Pont, Alexis Felix du Pont, John J. Raskob, Robert Rulith Morgan Carpenter, Henry F. du Pont, Eugene E. du Pont, William Coyne, Harry G. Haskell, Harry F. Brown, John P. Laffey, E. I. du Pont de Nemours & Co., du Pont Securities Company, and E. I. du Pont de Nemours Powder Company. Decree for complainant, and intervening complainants.
See, also, 234 Fed. 459.

John G. Johnson, William A. Glasgow, Jr., and Henry P. Brown, all of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for plaintiffs.
William S. Hilles, of Wilmington, Del., George S. Graham, of Philadelphia, Pa., William H. Button, of New York City, and John P. Laffey, of Wilmington, Del., for defendants.

THOMPSON, District Judge. Philip F. du Pont, the original plaintiff, and Eleanor du Pont Perot, Eleuthere Paul du Pont, Archibald M. L. du Pont, Ernest du Pont, Alfred I. du Pont, Francis I. du Pont, Louis Albert de Cazanove, Jr., Henry S. Morris and Charles Ellis Gooden, intervening plaintiffs, are stockholders of the E. I. du Pont de Nemours Powder Company and E. I. du Pont de Nemours & Co., defendants.
The individual defendants are stockholders of the E. I. du Pont de Nemours Powder Company and the E. I. du Pont de Nemours & Co. and the du Pont Securities Company, defendant corporations.
The E. I. du Pont de Nemours Powder Company, hereinafter referred to as the "Powder Company," was organized in 1903, under the laws of the state of New Jersey. From December, 1914, to the beginning of this suit, its authorized capital stock was $60,000,000, of a par value of $100 per share, divided into 250,000 shares of preferred and 350,000 shares of common. There were outstanding 160,688 shares of preferred and 294,272 shares of common stock.
The E. I. du Pont de Nemours & Co. is a corporation organized un-

der the laws of the state of Delaware, incorporated September 4, 1915, and, prior to the filing of the bill, had purchased all the assets and assumed all the liabilities of the Powder Company, paying the Powder Company in cash $1,484,100, $59,661,700 par value in debenture stock, and $58,854,200 in common stock. All of the common stock, at the time of bringing suit, had been distributed two for one to the holders of the shares of common stock of the Powder Company. Since the incorporation of the E. I. du Pont de Nemours & Co., the board of directors and officers of the two companies have been the same, and the E. I. du Pont de Nemours & Co. has been the operating company.

The du Pont Securities Company is a corporation organized under the laws of Delaware, March, 1915, with a capital stock of $7,500,000.

The controversy is over the disposition of a large block of common and preferred stock of the Powder Company purchased by Pierre S. du Pont for himself and certain associates from T Coleman du Pont in February, 1915.

In December, 1914, T. Coleman du Pont was the largest individual stockholder of the Powder Company, owning 14,599 shares of its preferred and 63,314 shares of its common stock. He was a member of the board of directors, president of the company, and a member of its finance committee, and continued so to be up until March, 1915.

Pierre S. du Pont was a vice president of the Powder Company, a member of the board of directors, and chairman of its finance committee.

On December 14, 1914, Coleman du Pont went to Rochester, Minn., to undergo an operation, and remained there until after March 10, 1915. During Coleman's absence, Pierre was the acting president of the Powder Company and at the annual meeting held in March, 1915, he was elected its president.

For a number of years prior to December, 1914, and up until the beginning of this suit, Alfred I. du Pont was a vice president of the Powder Company, a member of its board of directors and of its finance committee, and was the next largest individual stockholder of the Powder Company owning 37,767 shares of its common stock.

William du Pont was, during the same period, a vice president, a member of the board of directors, and of the finance committee.

The finance committee consisted of four members, namely, Coleman, Alfred I., Pierre, and William. These four were the largest stockholders of the company.

Prior to going to Rochester in December, 1914, T. Coleman du Pont made an offer to sell to the company 20,700 shares of its common stock at $160 a share for the purpose of distributing the same among its more important employés at the price paid by the company. This offer was presented to the finance committee and considered by it at a meeting on December 23, 1914; Pierre, Alfred I., and William being present.

On February 28, 1915, Pierre purchased for himself and his associates, John J. Raskob, treasurer, Irenee du Pont, Lammot du Pont and R. R. M. Carpenter, all of them directors and some of them vice presidents of the Powder Company, and A. Felix du Pont, all of the

holdings of Coleman, namely, 63,314 shares of common stock at $200 per share and 14,599 shares of preferred stock at $85 a share.

Briefly stated, the plaintiffs charge in their bill: That at the meeting of the finance committee on December 23, 1914, the entire committee was in favor of the purchase of the stock, but Alfred and William considered $160 per share too high a price to pay and considered that the company was not justified in paying more than $125 per share for the stock at that time. That a resolution was passed to that effect which Pierre was instructed to communicate to Coleman's agent, L. L. Dunham, and that the duty rested upon Pierre to continue negotiations with Coleman for the purchase. That, from that time until the purchase by Pierre and his associates, the stock was rapidly increasing in value owing to large contracts made with European nations at war for the supply of explosives, and the duty on the part of Pierre of continuing negotiations and of giving to the company the benefit of his negotiations for the purchase was still existing when he purchased all of Coleman's stock for himself and his associates on February 28, 1915. That Pierre concealed from the finance committee and the Powder Company information relative to the negotiations for the said stock and concealed from Coleman the true attitude of the finance committee, and thereby kept the other members of the finance committee, the board of directors of the company, and Coleman du Pont in ignorance of facts which were within his knowledge, and which it was his duty to disclose, and that he thereby was enabled to acquire the stock for himself and his associates, when the opportunity, at least, to purchase the stock should, in the performance of his duty, have been presented to the finance committee and the board of directors, with a full disclosure of all the information in his possession in relation to the negotiations with Coleman and in relation to the increase in the business of the company, which affected the value of the stock. That Pierre du Pont and his associates would not have been able to make the purchase involving nearly $14,000.000 without the aid of the credit of the company, and that he and his associates used their official position and facts within their knowledge relative to the financial business of the company in obtaining the credit necessary to consummate the transaction.

The defendants contend that the action of the finance committee on December 23, 1914, was a final rejection of Coleman's offer to sell 20,700 shares of common stock, and thereupon all negotiations with him were at an end, and that Pierre had no further duty of negotiating the purchase for the company and was at liberty to negotiate and purchase the stock for himself and his associates; that, in arranging for the purchase of the stock, Pierre and his associates were fully able, upon their own credit and by the use of the stock purchased from Coleman and certain of their own stock as collateral to finance the transaction, to purchase the stock and in fact did so without in any way using the credit of the company and their official positions with the company to obtain a loan of the necessary funds to carry through the purchase.

[1] A fundamental fact to be determined, therefore, is whether the effect of what was done at the meeting of the finance committee on

December 23, 1914, was a rejection of the offer of T. Coleman du Pont, or whether its effect was to instruct Pierre to make a counter offer to Coleman of $125 per share and to continue the negotiations.

The following resolution appears upon the minutes of the meeting of December 23d:

"Purchase of Common Stock Owned by Mr. T. C. du Pont.

* * * * * * * * * *

"Mr. P. S. du Pont presented a letter from Mr. T C. du Pont, offering to sell 20,700 shares of common stock of this company at $160 per share. After discussion, it was moved and carried (Mr. P. S. du Pont voting in the negative) that Mr. P. S. du Pont be instructed to advise Mr. L. L. Dunham, attorney for Mr. T. C. du Pont, that we do not feel justified in paying more than $125.00 per share for this stock."

Alfred du Pont testified that, when the resolution was offered and adopted, it contained the words "at this time," and William du Pont testified that it contained the word "now," or some equivalent expression, so that the latter part of the minute should have read that "we do not feel justified in paying more than $125, per share for this stock at this time (or now)."

It appears that the minutes of the finance committee were examined and signed by Pierre and Alfred, which seems to lend some weight to Pierre's denial that the words "now" or "at this time" were part of the resolution as presented, but William's recollection of the resolution as presented agrees with Alfred's.

There was a meeting of the board of directors of the Powder Company on December 30, 1914, at which a report of the finance committee, dated December 24, 1914, was presented, containing the following statement:

"Purchase of common stock. An offer was received from Mr. T. C. du Pont to sell 20,700 shares of the common stock of this company at $160 per share. The committee expressed the feeling that we are not justified in paying more than $125 per share for that stock and asked Mr. P. S. du Pont to take the matter up with Mr. T. C. du Pont further."

The report was "accepted and ordered filed" and "approved, ratified and confirmed" by the board of directors on December 30, 1914.

In connection with what occurred at the finance committee's meeting, the letters of Coleman du Pont and what occurred between Pierre and Alfred prior to the meeting throw some further light upon what was the real action of the committee.

On December 7, 1914, Coleman wrote to Pierre as follows:

"Mr. P. S. du Pont, Vice President—Dear Sir: As you know I have always felt those in responsible positions in our company should be encouraged to become importantly interested in the common stock, and I have, as you know, always thought well of the common stock and put a higher figure on it than you have. I think it well worth 185 today and think it will go to 190 to 200 before the year 1915 is many months old. This ownership of the common stock by the leading men is of so much importance to the company that as a member of the finance committee (the company having cash away beyond its requirements) I would recommend the funds needed to carry the stock for those men be advanced by the treasury.

"I am willing to sell for the purpose twenty thousand (20.000) shares at $160 per share ex dividend payable in say thirty or sixty days.

"To guide me I should like to have a suggestion from the finance committee, or a committee appointed by them, as to how it should be distributed.

"Inasmuch as important men associated with us have asked me to sell them some stock, I should like to have a prompt answer from the finance committee to enable me to reply."

(Then follows a similar offer to the president of the Hercules and Atlas Companies.)

This offer of Coleman was orally communicated by Pierre to Alfred, and he expressed himself to Pierre as entirely in favor of its acceptance. Pierre then gave to Coleman a memorandum of the employés of the company to whom he suggested that the company should resell without consultation with the other members of the finance committee. Coleman then sent to Pierre the following letter:

"December 14, 1914.

"Mr. P. S. du Pont, Building—Dear Sir: I have given a great deal of thought to my letter of December 7 as to redistribution of this stock, and my judgment is that each member of the executive committee be allowed 1,500 shares. That the men whose salary is $500 a month and over will be allowed to subscribe for three times the amount of their salaries. This makes a total according to the memorandum you left with me of 20,700 shares. I am willing to furnish the other 700 shares, or the company can do this, as in your judgment seems advisable.

"I suggest you make this announcement some time prior to the 23d of this month as I think it has some advantage.

"As I am going away to-day and do not know how long I will be gone, I have left the matter in Mr. L. L. Dunham's hands. He can come to Wilmington and see you upon receipt of telegram from you.

"Yours very truly, T. C. du Pont."

On December 14, 1914, Alfred wrote to Pierre as follows:

"E. I. du Pont de Nemours Powder Company.

"December 14, 1914.

"Mr. P. S. du Pont, V. P., Building—Dear Sir: After giving the question of purchasing a certain large block of du Pont common further consideration, I believe that 160, the price you talked of, is too high. 150 would be purchasing it on a 6 per cent. basis and 160 a 5 per cent. This is too low a rate for the company to invest its spare funds, and furthermore if it were offered to any of our employés it would not be sufficiently attractive at that price. I see no objection to the company purchasing this stock, but the question of price is one of great importance owing to the large investment. I would suggest that no decision as to the actual price be given the present owner until the finance committee has had ample time to think the matter over and discuss it together.

"Yours truly, Alfred I. du Pont, Vice President."

On December 21, 1914, Alfred wrote Pierre the following letter:

"E. I. du Pont de Nemours Powder Company.

"December 21, 1914.

"Mr. P. S. du Pont, V. P., Building—Dear Sir: I find that I made an error in writing to you under date of December 14 regarding the purchase of a certain large block of du Pont common stock in stating that 150 would be purchasing it on a 6 per cent. basis. I presume the discrepancy was noted by you as it should have been 133 and not 150.

"I doubt whether the investment of the company's surplus earnings by the finance committee on a basis even as high as 6 per cent. could be justified. In other words, if the company is unable to invest its surplus earnings at a rate better than the stockholders might themselves, they might contend that these earnings should be distributed in the form of a dividend. I presume that this matter will be discussed at our next finance meeting, on December 30.

"Yours truly, Alfred I. du Pont, Vice President."

From the testimony it appears that, during the discussion in the meeting, Pierre was in favor of purchasing the stock for $160 a share. Alfred was also in favor of the purchase, but took the position that that price was too high for the company to pay in view of the dividend of 8 per cent. then being paid and suggested $125 per share as being the limit in price which the company ought to pay. William was in favor of the purchase, but agreed with Alfred's idea that the investment could not be defended on a return of less than approximately 6½ per cent. and that $125 per share was all that should be paid for the stock. The letters from Coleman to Pierre of December 7th and 14th were not shown to Alfred or William. All three of the members of the finance committee, therefore, were in favor of the purchase of the stock at the time of the meeting and during the discussion. Neither Alfred nor William knew of what was stated in Coleman's letters to Pierre, except the bare fact that an offer had been made of 20,700 shares for distribution among the more important employés at $160 a share, and both Alfred and William were willing to pay $125 a share for the stock.

Alfred testifies:

"I suggested, after the resolution had been passed, that in conveying this information to Mr. Dunham that he tell Mr. Dunham to suggest to Mr. T. C. du Pont that if he could keep the offer open a month or two longer we might be able to increase the price offered for the stock."

Pierre du Pont testifies that he has no recollection of Alfred saying anything of that kind and "is sure he had no such instructions." Alfred's testimony is clear and positive. The latter part of Pierre's statement is evasive. In the absence of any explicit and unevasive denial by Pierre, I find as a fact that Alfred made the suggestion to which he testified.

As the resolution stands, it is not on its face either an acceptance or rejection of Coleman's offer, but contains an expression of opinion of which Coleman was to be informed by Pierre, through Dunham, that the committee did not feel justified in paying more than $125 per share for the stock. The report to the board of directors on December 30th justifies the conclusion that the committee did not refuse to accept Coleman's offer. It is there stated:

"The committee expressed the feeling that we are not justified in paying more than $125 per share for that stock and asked Mr. P. S. du Pont to take the matter up with Mr. T. C. du Pont further."

Pierre testified as follows as to what he reported to Dunham:

"XQ. Did you tell him then that the matter was finally ended? A. I reported what the committee had directed me to report.

"XQ. Did you tell him the matter was finally ended? A. I did not in those words. I told him the committee refused to accept the offer, which was exactly the same thing.

"XQ. And then and there, with the stating of that, he and you understood the thing was ended, did you? A. I understood that that was all there was to say. That was the last of my negotiation with L. L. Dunham on the subject."

If the intention of the finance committee was that Dunham was to be informed that the offer had been rejected and that was the end of the

matter, it is difficult to understand why they should report that Mr. P. S. du Pont had been asked "to take the matter up with Mr. T. C. du Pont further." It is clear that there was no intention on the part of the finance committee expressed in the minutes that the matter of the purchase of the stock should be ended by Pierre informing Dunham that the committee refused to accept the offer. According to Pierre's testimony, and he was the only one who could testify upon the subject except Dunham, who, for some unexplained reason, was not called as a witness, the price of $125 per share was not stated to Dunham, but he was informed that the offer had been rejected and nothing more. Pierre was not instructed to inform Dunham or Coleman that the offer of $160 per share had been rejected, but to inform him of the views of the finance committee upon the value of the stock and to take up further with Coleman, i. e., for further negotiation, the proposition pending before the committee whether or not it should purchase. To take a matter up further surely cannot mean to bring it to an end. The language implies a continuing commission to take up the matter in the future for further discussion or negotiation. It is not language that would be used in the ordinary course of business affairs to convey the meaning of bringing what had been pending to a finality by the rejection of an offer. Alfred and William are positive in their testimony that, when the resolution was offered in the finance committee, the words "at this time," or some equivalent expression, were added, and, in view of all the surrounding circumstances, it is found as a fact that language of that significance was contained in the resolution. The fact that the minutes were examined by Alfred and signed by him may well be explained by the absence of any cause at that time for him to suppose that the instructions to Pierre would be the subject of controversy. It was not the case of dealing with one at the time an adverse party, but of joint action of directors for the benefit of the company. In the light of the surrounding circumstances, however, and the language set out in the minutes in connection with the instructions to Pierre to take the matter up further, it makes little difference whether the resolution contained those words or not, for upon its face it is not a finality as a rejection of Coleman's offer. An expression of the value of property so fluctuating in price as stocks, and especially the stock of a company in the position in which the Powder Company was at that time, could not be regarded as applying to any time but the time at which the offer was considered; but such expression of opinion could not be construed as a direction to Pierre to inform Dunham that the offer was rejected. It was in effect a counter offer of $125 at that time with directions to Pierre to make that offer and report back to the committee. Was Pierre's conduct such as to relieve him of any further duty to the company so that he was free to act in the interests alone of himself and his associates?

Pierre, as we have seen, did not inform Dunham, nor in his subsequent correspondence with Coleman did he inform him, of the feeling of the majority of the finance committee as to the value of the stock, although he knew that the opinion of Alfred and William of the value of the stock was based upon the fact that the company was then paying a dividend of but 8 per cent., and that therefore the price of $160

a share would make it bring but a 5 per cent. return in dividends, and that the price of $125 a share was suggested upon an investment basis of 6½ per cent. And he did not, by showing Alfred or William Coleman's letter of December 7th, inform them of Coleman's opinion as stated in that letter:

"I think it well worth 185 to-day and think it will go to 190 to 200 before the year 1915 is many months old."

It surely would have been of advantage to the company to have the other members of the finance committee informed of the opinion of its president, who, with Pierre as acting president, was in the best position to know all about its business and its prospects, that its stock was worth at that time $25 a share more than the price at which he was offering it, and that during the following 12 months it would be worth $40 a share more; and it would have been to its advantage for Coleman to know that the price of $125 a share suggested by the finance committee was based upon the present dividend rate, and that Pierre had not placed before the committee Coleman's opinion of its present and prospective value. Alfred and William were not informed, when such information would have been of advantage to the company, of the contents of Coleman's letters of December 7th and 14th, except so much as was stated to them by Pierre at the meeting of December 23d, nor did they know of other correspondence concerning Coleman's offer which passed between Pierre and Coleman between the time of the meeting and the time of Pierre's purchase of the stock on February 28, 1915. And there is no evidence that Coleman ever knew of the feeling of the finance committee as to the value of the stock on December 23, 1914, until he received that information in a letter from Alfred dated February 16, 1915, written at a time when Pierre was negotiating for the purchase of the stock for himself and his associates at a price of $200 per share.

There is nothing in the evidence to show that Dunham reported to Coleman upon the subject of the stock, but it does appear that Pierre did "take the matter up further" with Coleman, without, however, informing him of the true position of the finance committee or the reasons for that position. On January 4, 1915, he wrote to Coleman:

"T. C. du Pont, President, Rochester, Minnesota—Dear Coleman: I have been intending to write you about the reception of your proposition by the finance committee. Unfortunately, Alfred, who had approved the plan before you went away, got somewhat crosswise in the meeting and I think it wise to let the matter rest for the moment; preferably until I can see you, before taking any other step. I am sorry and provoked that the proposition did not go through, for I feel that your offer was a generous one and should have had more considerate treatment; but, like many other things, the final result cannot be obtained quickly. * * *

"Your affectionate cousin, Pierre S. du Pont, Vice President."

This letter shows that Pierre understood that he was to take the matter up further, and the letter does not inform Coleman nor does it contain any intimation that the offer had been rejected, but it does not give Coleman the information which Pierre knew the committee intended him to have concerning their opinion of the price of the stock, nor does it inform him that the committee was not informed of his

views as to its value on December 23d or its prospective value during 1915. To this letter, Coleman replied as follows:

"St. Mary's Hospital, January 6, 1915.

"Dear Pierre: This is my first letter, a note yesterday to the kids was somewhat shaky as is this, but I hope you can read it.

"I am sorry that Alfred has taken the position you indicate and too, that it has passed the 1st of Jany. as to have made the announcement at Xmas seems to me would have been much more value to us from the human nature stand point.

"After talking to you I told some New York bankers that I would not need the money that I had arranged to get from them, as I had made a more permanent arrangement, but can I feel sure fix this when I get back. Perhaps it would be well for me to withdraw the proposition, if you think so do it, I of course know Alfred has some ulterior motive in mind, as he has tried to do what he could agin me at every opportunity, but this we both know, and I always take it into consideration. * * *

"I think Lew Dunham will be able to look after everything in the way of equitable finances, until I get back, even with the changed conditions; if not he will let me know and I will write you. * * *

"Your affec. cousin, Coleman."

This letter informed Pierre, if he had not been informed before, that Coleman was relying upon the sale for the purpose of obtaining money which he had formerly arranged to get from some New York bankers, and when Coleman authorizes him to withdraw the proposition, if it is well to do so, he is still allowed by Pierre, with the responsibility upon him of correctly informing Coleman as to the action of the committee, to continue in ignorance of the real situation and to base Alfred's attitude in getting "somewhat crosswise in the meeting" upon some ulterior motive upon his part. He writes to Coleman on January 9, 1915:

"Coleman du Pont, President, Rochester, Minnesota—My Dear Coleman: I was very happy to receive your letter of January 6th, particularly as it was in your own handwriting, indicating that you are feeling much better. * * *

"I feel you must be much disappointed in the question of the stock subscription. I used my best judgment in not trying to force the situation. Possibly I could have put it through by insisting, but at great risk of having the other side pitted against me; that might have complicated the whole plan for good and all. As it remains now, I feel that the proposition is open for reconsideration at your option, of course. Willie (meaning William du Pont) is away at present, but will be back in a couple of weeks; at which time I will take up the work again, unless I have word from you to the contrary. My judgment is that the deal will go through this time. * * *

"Your affectionate cousin, Pierre S. du Pont, Vice President."

Coleman then wrote to Pierre as follows:

"Rochester, Minn., 1/11/15.

"Dear Pierre: * * * Your letter just received and I was very glad to get it. * * *

"As to stock subscription I believed it was a good thing for the Co., when I made the offer and made a price that I thought low, but I concede that I have always placed a higher value on the stock than others, I did it for the good of the new committee, but am not anxious from a selfish standpoint to carry it out, except for the good of the Co. and that is more important than personal reasons.

"If you feel it a good thing for the Co. talk to Willie and do it if not don't. It may make some diff in my equitable finances but I think not that is I

think can make some arrangement when I get back that I canceled before leaving so use your own judgment. * * *

"Your aff. cousin, Coleman."

On January 14, 1915, Pierre replied to this letter as follows:

"Mr. T. C. du Pont, Rochester, Minnesota—My Dear Coleman: * * * As to the stock offer: In Willie's absence I shall do nothing. He will be here in a week and I will try to get some action. If this is not possible it will mean that the question of value of the stock was not uppermost in their minds. If not finally accepted would you approve making an offer direct to the men? I should think that a financing suitable to you might be arranged. I am quite sure that they would like to take the stock, but do not feel in position to say anything while you are negotiating with the company. No one but the executive committee and directors know of the offer as far as I know. The board of course knew it through the minutes of the finance committee.

"Your affectionate cousin, Pierre S. du Pont."

This letter of Pierre's makes it clear that he knew that the offer for Coleman's stock had not been rejected, and that at the time the letter was written the negotiations between Coleman and the company were still pending.

When Pierre says: "In Willie's absence I shall do nothing. He will be here in a week and I will try to get some action. If this is not possible it will mean that the question of value of the stock was not uppermost in their minds"—he was evidently referring to what Coleman said in his letter of January 11th about price, but he still omitted telling Coleman that Alfred and William thought that the stock was worth but $125 on December 23d. If the facts stated to Coleman had been known to them and it had been made known to Coleman that the resolution offered in the committee did make it apparent that the price was what was uppermost in their minds, it surely would have been of advantage to the company in the negotiations that were pending, in view of the immense increase in the business of the company, which will appear later, and its influence upon the value of the stock. Meanwhile, Coleman, on January 15th, wrote as follows:

"Rochester, Minnesota, January 15, 1915.

"Dear Pierre: Thinking over the stock offer matter: I still think it an advantage to the company, but in view of Alfred's position I think it best to withdraw it if the finance committee has not accepted my proposition; when I get home we can talk it over and if best I can renew it, but it seems very unbusinesslike to leave it in its present condition.

"Of course if you have talked to Willie or are in any way committed that settles it, I will carry out any statement you have made on the other hand if you have not made any my judgment is to withdraw it, again if you have any good reason for not doing so let me know your position. * * *

"Your affectionate cousin, Coleman du Pont."

Coleman then sent to Pierre the following telegram:

"January 17, 1915.

"Rochester, Minnesota, P. S. du Pont, Wilmington.

"Letter of 14th received. If you are not committed withdraw my offer. Will write. Coleman du Pont."

When Coleman wrote his letter of January 15th, in which he states he thinks it best to withdraw the offer "in view of Alfred's position," but leaves the matter to Pierre's judgment, he had not received Pierre's

letter of the 14th. Moreover, not having been informed by Pierre that the failure to accept his offer was based upon the value of the stock on December 23d, and neither of the other members of the finance committee having any knowledge of the negotiations or the withholding of information from him, Coleman now concludes to withdraw the offer if Pierre is not committed, but says:

"When I get home we can talk it over and if best I can renew it, but it seems very unbusinesslike to leave it in its present condition."

Upon having received Coleman's letter of the 15th and telegram of the 17th, Pierre wrote him as follows:

"January 18, 1915.

"Mr. T. C. du Pont, Kahler Hotel, Rochester, Minnesota—My Dear Coleman: Yours of the 15th has just come to hand. I have not talked with Willie alone, as he has been absent a couple of weeks and will not return for another week. However, as he supported Alfred in the stock proposal, I feel that I have obtained his opinion, but I had hoped that they would both swing around at our next meeting. There is, of course, no commitment; but I think there will be some disappointment, as I believe that the members of the executive committee were anxious to take the stock. Of course, no others than the executive committee and the board know of the offer, but I am sure that all the men would like to make the subscription, if the offer was made to them. I will of course do nothing further until I am authorized by you.

"Nothing new has turned up since the last writing. We have not yet heard from the large order for Russia; though to-morrow is the last day. I will write you later what we hear.

"Your affectionate cousin, Pierre S. du Pont."

The correspondence between Coleman and Pierre up to this point shows that the offer of Coleman was not rejected and was not so considered by Pierre, and it shows that Pierre did not regard Coleman's telegram as a definite and final withdrawal of his offer, but construed it in the light of Coleman's statement, "When I get home we can talk it over and if best I can renew it." Pierre says, "I will, of course, do nothing further until I am authorized by you."

It is impossible to reconcile Pierre's insistence that the offer was finally rejected on December 23d, with his own declarations in his correspondence with Coleman, and it is significant of the fact that he did not even at this point intend to construe Coleman's letter and telegram of January 15th and 17th, respectively, as final instructions to withdraw the offer, that he did nothing about withdrawing the offer, and did not report the fact that the offer was withdrawn to the finance committee. The only construction which can be put upon his conduct up to that time, which harmonizes with the resolution of the committee, the report to the board of directors, his correspondence with Coleman, and his subsequent conduct, is that he had at that time the intention of concealing from the finance committee the fact that he was negotiating with Coleman and of taking the position with them that he understood that the offer had been rejected on December 23d; of keeping Coleman in ignorance of the attitude of the finance committee and at the same time keeping the negotiations open with Coleman and the matter in such position that, in case the opportunity arose, he might take advantage of the negotiations for his own benefit rather than that of the company. Coleman, in the meanwhile, replied on January 19th to

Pierre's letter to him of January 14th, in which Pierre had suggested that, "If this (some action upon William's return) is not possible it will mean that the question of value of the stock was not uppermost in their minds":

"Rochester, Minnesota, Jan. 19, 1915.

"Mr. P. S. du Pont, Wilmington, Del.—Dear Pierre: Upon receipt of your letter of the 14th, I telegraphed you, 'Letter fourteenth received. If you are not committed withdraw my offer. Will write,' which is now confirmed.

"Inasmuch as Christmas and January first are past I don't think two or three more months will make any difference, and in my mind it would be such a good thing for the young men to have a stock interest that I am sure we can arrange for them to take it without it being purchased by the company, through one of the New York banks, probably the Bankers' Trust Company, but I believe if this is left until I get home we can work it out better.

"I note by the Wilmington papers of a few days ago that common stock was selling at 155 to 160. With the outlook and the orders ahead I can't understand why the prediction in my letter to you that the stock would be 180 even 200 during the first few months of 1915, is not being fulfilled.

"I note that the total orders are something over $40,000,000 with $10,000,000 more in prospect, not counting the two partially payable in bonds. These should certainly make the dividend 50 per cent. on 1915 and 1916 and 1917 which should make the stock easily worth 200. At any rate, I feel sure we can work out some plan that will be beneficial to the important men in the company and, therefore, beneficial to the company, just as soon as I get back home.

"Speaking from memory, you or some one told me that Alfred considered the common stock worth 300; therefore the price was not the reason for his changing his mind after I left Delaware.

"Your letters are all fully appreciated, but there is nothing going on at this end of the line give me the opportunity of writing much in reply.

"Your affectionate cousin, Coleman du Pont."

This letter and the telegram of the 17th should be considered in the light of Coleman's ignorance of the position of the finance committee and Pierre's concealment from Alfred and William of the correspondence between himself and Coleman and concealment from them of Coleman's ignorance of the position of the committee in relation to the price of the stock on December 23d.

In Pierre's letter of January 14th he puts to Coleman the suggestive question:

"If not finally accepted would you approve making an offer direct to the men? I should think that a financing suitable to you might be arranged."

Thus the first suggestion of not selling to the company came from Pierre at a time when it was his duty to keep the negotiations alive for the company. Coleman replies in the letter of January 19th:

"I am sure we can arrange for them to take it without it being purchased by the company, through one of the New York banks, probably the Bankers' Trust Company, but I believe if this is left until I get home we can work it out better."

Then on January 20, 1915, Coleman wrote to Pierre in answer to Pierre's letter of the 18th:

"Rochester, Minn., Jany. 20, 1915.

"Dear Pierre: Yours 18th received this a. m. and I am sure we can work out some plan on my return that will accomplish what we want. I can-

not understand why the other two should not have taken advantage of the offer and let the Co. help the men on whom the success must depend. * * *

"Regards to all,

"Your aff. cousin, Coleman."

If Pierre had given Coleman the information which it was his duty to give him and had given Alfred and William the information contained in his correspondence with Coleman, Coleman would have understood their position and they would have understood that of Coleman. Coleman would not then have been under the impression that they did not want to take advantage of the offer and let the company help the men, and that in order for the sale to be beneficial to the company, it would be necessary to work out some plan upon his return by which the men could take the stock through some outside method of financing, as suggested to him by Pierre.

On January 25, 1915, Pierre wrote to Coleman:

"Mr. T. Coleman du Pont, Rochester, Minnesota—My Dear Coleman: On my return from New York, where I have been for a couple of days, I find your letter and am glad to hear from you again. I am sure that some plan of advantage can be worked out when we next meet. A couple of days ago Alfred suggested to me that the finance committee take up the question of selling treasury stock to our important men. What would you think of such a plan? I do not know what he has in mind, but suppose something similar to your offer, excepting at a lower price. I do not think it need interfere with your arrangement if you desire to put it through also."

(Then follows some information in relation to supplying powder for the British government through J. P. Morgan & Co., who had been appointed financial agents for the purchase of supplies. He then relates an interview with a Mr. Kraftmeier upon the subject of protecting the Allies from the possible danger of interests inimical to them getting control of the Powder Company through purchase of its stock. He then resumes:)

"Your predictions as to the common stock have been nearly realized. John Raskob tells me this morning that the price has reached $188/190.

"It is difficult to judge of the effect of earnings by the extraordinary business. In the neighborhood of 100 per cent. seems a fair guess. That amount reinvested, say, on a 10 per cent. basis would mean a permanent increase of 10 per cent. on the earnings. Eventually this can be accomplished, so I think it would be fairer to count on 5 or 6 per cent. for the first couple of years. My judgment is that we will be warranted in resuming a 12 per cent. dividend basis for this year. I have another reason for advocating this, that I am quite thoroughly persuaded it will be a mistake to publish our quarterly statement this year."

He then states at length his reasons for not publishing the statement, and adds:

"The following are the figures on total sales, to date:

	Quantity, pounds
Cannon	33,291,000
Rifle	7,952,200
Guncotton	8,772,000
Triton	5,984,375
Total	55,999,575

"In addition to the above we have offers for 14,027,500 lbs.

"Your affectionate cousin, Pierre S. du Pont."

In this letter Coleman's proposal to sell his stock is still under consideration, and it appears that the stock on January 25th had risen

to the price of 188 or 190 on the market. It also shows what was Pierre's judgment of the dividend-earning value of the stock.

The conversation with Mr. Kraftmeier, referred to in the foregoing letter, was later the subject of discussion between Pierre and Alfred, and the suggestion was made that Pierre, Alfred, William, and Coleman deposit their stock for the purpose of preventing what seems to have been feared by Mr. Kraftmeier, and, in pursuance of that, Pierre wrote Coleman as follows:

"January 28, 1915.

"Mr. T. C. du Pont, Rochester, Minnesota—My Dear Coleman: In talking over the Kraftmeier rumor with the finance committee, it was suggested that we four large stockholders place our stock together for a period of time covering this extraordinary war condition with an agreement that the certificates would not be sold or used as collateral unless by common consent. I do not think it was intended to mean that any individual would be forbidden to use his certificates without consent of the others. In my opinion it would be better to agree that one could not use his certificates unless the others knew about it. Alfred proposed that any loans that might be now outstanding with du Pont stock as collateral could be taken up by the company and thus enable each individual to carry out the plan. The company could not suffer by this as they cannot put out within a reasonable time their large cash balance at more than ordinary interest. Surely with company stock as collateral would be more than safe. After suggesting this plan Alfred stated he had no loan on his stock, in a way that suggested a proposal for a show-down. Willie then stated that he had no loans. I said that I had none. As far as I know neither was acquainted with the other's position up to that moment. They then asked me to communicate with you to see if you would approve of the plan as outlined. Personally, I think it a good idea, as our ability to state positively that control of the stock was absolutely safe would put our foreign orders in much better position. Our business with the side of the Allies is so large now it may mean to them the turning point of the war. It is therefore, of the utmost importance that they know our situation. If you approve the plan and are in position to have Lou Dunham put it through, it would be a very good thing to tell Mr. Kraftmeier that we have determined to do this in order to assure our customers of the true position.

"Your affectionate cousin, Pierre S. du Pont."

To this Coleman replied:

"Rochester, Minn., Jan. 31, 1915.

"Dear Pierre: I am in receipt of your letter of January 28th, in regard to depositing stock and am sending the answer through Lew in same mail, if it is not inconsistent with what he has done since I left and the statement I made from memory correspond with the record he will take or mail it to you. I have been out of touch with the details left in Lew's hands so long that this is only fair to him and me, neither do I care to give you ancient history.

"Your aff. cousin, Coleman du Pont."

Pierre and Alfred had some discussion on January 23d, and Pierre testified that at that time he told Alfred that Coleman's offer had been "turned down" by William and Alfred on December 23d. Alfred denies that Pierre made this statement to him on January 23d, and states that he had no conversation with Pierre on the subject of Coleman's offer until February 10th, on which date there was a meeting of the finance committee at which Pierre, Alfred, and William were present. The evidence bears out Alfred's statement. Alfred testified as follows in relation to what occurred at that meeting:

"As I was about to leave the room, I remarked to Mr. P. S. du Pont, 'How are the negotiations for the Coleman du Pont stock progressing?' He re-

marked to me, 'Why, they are all off.' I said, 'Since when?' I had not been informed that they had been called off. He said, 'They were called off shortly after you and Mr. William du Pont turned down his offer in December.' I said, 'But the offer was not turned down.' I said, 'There was merely a difference of opinion as to price, and it was my understanding that you were to convey to T. C. du Pont through Mr. Dunham the information of the fact that we believe the price that he demanded for the stock, of $160 a share, to be excessive, and we suggested $125 a share as a proper price for the stock at that time.' Mr. P. S. du Pont, said: 'That was not my understanding. My understanding was that you turned down Mr. T. C. du Pont's offer definitely.' I appealed to Mr. William du Pont, who was seated across the table, within a few feet of me, and I asked him whether his understanding was consistent with my own. He said it was. I then said to Mr. P. S. du Pont, 'There seems to have been some misunderstanding as to the position taken by Mr. William du Pont and myself as to the meeting in December, and I desire to have this matter cleared up.' I said, 'You have unintentionally misinformed Mr. T. C. du Pont, and I suggest that Mr. William du Pont and I write to Mr. T. C. du Pont setting forth our views.' Mr. P. S. du Pont agreed that that would be an excellent course to pursue. Thereupon I asked Mr. P. S. du Pont if he would kindly send me such correspondence as had passed between himself and Mr. Dunham or Mr. T. C. du Pont in reference to the action of the finance committee on the date of December 23, 1914, so that I might be fully informed as to precisely what he said and before I, in turn, placed my view before Mr. T. C. du Pont. He kindly said that he would do so. I also asked him if he would please send copies to Mr. William du Pont, so that in the event of his desiring to write to Mr. T. C. du Pont, he would be fully informed and could do so. That was all that took place, as I remember, at that meeting."

Upon this matter, William du Pont's testimony is as follows:

"Q. After that meeting of the finance committee, when was the first time that you heard any discussion or talk about the proposition of Mr. T. Coleman du Pont? A. In February, the meeting held in February.

"Q. About what time in February can you tell us? A. I should think it was the second Wednesday in February.

"Q. That would be about the 10th? A. I suppose so. Meetings of the finance committee were held on the second Wednesday of each month.

"Q. Who were present at that meeting of the finance committee in February that you speak of? A. Mr. P. S. du Pont, Mr. Alfred I. du Pont, and myself.

"Q. What reference was made to the offer of Mr. T. Coleman du Pont at that time? A. Mr. Alfred I. du Pont asked how the negotiations were coming on.

"Q. Whom did he ask? A. Mr. Pierre S. du Pont.

"Q. What did he reply? A. As near as I can recall, he replied that they were off.

"Q. Did Mr. Alfred I. du Pont say anything to him about it further? A. He asked why they were off, and Mr. P. S. du Pont replied, I think, through the action of the finance committee. I am not quite clear about what the words used were.

"Q. Was that the substance of it? A. That was the substance of it, yes.

"Q. Then what did Mr. Alfred du Pont say, if anything? A. He said that was not his recollection. He asked me if it was my recollection. I said, No, it was not supposed to have been final.

"Q. Did Mr. Alfred du Pont tell him what he thought the finance committee's action was? A. Yes.

"Q. What did he tell him, if you recall, either in substance or words? A. I could not recall the words. He told him that the offer made before had not been a declination in any sense, simply it had been a counteroffer.

"Q. Then did you hear Mr. Alfred du Pont ask him anything about any communication that he made to Mr. T. Coleman du Pont on the subject, ask him for any letters? A. He asked for some letters, I think.

"Q. Mr. Alfred du Pont did? A. Yes.
"Q. Did he make any suggestion at that meeting as to what he would do or what you should do with regard to it? A. He suggested he would write to Mr. T. C. du Pont.
"Q. Alfred did? A. Yes.
"Q. Did he make any suggestion as to what you should do? A. I think he did. I think he suggested I should write.
"Q. Did you after that write to Mr. Coleman du Pont? A. No, I did not.
"Q. Why not? (Objected to. Objection overruled. Exception noted for defendants.)
"Q. State why you did not write Mr. Coleman du Pont. A. I understood Mr. Coleman du Pont was a very ill man, and did not think he was in a physical condition to be bothered with the matter."

On February 11, 1915, Pierre wrote to Alfred and William as follows:

"P. S. du Pont, Wilmington, Del.
"February 11, 1915.

"Messrs. Alfred I. du Pont, William du Pont, Building—Gentlemen: I am inclosing herewith a copy of my letter addressed to Mr. T. C. du Pont and copy of his reply on the subject of depositing stock. In talking with you yesterday I had not in mind that the letter to me contained so little concerning his point of view. The letter to Dunham, which I read but of which I have no copy, gave me the impression he did not care to go into the matter, for I wrote him afterwards: 'In view of your letters, I propose stating to the finance committee that you are not in position to take advantage of offers to loan money and that you do not care to deposit stock at this time.'
"I think, however, this answers the question fully. If there is anything you wish to add to my letter, I shall be glad to have you send it direct or forward it to me.
"Very truly yours, P. S. du Pont."

The letters inclosed and sent to Alfred and William were the letters of January 28, 1915, from Pierre to Coleman and Coleman's reply of January 31, 1915, in relation to the Kraftmeier incident and the pooling of stock. It is apparent that they had nothing whatever to do with the offer for the sale of Coleman's stock. The question of Coleman's pooling his stock had been previously disposed of, so Pierre could not have supposed that what Alfred wanted was the correspondence between Pierre and Coleman in regard to that arrangement. Pierre admitted at the trial that he knew what letters Alfred wanted, but sent the others inadvertently or because he was not in the habit of sending Alfred his private correspondence. The reference in the letter of February 11th to the conversation "yesterday" shows that Alfred's testimony and William's as to the date when Pierre told them the offer of Coleman had been "turned down" was correct. The following day Alfred, finding the letters in relation to Coleman's stock offer were not sent him, wrote to Pierre as follows:

"February 12, 1915.

"Mr. P. S. du Pont, V. P., Building—Dear Sir: I have your letter of February 11th, addressed to Mr. William du Pont and myself, inclosing copy of letter written to Mr. T. C. du Pont, under date of January 28th, and his reply to you, under date of January 31st. These letters refer to my suggestion that the four largest stockholders deposit their stock under a common guardianship during the present emergency. The letter which I had particularly in mind was the one you wrote Mr. T. C. du Pont, regarding his stock offer. There seemed to be a misunderstanding as to the position which Mr. William du Pont and I took regarding this offer to Mr. T. C. du Pont. In

order that Mr. T. C. du Pont may have no misunderstanding as to our position in the matter, I should like a copy of this letter sent to Mr. William du Pont and myself, for our information.

"Very truly yours, Alfred I. du Pont, Vice President."

To this letter Pierre did not reply. The evidence irresistibly forces the conclusion that there was a deliberate intention on Pierre's part to conceal from Alfred and William the correspondence which would have disclosed the true state of facts and disproved Pierre's statement that the offer had been "turned down" on December 23d.

Coleman, not having heard further from Pierre concerning the sale of the stock, wrote him the day after Alfred had asked for the correspondence in relation thereto, as follows:

"Rochester, Minn., Feb. 13, 1915.

"Mr. P. S. du Pont, Wilmington, Del.—Dear Pierre: I got a little too gay last week and have been on the 'blink' for five or six days, but am getting along all right now.

"The more I have thought of the stock question the more I believe with what little information I have that the common stock should reach 250 and may reach 300. If this is true, the men who are now at the helm and actually doing things should make the profit as between to-day's figure and that figure; it will be by far the best thing that can happen to the company. So clear I am that this is the right time to get them interested that I am willing, figuring as surely as I can that this stock will go much higher, to let go for the benefit of the men who are working, which, of course, means the benefit of the company, 20,000, 30,000 or even 40,000 shares at to-day's market, which I assume is about 200. As to the details of working this out I am entirely willing to leave this to you and Lew.

"If much time is desired the price should be higher. If the arrangement for cash payment is made through banks there should be no increased price. In order to get time when we purchased the company originally what we gave to be allowed time amounted to, I believe, over one hundred per cent. increased price, this because the element of chance must necessarily come in.

"Of course, I am only using my best judgment in this matter, but I am willing and strongly urge that the heads of departments and younger members of the family become most interested in the common stock. * * *

"Your aff. cousin, Coleman du Pont."

It appears from Pierre's letter to Alfred and William of February 11th that Coleman was not in a position to take advantage of offers to loan money nor did he care to deposit the stock at that time. His offer to sell 20,000, 30,000 or even 40,000 shares at about 200 may be read in connection with what he had previously said in his letters about arranging means through the sale of his stock to raise money which otherwise he would be obliged to arrange with bankers in New York.

Coleman, being still without information as to the attitude of the finance committee concerning the sale of his stock, now comes forward with an offer to sell the major part of his holdings at $200 per share. Alfred and William were never informed by Pierre of the offer contained in Coleman's letter of February 13th nor knew of its existence until the letter was produced at the trial. Alfred being in ignorance of Coleman's opinion of the value of his stock and Coleman being in ignorance of Alfred's and William's attitude towards his offer in December, Alfred wrote to Coleman as follows:

"February 16, 1915.

"Mr. T. C. du Pont, Rochester, Minn.—Dear Sir: At a meeting of the finance committee, held some time in December, Mr. P. S. du Pont brought to the attention of the committee your wish to dispose of twenty thousand shares of common stock of the Powder Company at $160.00 per share with the suggestion that same be redistributed upon some liberal basis among the more important of the company's employés.

"The committee were in accord with your general idea; viz. the purchase from you of 20,000 shares of stock, and I believe were also a unit on the point of a redistribution of at least a portion of this stock to the company's employés, upon some plan to be subsequently defined.

"The one point, on which there seemed to be a difference of opinion, was the question of price. The position which I took on this point, and which I believe was similar to the one maintained by Mr. William du Pont, was that in purchasing this stock at the price suggested by you, which would involve the expenditure of $3,200,000 of the stockholders' funds, an investment of this size by the finance committee could not be defended on a return of less than approximately 6½ per cent. or at least better than 6 per cent., and for this reason, the price of $125.00 or an investment on a basis of, roughly, 6½ per cent. was suggested. It is my opinion that this principle should be the guiding one in any investment of the company's surplus funds, in lieu of a distribution of same.

"Again, in offering this stock for subscription to our employés, it should be made on an attractive basis, which, in my opinion, should not be less than 6½ per cent., and, as the company cannot afford to lose on a transaction of this kind, it was manifestly impossible for it to purchase stock at one figure and offer it to its employés at a lower one.

"I believe it an excellent time to make an offer of this character to the employés at as low a figure as is consistent with the company's interests, in order that the employés may benefit by any increment in value, which the present conditions would seem to indicate as quite provable, and I furthermore believe that if the company can purchase this stock from any outside source, it would be better to acquire it in this manner, rather than issue its treasury stock for the above-mentioned purpose.

"I am setting my position before you clearly, for the reason that I have lately ascertained from Mr. P. S. du Pont that he did not understand my position as I had intended to present it, and for this reason, I feared that he had unintentionally conveyed to you a wrong impression as to my reasons for advocating the finance committee's decision in the matter.

"Yours truly, Alfred I. du Pont, Vice President."

On the same day that this letter was written, a copy of it was sent to Pierre and William. Alfred's letter was written for the purpose of explaining to Coleman the position taken by him and William at the meeting of December 23d; but Coleman, hearing for the first time of the price of $125 a share suggested by the committee and having on the 13th written to Pierre offering to sell a large part of his holdings at $200 per share, apparently considers the letter a suggestion that he should now sell at $125 instead of $200 per share, and writes Alfred as follows:

"E. I. du P. de N. P. Co.

"Rochester, Minn., Feb. 19, 1915.

"Mr. Alfred du Pont, Wilmington, Del.—Dear Alfred: I am in receipt of your letter of February 16th, and have read it several times. I cannot, however, make out why you wrote it.

"To reiterate, the offer I made in December to sell 20,000 shares at $160.00 was made, as Pierre will tell you, at what I then considered, and now know, was a sacrifice to myself.

"In that proposition, I stated the stock would go to $200.00 early in 1915. Having made up my mind that it was wise to get the young men of the

company interested, I took the question up with Pierre, who agreed with me that it was a good thing for the younger men of the company, and, therefore, a good thing for the company. Pierre told me that you too had agreed it was a good thing. That it was a good thing, subsequent events have proven.

"A few days after my operation, Pierre advised me there was some misunderstanding in regard to this proposition and that you were not prepared to accept it, while I had fully understood before leaving Wilmington that you would accept it.

"I immediately wired Pierre to withdraw the proposition, unless he was, in some way, committed.

"In the third paragraph of your letter you say, 'The one point on which there seemed to be a difference of opinion was the question of price.'

"If you will have the date of my proposition to the finance committee looked up, you will find that the then accepted orders, and the money in our hands, was sufficient to make the stock have a book value beyond the price at which I offered it, and the earnings, by reason of the accepted orders, would make the 6½ per cent. you mention in your letter, look like 'a drink of water.'

"On the second page of your letter, you say, 'I believe it an excellent time to make an offer of this character to the employés at as low a figure, etc.'

"To guide me, won't you please advise how much of your common stock you are willing to let go at this time to the important employés, at price suggested by you, $125 per share. Probably I can join with you in an offer.

"The position that you take, that it is wiser to buy outstanding stock than to issue new stock, is, I think, a correct one.

"I am really sorry, but to be perfectly frank with you, I cannot understand the purpose of your letter to me.

"Yours sincerely,

Coleman du Pont."

Meanwhile, on February 16th or 17th, Mr. Dunham, Coleman du Pont's agent, called upon Pierre and stated to him that he had authority to sell 20,000 to 40,000 shares of Coleman's stock. The terms of the offer made through Dunham were apparently the same as those contained in Coleman's letter of the 13th. Upon that point Pierre testifies:

"My recollection of the letter is that he stated he was still firmly of the opinion that it was a good thing for the company for the principal men of the company to be owners of a considerable amount of stock and for that purpose he was willing to sell, I think 20,000 to 40,000 shares. That was exactly what Dunham had stated to me."

He further testifies that Dunham was asked "whether, if T. C. du Pont sold a large amount, say 40,000 shares, he would be willing to pool the voting power with whoever bought the stock. He said he didn't know, but that he would communicate with T. C. du Pont."

At a directors' meeting on March 10, 1915, Mr. Connable, one of the directors, asked the question:

"As I understand, this stock was offered by Mr. T. C. du Pont for sale. It was offered on the general market. This syndicate knew of that fact and did not want to see the stock get into the hands of outsiders. They organized a group to acquire the stock. Is that correct?"

Pierre replied:

"Not exactly. I did not know that the stock was actually offered to anybody. It was not offered to the syndicate. The syndicate made a bid for it."

It is found as a fact that Coleman's offer to sell was a general offer to sell to any one who would buy, and that Pierre so understood it.

On February 17th, having Coleman's letter of the 13th and Dunham's verbal offer, Pierre showed the letter to John J. Raskob, the treasurer of the company, and one of its directors. Later on, Pierre, Raskob, Irenee and Lammot du Pont, Pierre's brothers, R. R. M. Carpenter, Pierre's brother-in-law, all directors of the company, had one or more conferences, at one of which A. Felix du Pont was present, the result of which was a decision that the six mentioned would endeavor to purchase a substantial block of Coleman's stock. Dunham sent a telegram to Coleman on the 17th as follows:

"Wire me if you will be willing to sell 40,000 shares and pool balance for voting purposes. Another proposition: Would you be willing to sell entire holdings; both cash. L. L. Dunham."

Dunham reported to Pierre that Coleman replied that he would sell all of his holdings, but would not pool any part of them with those who purchased a part, unless he knew the conditions of the pooling agreement.

As a result of the conference, Raskob was sent to New York and called upon Mr. Porter, representative of J. P. Morgan & Co., at his office and endeavored to make arrangements with him for a loan to enable Pierre and his associates to purchase all of Coleman's stock. At that time Morgan & Co. were the financial agents for the allied nations at war. Through them, the Powder Company was transacting its business in the sale of munitions of war and carried a large deposit with them. Raskob stated to Mr. Porter that he and his associates contemplated buying all the shares of Coleman's stock, including 14,500-odd shares of preferred and 63,000-odd shares of common at about $200 per share for the common, and that they would like to borrow the difference between approximately $14,000,000, the total purchase price, and the amount that Coleman would take as deferred payment upon a note to be given to him. He proposed giving as collateral for the amount of the note which they would sell in New York to J. P. Morgan & Co. all the preferred stock purchased from Coleman and an amount of common stock which would margin the loan down to 50 per cent. Mr. Porter, after discussion of the proposition, left his office to make inquiries, and on his return told Raskob that he felt satisfied that at least $10,000,000 of the necessary $14,000,000 to buy the stock could be placed. An arrangement finally was made by which Pierre and Raskob were assured that the loan could be obtained. Pierre then sent to Coleman the following telegram:

"Wilmington, Del., Feb. 20, 1915.

"T. C. du Pont, Blackstone, Chgo.

"Have arranged final conference with bankers Tuesday and Wednesday propose purchasing your sixty three thousand two hundred fourteen common at two hundred and thirteen thousand nine hundred eighty nine preferred at eighty paying eight million cash and five million seven hundred sixty two thousand in seven year five per cent. notes of company to be formed collateral on notes to be thirty six thousand shares common stock we to have privilege of paying notes before maturity also prepared to close immediately do you accept this proposition has Dunham full authority and necessary power to act for you important this be kept confidential for present. Pierre."

To this telegram Coleman replied as follows:

"Chicago, Ill., Feb. 20, 1915.

"Pierre S. du Pont, Wilm., Del.

"Telegram received would rather keep preferred than sell at 80 think deferred payment should be at six per cent. March dividend to be adjusted have talked to Dunham and asked him to confer with you Dunham will be here Tuesday perhaps you would prefer to have me call you up then leave Wednesday.

T. C. du Pont."

Pierre then sent the following telegram to Coleman:

"Wilmington, Del., Feb. 20, 1915.

"T. Coleman du Pont, Blackstone Hotel, Chgo.

"We accept your modifications to our telegram six per cent. on deferred payments and eight five for preferred stock. This makes deferred payment five million eight hundred thirty one thousand eight hundred sixty five dollars carrying the six per cent. Please write letter confirming details will be settled with banks on Tuesday.

Pierre."

On the same day Pierre wrote Coleman as follows:

"February 20, 1915.

"Mr. Coleman du Pont, Blackstone Hotel, Chicago, Ill.—My Dear Coleman: I beg to confirm my telegram of to-day and your phone conversation:

(Then follows recital of Pierre's two telegrams of February 20th.)

"I understand I have purchased from you sixty-three thousand two hundred fourteen (63,214) shares of the common stock of E. I. du Pont de Nemours Powder Company at two hundred (200) dollars per share and thirteen thousand nine hundred eighty-nine (13,989) shares of the preferred stock of E. I. du Pont de Nemours Powder Company at eighty-five (85) dollars per share. Also, you are to be paid eight million (8,000,000) in cash and five million eight hundred thirty-one thousand eight hundred sixty-five (5,831,865) dollars in six per cent. (6%) seven (7) year notes of a company to be formed to complete this transaction; the collateral on the notes being thirty-six thousand four hundred fifty (36,450) shares of the common stock of E. I. du Pont de Nemours Powder Company. The company is to have the privilege of paying these notes before maturity. Until we have all the details arranged, I suggest that the transaction be kept confidential. I will let you know as soon as it is announced, which of course must be fairly soon. I have arranged for the loan in New York, but some details will have to be finished on Tuesday, February twenty-third (Monday being a bank holiday). I will arrange immediately with Lou Dunham for the transfers.

"Your affectionate cousin,

Pierre S. du Pont."

On February 22d, Pierre sent the following telegram:

"Wilmington, Del., Feb. 22, 1915.

"T. C. du Pont, Blackstone Hotel, Chgo.

"Please wire acceptance of proposition my letter twentieth in order that we may have definite proposition for banks tomorrow.

Pierre."

To which Coleman replied:

"Chicago, Ill., Feb. 22, 1915.

"P. S. du Pont, Wilmn.

"Proposition accepted for entire holdings don't know exact number share assume collateral on deferred payments to be maintained relatively same as at start.

Coleman."

Pierre and Raskob made the final arrangements with Mr. Porter in New York on February 23d. The arrangement is outlined in a letter as follows:

"February 24, 1915.

"J. P. Morgan & Co., New York City—Gentlemen: Attention of Mr. Porter. I wish to confirm my understanding of our conversation of yesterday.

We are incorporating the du Pont Securities Company under the laws of the state of Delaware with a capitalization of $7.500.000. which company will purchase 14,599 shares of the preferred and 91,491 shares of the common stocks of E. I. du Pont de Nemours Powder Company. The company will issue a seven year note of $5,903,715 to T. C. du Pont, carrying 36.900 shares of the common stock of E. I. du Pont de Nemours Powder Company as collateral. They will also issue note for $8,500,000 payable eighteen months after date, with interest at the rate of six per cent. per annum, to be sold by you at par. The collateral on this note will be 14,599 shares of preferred and 54.591 shares of the common stocks of E. I. du Pont de Nemours Powder Company, coupled with underwriting or guaranty agreement. The company is to have the right to renew this note for a further period of eighteen months at the same rate of interest. A commission of 1½ per cent. is to be paid on such part as may be renewed.

"Papers of incorporation are being prepared to-day by our counsel, Mr. William S. Hilles, who, with Mr. Raskob, will meet Mr. Prosser and counsel of the Bankers' Trust Company in New York to-morrow with a view to agreeing on all the forms of necessary resolutions, forms of notes, guaranty agreement, etc.; the intention being to file the certificate of incorporation on next Monday, at Dover, Delaware, and complete the transaction in New York on Tuesday, at which time the $8,500,000 cash will be available.

"The commission for your services in connection with this transaction will be $170,000, being 2 per cent. on the amount of the loan.

"Very truly yours, Pierre S. du Pont."

Pierre, Irenee, Lammot, R. R. M. Carpenter, Raskob, and A. Felix du Pont, as subscribers, caused the incorporation of the du Pont Securities Company on March 1, 1915, with an authorized capital of $10,000,000. A loan of $8,500,000 was obtained through J. P. Morgan & Co. The stock purchased from Coleman, together with 28,277 shares of common stock contributed by Pierre and his five associates, was sold to the du Pont Securities Company for which Pierre and his five associates received $7,500,000 in stock of the Securities Company, $8,500,000 in cash represented by its notes sold to J. P. Morgan & Co., and about $5,900,000 represented by its notes to T. C. du Pont for the deferred payment. The transaction was closed with Pierre on the basis agreed upon. The $8,500,000 loan was distributed by Morgan & Co., after retaining part of it, among 14 banks, all of which were depositories of the Powder Company. The transaction with the banks was closed on February 23d. On that day the Powder Company was credited in its deposit account with J. P. Morgan & Co. with $5,500,000, on account of sales to foreign governments, which amount was immediately drawn out by the Powder Company's checks through Raskob as treasurer, and in large part distributed among the banks which participated in the loan, so that the deposits in participating banks were increased on the following day over those on February 23d, in round figures, as follows:

Mechanics' & Metals' National Bank, New York, from $191,000 to $369,000.

American Exchange National Bank, New York, from $199,000 to $591,000.

Bankers' Trust Company, New York, from $191,000 to $791,000.

First National Bank, New York, from $100,000 to $400,000.

National City Bank, New York, from $522,000 to $958,000.

Chase National Bank, New York, from $193,000 to $593,000.

Hanover National Bank, New York, from $195,000 to $595,000.
National Park Bank, New York from $190,000 to $590,000.
Empire Trust Company, New York, from $121,000 to $321,000.
Chatham & Phœnix National Bank, New York, not increased at that time but on February 23d the balance was $192,000 and within ten days had become $402,000.
Equitable Trust Company, New York, from $191,000 to $491,000.
National Bank of Commerce, New York, from $196,000 to $596,000.
The deposit in the Philadelphia National Bank was decreased on the 24th, but on the 25th was increased by over $100,000 and J. P. Morgan & Co.'s account which, on February 17th, stood at $527,000 had been increased on the 19th by over $2,400,000.

It is alleged in the bill that Pierre and his associates used the credit of the company to obtain the loan of $8,500,000 upon which to finance the transaction. Whether the loan could have been obtained from other banks, not depositories of the Powder Company, upon the security of the stock deposited as collateral, together with the individual guarantees of Pierre, Irenee, Lammot, Raskob, Carpenter, and Felix cannot be determined. It would be mere conjecture. What they did must be drawn from the evidence. The loan was negotiated by the acting president and treasurer of the Powder Company through a banking house having an intimate knowledge of the company's business, having large sums passing through its hands to the company and having a large deposit of the company's cash on hand and $5,500,000 coming in on the day of the transaction. The loan was distributed among the depositories of the Powder Company, and the deposits in at least 11 of the depositing banks were increased by enormous amounts out of the $5,500,000 of the company's cash the day after the loan was placed through checks drawn upon J. P. Morgan & Co. That firm knew that those obtaining the loan included the acting president, the treasurer, and directors of the Powder Company. The collateral consisted of a very large block of the stock of the company and the Securities Company, the maker of the note, was obliged to meet it, if at all, out of dividends derived from that stock, as it had no other source from which to meet its obligations. Those dividends would have to be declared by the action of a board of directors of which the parties to the syndicate were officers and members. Under these circumstances, it would be placing motives, reasons, and conclusions of witnesses on a higher plane as evidence than facts to conclude that those officers did not use the advantages derived from the company's financial standing from their official connection with the company and from the deposit of its funds in obtaining the credit upon which the loan was based.

[2] Upon learning of the transaction Alfred and William promptly made objection. On March 2d William du Pont sent the following telegram to Pierre:

"Paper states you have purchased Coleman's stock. I presume for the company. Any other action I should consider a breach of faith."

Alfred I. du Pont expressed to Pierre verbally a similar opinion. On March 2d, the date of William's telegram, Alfred invited Pierre to come to his office and asked him concerning the purchase of the stock.

Upon being informed of the details of the arrangement with J. P. Morgan & Co. and that Pierre proposed to divide the stock among the stockholders of the holding company, Alfred testifies:

"I then said to him: 'Pierre du Pont, don't do this. It is wrong.' He asked me why it was wrong. I said: 'Because you have accomplished something by virtue of the power and influence vested in you as an officer of the company, and by knowledge which you could only have acquired in your official capacity, which you could not have accomplished as a private individual. For that reason the stock which you have acquired in this matter does not belong to you but belongs to the company which you represent. I therefore ask you to turn this stock over to the company.' He said he was very sorry that he could not agree with my point of view. In a further endeavor to get him to make some concession along my line of thought, I said: 'Pierre, your father and my father were brothers. Neither of those men would have approved, I am confident, of what you have done. For their sake, as well as for your own, put that stock in the company's treasury, because you can't afford to do anything that will invite criticism or condemnation on the part of any of your fellow bankers which would in any way injure your business reputation.' I said, 'Pierre, I ask you.' He said he could not do it, that the thing was an accomplished fact and could not be undone. I said, 'Then you refuse to make this concession which I ask of you?' He said, 'I do.' That terminated the interview."

On the evening of March 3d, Alfred, William, Alexis, Philip, Eugene E., Francis, Irenee, and Pierre met at Alfred's office and discussed the subject of Pierre's acquisition of the stock and the propriety of the manner in which it had been acquired, and a reiteration was had of the position which Alfred took on March 1st that Pierre owed it to the company to turn the stock into the company's treasury. William also urged that Pierre turn the stock into the company, stating that he had purchased it in his official capacity, and he (William) would consider any other disposition of the stock an infringement of the proprieties of his office and a breach of faith as an officer of the company.

Neither Alfred nor William at that time took the definite position that Pierre had taken advantage of negotiations which had been pending under Coleman's offer considered by the finance committee on December 23d. They did not in fact know that Pierre had conducted the negotiations, as they had no information upon that subject except what they had derived from Pierre at the meeting of the finance committee on February 10th, when they both believed that Pierre had misunderstood the instructions of the finance committee and believed, as he stated to them at that time, that he considered that the offer had been finally rejected at the meeting on December 23d. In their position at this time, they, being ignorant of the facts and kept in ignorance by Pierre, based their charge of bad faith and breach of trust on Pierre's part upon the fact, which they believed, that he as an official of the company had used the company's credit to buy the stock and had used information obtained by virtue of his office of the value of the stock, and of the fact that the stock was for sale, for his own advantage when he should have acted for the advantage of the company.

Pierre, having declined to turn the stock over to the company, consulted Mr. Laffey, counsel for the company, who informed him that, in his opinion, the company could not lawfully purchase the stock, be-

cause under its charter, and under the laws of New Jersey, it could not purchase its own stock except out of its surplus.

The purchase price of the stock amounted to $13,903,715, which was in excess of its surplus, as shown in the statements of the financial condition of the company as of February 28, 1915, under the item "profit and loss," $5,303,599.82, at that time, over and above all of its liabilities, including in that term those fixed, current, and contingent, and the amount of capital stock paid in.

Pierre then addressed to each of the board of directors of the Powder Company a letter dated March 5, 1915, stating that he, together with others, had arranged to purchase Coleman's stock; that Coleman had written to him before Christmas offering 20,000 shares of common stock to the company at $160 per share with the suggestion that the stock be resold to the important employés. He then cited the resolution from the minutes of the finance committee meeting of December 23, 1914, and stated that this information was transmitted to Coleman, who withdrew his offer very shortly afterwards; that about the middle of February Alfred brought up with the finance committee the subject of purchase of this stock and expressed the opinion that Coleman had not understood the position of himself and William on the question and suggested that both he and William should write to Coleman outlining their position; that this was done by Alfred in his letter of February 16th, of which he attached a copy. He stated that this letter most clearly outlined the position of the majority of the finance committee at the time of the meeting and amplified the minute of the meeting; that on the same day, February 16th, he learned from Coleman's confidential representative that Coleman was planning to sell a large block of his stock, and, as the company was not interested, he felt at liberty to sell elsewhere; that this resulted in a negotiation on February 17th, and the offer to purchase was made and accepted on February 20th; that the final details were finished on March 2d. He then recited the telegram from William of March 2d, stating that Alfred had expressed to him a similar opinion. He stated that, in taking exception to the accusation of bad faith, the meaning attached to these words is as follows:

"I could not have made the purchase of this block of stock unaided by the company; that therefore the company is entitled to the stock. There seems to be no contention that my position in the company enabled me to receive an offer from Mr. T. C. du Pont; the point being that I could not have financed the purchase of the stock without using company credit. I have no reason to think that I am accused of any improper use of credit, but of having used my position to enable me to obtain credit in New York that as an individual I could not have obtained. Messrs. Alfred I. and William du Pont, who have expressed this opinion most strongly, admit that they know neither the amount of the loan, the nature of the collateral used, nor the terms of the transaction. I have given them the following information:

"That a loan was placed through J. P. Morgan & Co. with whom our company first had relations by opening an account on December 9, 1914. Messrs. J. P. Morgan & Co. undertook to place this loan in their usual manner, namely, for a commission. They selected a number of banks and distributed the loan among them. After the transaction was completed, we were made acquainted with the names of the banks who took the loan. The latter was about 50 per cent. oversubscribed, and it was so far distributed that Morgan & Co. had not

retained more than 10 per cent., i. e., the allotments to banks amounted to more than 90 per cent.

"I declare that neither I, nor any of my associates, have used or attempted to use the company's name in this transaction. I have been greatly surprised that Messrs. Alfred and William du Pont consider that the company has in any sense the right to take this stock, and still more surprised that some others of our directors have at least entertained such a feeling, if they do not now possess it. The object of this letter is to endeavor to settle satisfactorily in everybody's mind the question of propriety by inquiring whether the directors wish to purchase the stock for account of the company."

He then gave the company the opportunity to make an offer to him and his associates, withdrew the statement made on the evening of March 4th that he would not sell the stock, and stated he was now open to consider a proposition. He stated that the purchase, which had been finally closed beyond any power to change, was such that the whole of the 63,314 shares of common and 14,599 shares of preferred stock purchased from T. C. du Pont was open to the company's offer of purchase; that the price paid was $200 per share for the common and $85 per share for the preferred, and any offer made for the purchase of common stock must be subject to an outstanding option to purchase 8,234 shares of common stock for $1,139,600, or approximately $138 per share, and that, in order to undo what had been done, an expenditure of approximately $250,000 would be necessary.

The matter was brought before the board of directors at a meeting on March 6, 1915. Those present were Pierre, Alfred, William, Irenee, Eugene E., Lammot, Francis I., Alexis I., and H. F. du Pont, R. R. M. Carpenter, H. G. Haskell, Raskob, H. F. Brown, F. L. Connable, William Coyne, Henry Belin, Jr., Charles L. Patterson, and E. G. Buckner. Mr. Laffey was called into the meeting at Pierre's suggestion for advice as to the legal phase of the matter. He gave it as his opinion that the company was limited in its right to purchase its own stock to the amount of its surplus. A resolution that the company offer to purchase the stock from Pierre and his associates, in accordance with the terms stated in Pierre's letter of March 5th, was then offered. Upon a substitute motion the matter was referred to the finance committee for report and recommendations on March 10th. At this meeting of March 6th, T. Coleman du Pont's resignation was received. Pierre was elected president, and A. Felix du Pont a director. Pierre was appointed chairman of the finance committee, and Irenee elected to the vacancy on that committee caused by Coleman's resignation.

A meeting of the finance committee was held on March 8th, at which were present Pierre, Alfred, William, and Irenee. Upon a motion to recommend that the board of directors make an offer to purchase the stock from the syndicate in accordance with the terms stated in Pierre's letter, Alfred and William voted aye and Irenee voted nay. Pierre did not vote. Under the by-laws governing the finance committee, the motion therefore failed to pass. At the directors' meeting on March 10th, the report of the finance committee without recommendation upon the resolution referred to them at the meeting of March 6th was received and filed without any further action. Raskob offered a resolution that the company make an offer to purchase from the syndicate the stock

referred to in the letter from P. S. du Pont dated March 5th upon the terms stated therein. Upon being put to a vote, the motion was lost; Alfred, William, and Francis voting in the affirmative, Mr. Connable not voting, the other members present, including Raskob, voting in the negative. Nineteen directors were present at the meeting. The board consisted of twenty members in office, and the by-laws provide:

"The affirmative vote of a majority of all the directors for the time being in office shall be necessary for the passage of any resolution."

It therefore would have required the vote of eleven directors to pass the resolution. Of those present and voting, the following had an interest in the stock: Pierre S. du Pont, Irenee du Pont, Lammot du Pont, A. Felix du Pont, John J. Raskob, and R. R. M. Carpenter, as members of the syndicate who joined in the purchase of the stock. Coyne, Haskell, and Brown had each received from Pierre a promise of 1,500 shares of the stock of the du Pont Securities Company. After the vote had been taken, Laffey was elected a director. Prior to this meeting, he had been promised 500 shares of stock in the Securities Company.

The defeat of the resolution to offer to purchase the stock is relied upon by the defendants as a ratification of the purchase by the syndicate and as a rejection by the board of directors of an opportunity to make an offer. Alfred and Francis protested against the directors who were interested in the Securities Company voting upon the acquisition of the stock. At that time it was not disclosed to the directors who were not interested that Haskell, Brown, and Coyne had an interest at that time in the Securities Company, nor that Laffey, prior to the meeting of March 10th, had been promised an interest. Pierre's letter, in which he made the proposition to the company, failed to disclose the negotiations which he had had with Coleman du Pont during January, 1915, failed to lay before the directors the correspondence between himself and Coleman, and it failed to set out the terms of Coleman's offer of February 13th and to state what was done in the negotiations after that time. While he evasively stated the fact that the "company's name" had not been used in obtaining the loan, he did not state that the banks which took the loan were depositories of the company, having with one exception large balances of the company's funds upon deposit; nor did it state the names of the banks, although he knew them at that time. It was at Pierre's suggestion that Laffey was called into the board on March 6th to give his opinion upon the legality of the purchase of the stock, which Pierre, on March 5th, had obtained in advance. If Pierre and the other directors interested in the purchase of the stock had in good faith intended to obtain fair unbiased consideration of the resolution offering to purchase from them, there should have been laid before the board a full and unreserved disclosure of the whole truth in relation to the action of the finance committee in relation to the information given by Pierre to Dunham and Coleman of that action, in relation to the negotiations conducted by Pierre with Coleman up to the time the purchase was consummated, and in relation to all the details of the loan of $8,500,000. Nine directors had an interest antagonistic to the company's acquisi-

tion of the stock. Alfred, William, and Francis, through the concealment from them of the true state of facts, based their support of the resclution upon the ground that Pierre and his associates had acted in bad faith in using their official knowledge of the company's business and in using the credit and financial standing of the company in obtaining the funds to finance the purchase. It was the duty of Pierre and his associates to see that there was made to them, together with Mr. Connable, who did not vote, and the six other directors who voted with the nine interested directors, a full disclosure of all the facts and circumstances in connection with the whole transaction. While the action of the board of directors therefore constituted a formal refusal to take advantage of the opportunity to make an offer to Pierre and his associates to take the stock for the company, that action was obtained by the votes of nine directors who, at that time, were interested in preventing the company from acquiring the stock, and of six others who were kept in ignorance, through willful misrepresentation and suppression of facts they were entitled to know. To uphold the action at the board meetings of March 6th and 10th, under these circumstances, would be contrary to conscience and good morals and to the rule of equity forbidding a director, while representing the corporation, from acting in his own interest and against the interest of the corporation and requiring a full disclosure by a director as a fiduciary of everything which he himself knows bearing upon the matter in hand.

[3] After the suit was brought on January 18, 1916, the board of directors of E. I. du Pont de Nemours Powder Company and the E. I. du Pont de Nemours & Co., the directors being the same in each company, sent a circular letter to the stockholders of the two companies reciting the fact that on December 8, 1915, Philip F. du Pont had brought the present suit. The names of the individuals accused of defrauding the company for their personal gain and violating their duty as directors were given, and copies of the bill of complaint and the answer of Pierre S. du Pont were inclosed, and it was requested that the stockholders carefully read the inclosures. It then recited Coleman's offer to the company of December 7 and 14, 1914, and stated that the finance committee on December 23, 1914, had instructed Pierre to advise Coleman that the committee did not feel justified in paying more than $125 per share; that Pierre urged that the offer as made be accepted and voted against its rejection; that Coleman withdrew the offer after being advised by Pierre of the attitude of the finance committee; that a month later Pierre and others, learning that Coleman was willing to sell all of his holdings in the company, made him an offer, and he and his associates had purchased these shares for their own account at $200 per share for common and $85 for preferred. It stated that Philip du Pont's statement that Pierre and his associates did not have either credit or marketable collateral which would enable them to effect the loan in that amount, and therefore could not finance the purchase of the stock of Coleman without using the credit of the Powder Company, was entirely unwarranted by the facts as fully set forth by Pierre in his answer; and that, objection being raised to the purchase by two of the directors of the company, Pierre, without ad-

mitting or conceding any obligation so to do, expressed to the board of directors a willingness to entertain an offer for the stock.

It then recited the action of the board at its meeting on March 10, 1915, and the opinion of the attorney of the company that, since there was not sufficient surplus in the treasury for the purpose, the purchase of the stock would be illegal. It recited that, after receiving notice of the suit, the president called together the board of directors to learn their wishes in the matter, and that they immediately passed a resolution of confidence in the accused officers and directors and, by a vote of 16 to 3, disclaimed on behalf of the company any right or interest in the stock in question, which resolution was set out at length. The subscribers to the circular letter stated that they owned or represented by proxy at that time over 55 per cent. of the total voting stock of the E. I. du Pont de Nemours & Co. and asked that proxies be given to Pierre, Alexis and John J. Raskob, authorizing these men to vote at the next annual election to be held on the thirteenth day of March, 1916, in Wilmington, Del., to elect a board of directors for the coming year. Twenty-one names were then set out as candidates for election to the board of directors.

At the annual meeting referred to, held on March 13, 1916, the board of directors named in the communication were elected, and the proxies were also used in voting for and adopting a resolution which is set out at large in the defendants' seventy-third request for findings of fact. The resolution contained a statement of the transaction in relation to the purchase of the Coleman du Pont stock substantially as narrated in Pierre's letter to the board of directors of March 5, 1915, and recited the action of the board of directors and approved of the policy of the board in refusing to offer to purchase the Coleman du Pont stock and expressed approval of the policy of applying the money and assets of the corporation to the carrying on of ordinary business rather than purchase of stock of the company except when bought out of surplus for bonus or other similar legitimate purposes. It also approved the sound business judgment of the directors in the declaration of dividends.

As a ratification of the act of the board in refusing to offer to purchase Coleman's stock from Pierre and his associates, or a condonation of the fraud practiced by Pierre and his associates, or approval of the policy of the board, the resolution cannot be accepted as expressing the views of the stockholders whose proxy votes were obtained by means of the circular letter. The letter requested proxies for the purpose of voting for directors and not for the purpose of acting upon the resolution, and further, is open to the same objections of failure to make full disclosure as is the letter of Pierre to the directors. It is difficult to see on what ground the stock representing that purchased from Coleman can be regarded as properly included in a vote upon such a question. Every principle of honesty and rule of propriety and fair dealing would require that it be not voted. If Pierre and his associates, through breach of the good faith which he, as agent for, and all as directors and officers of, the company, were bound to observe in their relations with the company, cannot hold the stock unless the company has had a fair opportunity to purchase it, it follows that

it cannot be turned against the company by voting it to sustain the unlawful methods of those so obtaining it. Neither the action of the board of directors on March 10, 1915, nor the action of the stockholders on March 13, 1916, has any weight as against the company and its stockholders in condoning the action of Pierre and his associates, or ratifying that of the board of directors, or in determining that the company had rejected an offer to purchase the stock.

[4] It is averred in the answers of the defendants and vigorously contended in most able argument of their counsel that the company could have purchased Coleman's stock only out of its surplus which, upon February 28, 1915, it is claimed, amounted to $5,303,599.82, while the amount required for the purchase was $13,903,715, and that the use of any other funds would have impaired its capital stock. A statement of the financial condition of the Powder Company as of February 28, 1915, showed that it had in hand cash amounting to $15,773,496.09, and added to that bills receivable, accounts receivable, materials and supplies, finished products, and deferred charges, making a total working capital, consisting of the quick or fluid assets available for carrying on its current commercial and manufacturing business, amounting to $40,757,045.82. Investments added to this brought the total current assets up to $54,464,884.01. The current liabilities consisting of bills payable, accounts payable, bond interest and dividends payable, and deferred credits, amounted to $4,669,515.62, leaving an excess of current assets of $49,795,368.39. The fixed or stable assets consisted of plants, real estate, construction, fixtures, etc., amounting to $24,199,640.18, and patents, good will, etc., $22,320,306.02, making the total assets, less current liabilities, $96,315,314.59. Contract advances amount to $23,903,202.56, and funded debt $17,354,000. These two items, together with reserves for depreciation, amortization, etc., amount to $45,545,630.88, which, deducted from the above balance, leaves an excess of assets of $50,769,683.71, after deduction not only of current liabilities, but fixed liabilities, consisting of funded debt and reserves for depreciation, etc., and the total of the contract advances. Deducting from this excess of assets the capital stock, consisting of preferred amounting to $16,068,801.34 and common, $29,397,282.55, leaves profit and loss or surplus at the figure above stated $5,303,599.82.

The amount of contract advances, which apparently is absorbed in the current assets, is deducted as a whole from the assets of the company. These contract advances represent 50 per cent. of the contract price, paid in advance by the foreign governments at war, upon the total amount of their contracts entered into with the Powder Company from time to time for the purchase of munitions of war. On December 31, 1914, the contract advances in hand amounted to $7,947,711.87; on January 31, 1915, to $14,657,646.51; on February 28, 1915, at the time Pierre purchased Coleman's stock, to $23,903,202.56; and on March 31, 1915, to $30,771,053.49. There was a constant increase in the amount of the contract advances in hand until, on September 30, 1915, they amounted to $85,494,332.91.

The average cost of manufacture of rifle powder and cannon powder was agreed to by the parties and filed as a stipulation in the cause.

The amount of the contract advances assured the Powder Company of a substantial profit upon each contract over the cost of manufacture in case the buyers refused or failed to accept any lot or the whole amount called for under any contract, or failed to pay the remaining 50 per cent. of the contract price, and the powder was left upon the company's hands.

It has been seen that the surplus which appears under the item of "profit and loss" is arrived at by deducting from all current assets, investments, and fixed assets, not only the current liabilities and the fixed liabilities, but, as a contingent liability, the amount of cash advanced upon the contracts. It may be that that item was properly deducted in order to ascertain the surplus as a bookkeeping term, but in reality the amount of the current assets of the company which could be used without impairing its capital stock paid in is to be determined by a comparison of all of the assets of the company, including all of its quick or fluid assets available as working capital, with its actual indebtedness over and above its capital stock. The amounts advanced to it upon these contracts did not constitute an indebtedness, but there was a contingent liability based upon the agreement in the contracts that upon the failure of performance upon the part of the seller caused by failure of powder to conform to contract requirements or by any contingencies beyond its control by strikes, or labor trouble, the Powder Company would be required to return to the buyer such amount of money as may have been advanced on account of the powder so affected.

At the time Coleman's stock was purchased by Pierre on February 28, 1915, the contracts had increased in amount from $18,292,225 on December 31, 1914, to $58,932,225. Additional contracts for enormous amounts were being negotiated at that time, so that by the end of March the contracts exceeded $90,000,000 and by the end of September exceeded $225,000,000.

During the period covered by Pierre's correspondence with Coleman, it appears that the manufacturing plant was increasing its capacity sufficiently to successfully meet every requirement of its enormously increasing business. The predictions of Coleman as to increase in the value of the stock were realized and there was a confidant expectation of profits of 100 per cent.

The defendants' witnesses testified as to the risks attending performance of the contracts based on the uncertainty of the plant being capable of the required production. The statements made by the officers and directors of the company during the period in question bear a different inference from their testimony on the stand. The correspondence between Coleman and Pierre and the discussion at the meetings of the board of directors in March carry conviction that the company was fully able to produce and was producing all that was necessary to carry on the business, and that huge profits were to be made out of the business on hand. Between March 1, 1915, and the time of the trial in July, 1916, cash dividends equivalent to 183 per cent. had been paid upon the stock of the Powder Company. At the time of the meeting of the board of directors of March, 1915, it was stated by Pierre that the surplus out of which alone Mr. Laffey advised the

board the stock could be purchased amounted to $9,500,000. In addition to what was, in the bookkeeping sense, called surplus, the company had in hand amply sufficient sums to purchase the stock without impairing the capital stock paid in, unless the total amount of the advances constituted an indebtedness.

Mr. Laffey's opinion was based upon paragraph 7, § (h), of the charter, and section 30 of the corporation law of New Jersey. The charter contains the following provision:

"3. The objects for which this corporation is formed are: * * * (f) To subscribe or cause to be subscribed for, and to purchase or otherwise acquire, hold for investment, or otherwise sell, assign, transfer, mortgage, pledge, exchange, distribute or otherwise dispose of the whole or any part of the shares of the capital stock * * * of itself or any other corporation or corporations. * * *

"7. * * * In furtherance but not in limitation of the powers conferred by law, the board of directors are expressly authorized: * * * (h) From time to time to fix and determine and to vary the sum to be reserved over and above its capital stock paid in as working capital before declaring any dividends among its stockholders; to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; to fix the time of declaring and paying any dividend, and, unless otherwise provided in the by-laws, to determine the amount of any dividend. All sums reserved as working capital or otherwise may be applied from time to time to the acquisition or purchase of its bonds or other obligations or shares of its own capital stock or other property to such extent and in such manner and upon such terms as the board of directors shall deem expedient, and neither the stock, bonds or other property so acquired, shall be regarded as accumulated profits for the purpose of declaring or paying dividends unless otherwise determined by the board of directors; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the company's capital stock as provided by law."

Under the charter, therefore, one of the objects of the corporation is the purchase of its own stock. Paragraph 7, § (h), confers upon the board of directors authority "in furtherance but not in limitation of the powers conferred by law." The first of the powers in section (h) is to fix and determine and to vary the sum to be reserved over and above its capital stock paid in as working capital before declaring any dividends among the stockholders, and the second is to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in. In considering the effect of the paragraph providing that "all sums reserved as working capital or otherwise may be applied from time to time to the acquisition or purchase of * * * shares of its own capital stock," counsel for the defendants contends that this provision of the charter limits the investment of the company's funds to the sums reserved as working capital by action of the board over and above its capital stock paid in, and that hence the company could not use any part of its working capital in the commercial sense, consisting of its quick or fluid assets at that time amounting to over $40,000,000 for the purchase of its own capital stock. I do not, however, so construe the charter provision. The power conferred by the first clause of section (h), when read in connection with the whole of the section, confers authority to set aside out of the company's surplus before declaring dividends a sum as working capital, but it does not restrict the company's work-

ing capital to the sum so set aside. It does not mean that the company shall not use any of its quick or fluid assets as working capital, except the sum so reserved, but that, in order to justify the board of directors in not distributing its entire surplus in dividends, its previously existing working capital, if any, is to be added to by the sum so reserved. The forms in use by the company recognize working capital in the commercial sense and not in this restricted sense. The authority to acquire or purchase out of "all sums reserved as working capital or otherwise" is not confined to its capital stock, but includes "its bonds or other obligations," "or other property," and the provision that "shares of such capital stock so purchased or acquired may be resold" should be read in connection with the direction that neither the stock, bonds, nor other property so acquired shall be regarded as accumulated profits for the purpose of declaring or paying dividends. The board of directors are therefore expressly authorized to invest in the things enumerated including the company's capital stock all such sums as shall be reserved as working capital or otherwise, but the directors are not limited to the use of the sums so reserved for the purchase of its capital stock to the exclusion of the use of other funds of the company. The authority to so invest is expressly declared to be "in furtherance but not in limitation of the powers conferred by law." As the directors are authorized to purchase the company's bonds or other obligations or shares of its own capital stock or other property and are not confined to investment in its capital stock, it would follow that, if the provision is construed to mean that the funds the board may use in the purchase of its capital stock are to be confined to the sum so reserved, the same limitation would apply to its bonds, or other obligations, or other property purchased by it. This would lead to the absurd conclusion that, if the company had in its working capital large amounts of cash on hand without having any such sums reserved, it could not, if it found it to its advantage to do so, purchase its own bonds or notes before maturity or any other property for investment.

It is concluded that the section of the charter cited authorizes certain purchases to be made with the sums set aside out of surplus, but does not exclude the use of other funds of the company in making such purchases.

As the powers conferred upon the board by paragraph 7, § (h), are declared to be "in furtherance but not in limitation of the powers conferred by law," the corporation laws of New Jersey of 1896 (P. L. p. 277), under which the Powder Company was organized, will be examined.

Section 1, subd. 4, and section 20, provide:

"Every corporation shall have power: * * * (4) To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require. * * *

20. The shares of stock in every corporation shall be personal property."

In Berger v. United States Steel Co., 63 N. J. Eq. 809, 53 Atl. 68, decided by the Court of Errors and Appeals, it was said:

"In Chapman v. Ironclad Rheostat Co., 33 Vr. (62 N. J. Law) 497 [41 Atl. 690], Mr. Justice Dixon, in an opinion delivered in our Supreme Court, very

clearly demonstrates that, under the Corporation Act of 1896, there is an implied grant of power to corporations to purchase shares of their own capital stock whenever such purchase is required for legitimate corporate purposes. Section 20 makes such shares personal property; section 1, subd. 4, gives power to purchase such personal property as the purposes of the corporation shall require, except what is excepted in section 3, which exception does not include shares of its own stock. Therefore, in connection with sections 29 and 38, the right of a corporation to purchase its own shares is necessarily implied."

Section 30 of the New Jersey Corporation Act (2 Comp. Stat. 1910, p. 1617) is relied upon by the defendants as preventing the acquisition of its own stock except from surplus. The section reads:

"The directors of a corporation shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation, nor shall it divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of such corporation, or reduce its capital stock except as authorized by law." (Then follow the penalties imposed upon directors for violation of the provisions of this section.

No case appears to have come before the courts of New Jersey in which this statute was held to prohibit a corporation from the purchase of outstanding shares of its own stock. It is construed by counsel for the defendants as applying to the present case upon the ground that the proposed transaction would have been a payment to Coleman or Pierre of part of its capital stock (that is, its paid-in capital) in payment for the shares. It is difficult to see the application of the section to the situation in this case. Even if it is to be construed as meaning that a corporation may not impair or deplete its capital stock by the purchase of its own shares, the reasons of the statute law and the common law for such a prohibition are that the paid-in capital represents to the creditors the assets of the company to which they may have recourse for payment of the company's debts, and, if the company has to use its paid-in capital in order to make payment for its own stock, it is preferring its stockholder as a creditor, and, to the extent to which the paid-in capital is used, it is depleting the fund to which its other creditors are to look for payment. Assuming that the act is intended to reach such a case, it is incumbent upon the defendants to show that the capital of the company over and above its capital stock paid in was not sufficient to pay its then existing creditors, and also to pay for the stock. In taking under consideration the question, it may first be concluded that surplus in the bookkeeping sense in which it was used upon the sheets or forms furnished by the Powder Company is not necessarily its surplus in the sense of representing what would remain out of its assets after deducting the full amount of its capital stock paid in plus its indebtedness. Its current liabilities were but $4,669,515.62, and its funded debt, which had many years to run, $17,354,000. Its capital stock amounted to $45,466,083.89. Adding its capital stock, its total current liabilities, and its funded debt, the sum of its capital stock and what it owed its creditors amounted to $67,489,599.61, which, deducted from its total assets of $100,984,834.21, left it on hand a balance of current assets of $33,495,230.60. The purchase of the Coleman du Pont stock, therefore, would have left the company in hand over and above its liability for capital stock and its

liability to its creditors nearly $20,000,000, and deducting the reservation for depreciation, amortization, etc., which good business policy impelled the company to set aside, over $15,000,000 would have been available for contingent liabilities arising under its contracts. The materials and supplies on hand, together with the finished products, were valued at over $9,500,000. As these items may be assumed to have been in part at least what was on hand for carrying out the contracts at their value at the plant, and would have been on hand at that time if at that moment the war had ceased, the Powder Company was protected, not only by the advances upon which it would not have to encroach, except upon the contingencies named in its contracts, but it had the additional protection of materials and supplies and finished products at its disposal. The advances were unquestionably used in part, at least, as working capital which, on February 28, 1915, amounted to $40,757,045.82, and the company would still have had a large working capital if it had paid for the stock out of that item, and it cannot, upon any reasonable inference, be found that the purchase would have impaired the capital stock paid in.

It is concluded, therefore, that the company had ample power to purchase its own stock under its charter and under the corporation laws of New Jersey, and that it had ample assets on hand out of which it could lawfully have paid for the stock without depleting its paid-in capital.

The question whether the company should purchase the stock offered in December, 1914, was pending before a committee of the board of directors having full power and authority to represent and act for the corporation in the matter.

Under the by-laws of the Powder Company, it is provided in article 3, § 3:

"The finance committee shall have special and general charge and control of all financial affairs of the company and such other matters as may be assigned to it from time to time by the board of directors. * * *

"During the intervals between the meetings of the board of directors, the finance committee shall possess and may exercise all the powers of the board of directors in the management of the financial affairs of the company, and such other matters as may be assigned to it from time to time by the board of directors, in such manner as said committee shall deem to be best for the interests of the company, in all cases in which specific directions shall not have been given by the board of directors.

"During the intervals between the meetings of the finance committee, the chairman thereof shall possess and may exercise such of the powers vested in the finance committee as from time to time may be conferred upon him by resolution of the board of directors or of the finance committee."

Therefore, when Pierre was instructed to advise Mr. L. L. Dunham, attorney for Mr. T. Coleman du Pont, that the finance committee did not feel justified in paying more than $125 per share for this stock at that time, and to take the matter up further with T. Coleman du Pont, and that action was ratified and confirmed by the board of directors on December 30th, the corporation, through the committee upon whom the power was conferred, had taken this position upon Coleman's offer: It had not accepted or rejected the offer, but had placed the matter in the hands of its chairman for further negotiation upon his part with Coleman. It thereupon became his duty by virtue of

the special agency vested in him by the action of the finance committee to take the matter up further with Coleman and to fully inform Coleman in accordance with the terms of his instructions and necessarily to keep the finance committee informed of what was going on between himself and Coleman. The question before the finance committee was whether it should or should not acquire the stock. Coleman had offered it at a certain price, and the action of the finance committee cannot reasonably be construed as other than making a counter offer. With these instructions before him and this duty upon him, Pierre violated that duty by informing Dunham, according to his own statement, that the offer had been rejected, but did not give Coleman the information at that time that the finance committee was willing to buy the stock at a lower price than offered by him. He, however, kept the matter open with Coleman through his correspondence until Coleman, not knowing that there was any counter offer, instructed him to withdraw the offer with a view of renewing it in the future. His action, when the question was put to him on February 10th and he informed Alfred and William that the offer had been "turned down" on December 23d, and when they asked for the correspondence between him and Coleman and he furnished them with correspondence upon another subject, and when his attention was called to that fact by Alfred on February 12th he still failed to furnish the correspondence which was wanted, cannot be reconciled with anything but an intention on his part to conceal from them what had transpired. This conclusion becomes irresistible when we find that on the following day, February 13th, Coleman wrote the letter offering to sell from 20,000 to 40,000 shares of stock. The finance committee had not determined that it would purchase the stock, but this fact can make no difference in Pierre's duty to faithfully represent the company under the instructions from the finance committee in his dealings with Coleman and to make full disclosure to the finance committee of what transpired between him and Coleman. If he had with fidelity carried out his trust, had correctly reported to Coleman the substance of his instructions from the finance committee, and had fully and freely disclosed to the finance committee what had transpired between him and Coleman, and the finance committee or the company had determined to proceed no further, or had determined not to purchase Coleman's stock, his position of agency and trust for the company would have been at an end and he would have been free to act for his own interests and those of his associates. Having failed to do this and having purchased the stock, he did not offer to turn it in to the company, or to permit it to purchase it, but did give it an opportunity to make him and his associates an offer to take it, not, however, upon the terms under which he had purchased it from Coleman, but under terms involving the necessity of the company making good, obligations which he and his associates had entered into in the meantime with third parties and other directors of the company in relation to the stock. This opportunity to make an offer to sell to the company, if made in good faith, involved a duty upon Pierre's part and upon the part of the officers and directors associated with him in interest in the purchase at that time to make a full disclosure to the board of direc-

tors of all that had previously transpired in relation to the stock so that they might be fully informed of what rights, if any, the company had in the matter, or what its opportunity to purchase had been. No such disclosure was made to the board. Although the board was informed that Pierre and five other directors had an interest in the stock, the fact that three others were also interested was not disclosed. With nine directors having an interest antagonistic to the corporation and voting, it was therefore a certainty that a resolution to buy the stock could not pass, even if all the rest had been in favor of it, because the board at that time consisted of twenty members, and it required a majority vote of those in office to pass the motion. The subsequent resolutions at the stockholders' meeting, as has been shown, were passed by proxy votes given for election of directors. While the proxy votes were given for the election of a board friendly to Pierre and his associates and recommended by them, this cannot be construed as an indorsement of all that Pierre and his associates had done and of the prior action of the board because of a further failure to fully disclose to the stockholders the circumstances under which the stock had been purchased. Moreover, the stockholders receiving the communication were informed that the subscribers to the letter owned in person, or represented by proxy over 55 per cent. of the total voting stock of E. I. du Pont de Nemours & Co. and were not informed that the stock in controversy was included in that 55 per cent. Under the facts, therefore, what was done at these meetings cannot have any force and effect as valid action on the part of the board of directors, or the stockholders at these meetings.

[5] The duties of a director or other officer of a corporation in transactions where he is representing his company are governed by well-established and familiar rules of equity. A director of a corporation may freely purchase its stock, and occupies no relation of trust to an individual stockholder which prohibits his using whatever advantage his position may afford him through knowledge of its business and condition superior to that of the stockholder with whom he deals. He is not accountable to the stockholder for withholding information from him which affects the value of the stock, but to the corporation, the whole body of stockholders, he stands in a fiduciary relation which requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal benefit or advantage by reason of his position distinct from the coshareholders. By assuming the office, he undertakes to give his best judgment in the interest of the corporation in all matters in which he is acting for it untrammeled by hostile interest in himself or others. If he acts for himself in matters where his interest conflicts with his duty, the law holds the transaction constructively fraudulent and voidable at the election of the corporation. He is disqualified by the intervention of a personal interest to act in the performance of his duties as trustee for the company, and is not permitted to obtain title to property where he has any duty to perform which is inconsistent with the character of a purchaser on his own account. When a director attempts in viola-

tion of his duty to acquire interests adverse to the corporation in respect to any matter involved in the confidence which has been reposed in him, as to which equity imposes a disability upon him to deal in his own behalf, the court will hold him as a trustee for the corporation, and he must account for the profits which otherwise would have accrued to the corporation. The product of the transaction will belong to the corporation exclusively. The law will presume that whatever was done in furtherance of the original scheme, under which the agency was created, was done under and through the agency. The burden of showing that the relation was changed before or during the agency rests upon the party so affirming.

It is asserted by counsel for the defendants that, when Coleman withdrew his offer, the duty on Pierre's part of acting for the company was at an end and he was then free to act for his individual interests. It must be assumed that Coleman's conclusion to withdraw the offer, qualified, as it was, by a suggestion of renewing it in the future, was affected by Pierre's breach of the fidelity he owed to the company in misinforming and misleading Coleman as to the real action of the finance committee. And it is shown that Pierre, while the duty rested upon him of negotiating solely in the company's interests, initiated by suggestion to Coleman the plan for a financing of the transaction otherwise than by a sale to the company. The finance committee was in favor of purchasing the stock, but that fact and the reasons for not buying it at $160 had not been stated to Coleman, although it was rapidly rising in value and Coleman, knowing this, was kept by Pierre in ignorance of facts which Pierre should have disclosed to him. He, in whom confidence was reposed of faithfully representing the company in the transaction, cannot, after betraying his trust through suppression of the facts and through abandonment of his principal by suggestion of a sale through an outside financing, now take advantage of his own wrong and successfully claim that the resulting withdrawal of the offer, thus brought about and concealed from his principal until the trial of the cause, relieves him of any further responsibility and put him in a position to thereafter deal for himself.

There never has been, however, any corporate action determining whether or not the company should purchase the stock. If such action had been taken, the remedy afforded to the plaintiffs would properly be a decree declaring it to be the duty of the defendants to assign and transfer the stock to the E. I. du Pont de Nemours & Co. upon reimbursement of the cost of acquiring it and an accounting for dividends received thereon, or in case it should be found that the stock could not for any reason be transferred to the E. I. du Pont de Nemours & Co., an accounting for the difference between the cost and the fair market value of the stock, together with the dividends received thereon. The question whether the company should or should not acquire the stock, or any part thereof, not having been determined by the company, that question of business policy is not one for the determination of the court. The court cannot place itself in the position of the corporation and determine that the company should take advantage of the opportunity to purchase the stock as it has a right

to do, but it is still a question which is open to the company for its decision, notwithstanding that it is a foregone conclusion that its acquisition would be of enormous profit to the company. This question must therefore be determined by the company itself. If it were referred to the board of directors, that board is disabled for the purpose of passing upon the question, as the majority of the directors are disqualified by interest to act upon the matter. The board, therefore, could not summon a qualified quorum. The only course remaining, therefore, is to put the question before the stockholders of the E. I. du Pont de Nemours & Co. for their decision at a meeting called for that purpose, to be conducted under the supervision of a special master after due notice thereof and notice of the decree in this cause, the holders of the stock acquired from T. Coleman du Pont or the proceeds in stock of E. I. du Pont de Nemours & Co. thereof to be enjoined from voting said stock.

Counsel for the respective parties have submitted requests for findings of fact and conclusions of law, which have been filed in the cause, and which, together with the answers thereto, are hereby made a part of this opinion with the same force and effect as though set out herein in full.

The answers to the plaintiffs' requests for findings of fact declined or qualified, without repeating the requests, are as follows:

30. Answer: This request is declined for the reason that, while Coleman was willing to sell to the company. he was also willing to have the purchase made for the benefit of the men who were working for the company, under some other method of financing.

35. Answer: I so find provided the request means no other offer was made by Coleman after the offer considered at the finance committee meeting of December 23, 1914.

41. Answer: This request is declined. It is found, however, that the ownership of the stock was an essential and potent factor in the practical control of the Powder Company.

45. Answer: This finding is declined for the reason that, while it is improbable that the loan would have been so made, the negative form of the request is too broad a conclusion to draw from the evidence.

As to all of the requests of the plaintiffs for findings of fact, with the exception of those above specifically answered, I find as requested, and such findings are made the findings of the court and a part of this opinion.

The answers to defendants' requests for findings of fact declined or qualified, without repeating the requests, are as follows:

3. Answer: The request is broader than is justified by the evidence. I find, however, that that is the only manufacturing and mercantile business in which the corporation is engaged.

14. Answer: I so find as to the actual business and prospective business in the manufacture and sale of powder and concerning the finances of the company, provided that the term "business" does not include the business in relation to Coleman's offer to sell his stock.

15. Answer: This request is declined because the evidence does not show whether or not Pierre S. du Pont, by reason of his position as

acting president and his being in closer touch with all the principal officers of the company and its manufacturing and commercial business, had opportunities to become informed and did have information which Alfred I. du Pont did not have.

18. Answer: This request is declined.

19. Answer: As to the first part of the request down to and including the words "by T. Coleman du Pont," it is so found. The remainder of the request is declined.

22. Answer: This request is declined for the reason hereinbefore stated at length.

24. Answer: As to the portion of this request down to and including the words "160 per share," it is so found. As to the concluding part, "and never instructed or intimated to Pierre S. du Pont that they would increase the price beyond $125 a share," it is declined, as it has been hereinbefore found that Alfred I. du Pont did make an intimation to Pierre S. du Pont that if the offer were held open the committee might increase its offer.

25. Answer: As to this request, I so find as to the part thereof down to and including the words "with Mr. T. C. du Pont further." The part thereafter, which excludes any other meaning than that therein set out, is declined. The concluding clause, "and the action of the finance committee as expressed in the resolution at the price fixed in the resolution was 'approved, ratified and confirmed' by the board of directors at that meeting," is declined because it carries the inference that the resolution as set out in the minutes was presented to the board. What was approved, ratified, and confirmed was what was set forth in the report.

27. Answer: This request is declined. There is no evidence that Pierre mentioned the price of $125 to Dunham, or that he did anything further than tell Dunham that the finance committee had refused to accept the offer.

29. Answer: This request is declined. While the correspondence standing alone may show such desire on the part of Pierre, the existence of such a desire is inconsistent with his conduct.

31. Answer: The latter part of the request, as follows, "the letter contains no suggestion of a sale to the company," is declined. As to the portion of the request down to the words "through outside agencies," it is so found.

35. Answer: This request is declined. Coleman's letter of February 13, 1915, did contain a suggestion of a renewal of a proposition to sell the stock to the company.

39. Answer: This request is declined.

40. Answer: This request is declined. Provided that if the words "a few" are struck out, it is so found.

41. Answer: This request is declined.

43. Answer: I decline to so find because at the meeting held on March 15, 1915, the plaintiffs and all of the stockholders, with the exception of those interested in the acquisition of Coleman's stock, were fraudulently kept in ignorance of Pierre's breach of trust and that of his associates, and therefore the action of the stockholders'

meeting was obtained by fraud and concealment which renders it null and void.

44. Answer: This request is declined for reasons hereinbefore stated.

45. Answer: This request is declined.

46. Answer: This request is declined.

47. Answer: This request is declined.

48. Answer: This request is declined.

49. Answer: This request is declined. It is shown by the evidence, including Dunham's telegram to Coleman of February 17, 1915, that the first suggestion for the sale of the whole of Coleman's stock came from Pierre.

50. Answer: This request is declined. There is no evidence that Coleman knew that fact until Pierre closed the bargain.

53. Answer: This negative request is declined. The ownership of the said stock was an essential and potent factor in the practical control of the Powder Company.

54. Answer: This request is declined as irrelevant and immaterial and also because there is no evidence to either support or contradict it.

58. Answer: It is so found. J. P. Morgan & Co. also relied upon the official connection of Pierre and his associates with the Powder Company.

59. Answer: This point is declined because it involves a conclusion not supported by the evidence as to what was the usual and ordinary course of J. P. Morgan & Co.'s business. It is found that J. P. Morgan & Co. did rely upon the value of the stock and the personal guaranties in addition to the other circumstances inducing them to make loans as hereinbefore found in this opinion.

61. Answer: This request is declined. The facts in evidence show that there was an understanding on the part of Pierre and Raskob that the depositary banks were to participate in the loan.

63. Answer: This request is declined.

65. Answer: It is so found provided the company had purchased upon the terms dictated by Pierre and his associates, and the term "their interest" refers to the number of shares they were to receive under either arrangement. They had at that time a personal interest in carrying out what would be to Pierre's interest in preference to the interests of the stockholders.

66. Answer: This request is declined. The evidence shows that Mr. Laffey could have had no information upon which to volunteer such statement, unless he had been asked the question by Pierre.

74. Answer: It is so found with the qualification that the voting in favor of the resolution, of the shares for which the proxies were obtained through the circular letter hereinbefore referred to, was a fraud upon those stockholders and the company, and the result so obtained is null and void.

75. Answer: The latter part of this request is declined from the words "but the statements" to the end of the request. The words "Total Working Capital" used upon the forms were used in the commercial sense to indicate the quick or fluid assets and those quick or

fluid assets were considered as its "working capital" by the company. As to the first part of the request, it is found as stated therein.

78. Answer: This request is declined.

79. Answer: This request is declined.

81. Answer: This request is declined, except as to the statement in the first paragraph that Pierre purchased the stock of T. Coleman du Pont for himself and his associates.

82. Answer: This request is declined for the reasons hereinbefore stated in the discussion of the effect of the vote of approval.

As to all of the requests of the defendants for findings of fact, with the exception of those above specifically answered, I find as requested, and such findings are made the findings of the court and a part of this opinion.

The plaintiffs' requests for conclusions of law are answered as follows:

1. Answer: It is so found.

2. Answer: It is so found.

3. Answer: It is so found.

4. Answer: It is so found.

5. Answer: It is so found, subject to what has been stated as the conclusion of the court upon the submission of the question of acquiring the stock to a meeting of the stockholders of the E. I. du Pont de Nemours & Co., and provided the stockholders decide that the company shall avail itself of its right to acquire the stock.

The defendants' requests for conclusions of law are answered as follows:

1. Answer: This request is declined.

2. Answer: This request is declined.

3. Answer: This request is declined.

4. Answer: This request is declined.

5. Answer: This request is declined. The latter part of the request is a mixed conclusion of fact and law and too broad to be justified by the evidence.

6. Answer: It is so found.

7. Answer: This resquest is declined as applied to the Powder Company if the word "speculate" is used in the sense of purchasing its stock for investment, for retirement, or for resale.

8. Answer: This request is declined as having no relation to the facts in this case.

9. Answer: This request is declined, in view of the sense in which the defendants have used the word "surplus."

10. Answer: It is so found.

11. Answer: The general proposition of law is correct, but it has no bearing upon the facts in this case and is therefore declined. The action of the board was obtained under circumstances which made it a fraud upon the company and the stockholders. The fact that there were existing conditions which would justify the exercise of a fair discretion becomes immaterial.

12. Answer: It is so found.

13. Answer: It is so found.

14. Answer: This request is declined.

15. Answer: This request is declined.
16. Answer: This request is declined.
17. Answer: This request is declined.
18. Answer: This request is declined.
19. Answer: It is so found provided that conversations in which Alfred or William made statements to Pierre in relation to Coleman's offer to sell his stock were notice to Pierre of the attitude of the other members of the finance committee and their construction of the instructions given him and have a bearing upon the question of his good faith in carrying out those instructions.
20. Answer: It is so found.
21. Answer: This request is declined.

A decree will be entered in favor of the plaintiffs in accordance with this opinion.

SANTA MARINA CO. v. CANADIAN BANK OF COMMERCE.

(District Court, N. D. California, Second Division. October 24, 1916.)

No. 46.

1. BANKS AND BANKING ⟸130(1)—DEPOSITS—LIABILITY FOR TRUST FUNDS.
The secretary of complainant corporation received checks payable to complainant or order in payment of rents due the company. His only duty in connection with such checks was to appropriately indorse and deposit the same to complainant's account in its designated depository bank. A number of such checks he indorsed by himself as secretary without authority and deposited to his own personal account in defendant bank, where he also deposited money of his own. Upon this account he drew checks, some of which were to defendant in payment of notes given for money borrowed for his personal use. *Held*, that defendant was chargeable with notice that the checks so deposited were the property of complainant, and not of the depositor, and that so much of the deposit account as was made up of their proceeds was a trust fund; that, while it had the right to presume that checks given by the depositor for personal obligations were not intended to be paid from such fund so long as the account was sufficiently large, it was liable to complainant for money which it had itself received with reason to know that it came from the trust fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

2. BANKS AND BANKING ⟸130(1)—DEPOSITS—LIABILITY FOR TRUST FUNDS.
In such case, where the trust was one created ex maleficio, there could be no presumption that deposits subsequently made by the depositor of his own funds, and perhaps checked out to others than defendant, were replacement of the depleted fund, so as to exonerate defendant from liability.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

3. EQUITY ⟸71(1)—LIMITATION OF ACTIONS ⟸100(1)—LACHES.
Complainant, having no other business than the care and rental of its buildings, and which therefore permitted its rentals, beyond the amount required for current expenses, to accumulate in bank until it desired to make a considerable payment on its mortgage indebtedness, was not chargeable with laches because it did not for three or four years dis-

cover the discrepancy between its bank balance and the reports made monthly by its secretary; nor was it barred of relief by Code Civ. Proc. Cal. § 338, which imposes a limitation of three years on actions for fraud or mistake, but provides that the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, where suit was commenced promptly on such discovery.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204–207, 209–211; Limitation of Actions, Cent. Dig. §§ 480, 493.]

4. PAYMENTS ⟸39(4)—APPLICATION.

Where a corporation obtained judgments against a defaulting officer on an indebtedness for a part of which it afterward brought suit against defendant, it had the right to credit any sum collected by execution on the judgments first on the part of the indebtedness for which defendant was not liable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 107.]

In Equity. Suit by the Santa Marina Company against the Canadian Bank of Commerce. Decision for complainant.

E. W. McGraw and J. E. Barry, both of San Francisco, for plaintiff.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for defendant.

BLEDSOE, District Judge. This is a suit in equity, instituted for the purpose of securing a decree to the effect that a certain fund, which, it is alleged, is in the possession of the defendant, is held by defendant for the use and benefit of plaintiff. The facts as presented in the pleadings are involved in considerable complexity of detail, but I think may be stated fairly with brevity.

Previous to 1913, one Hooper was for some years a trusted employé of the Mercantile Trust Company, and was also the secretary and a trusted employé of the plaintiff corporation. Plaintiff had no other business than the ownership and control of two pieces of improved real estate in the city of San Francisco. One had situate upon it an eight-story office building, from which the income was very large, amounting to several thousand dollars each month; and the other a small store building, rented for a sum approximating $350 per month. The rents from these buildings were collected by two certain real estate firms, who, after deducting their commissions, would draw their checks in favor of plaintiff company, and these checks, in due course, would be delivered to Hooper, the secretary thereof. His sole function in this behalf was to indorse these checks in appropriate fashion and deposit them to the credit of the account of the plaintiff corporation in its sole depository, the Mercantile National Bank, an institution closely affiliated with, and in fact operating in the same building as, the Mercantile Trust Company, in which he was employed. Hooper's other principal functions as secretary were to render monthly reports of the receipts and disbursements of plaintiff corporation to its board of directors, and, in conjunction with an executive officer of the company, to sign checks for moneys drawn upon its funds and designed to meet its obligations. The rental of the smaller building of plaintiff above referred to was collected by the real estate firm of

Bovee, Toy & Co., and the net amount due plaintiff was paid to plaintiff regularly by their check drawn upon the Bank of California.

Hooper at the times herein under consideration maintained his individual bank account with defendant. Commencing in December, 1907, he followed the plan of appropriating to his own use, at irregular intervals, the moneys represented by monthly checks drawn by Bovee, Toy & Co. and payable to his employer, plaintiff herein. The first check so appropriated was for $297, and the method of appropriation was substantially as follows: The check was payable to the Santa Marina Company or its order. He indorsed it upon the back, "Santa Marina Company, by R. T. Hooper, Secretary," and in this form deposited it in defendant's bank in and to the credit of *his own personal account.* Similarly, with slight variations with respect to the form of the indorsement not material to this controversy, other checks were thus deposited until the amount thus appropriated totaled the sum of $6,775.98; the last deposit being made by him on the 23d of March, 1911.. The checks all passed through the clearing house in due course and were regularly credited to the account of defendant bank. Other moneys belonging to Hooper and coming from other sources were deposited in his personal account in defendant's bank from time to time, and also checks were drawn upon the account in payment of personal obligations of his from time to time. In addition, he borrowed money of the defendant bank at certain dates beginning in February, 1909, and these sums were repaid by him, in installments, by checks drawn upon his personal account aforesaid from time to time. The last loan made to him was in July of 1912, in the sum of $1,500. Of that amount $1,000 was paid in 1914, through the sale by the bank of certain securities held by it, and the balance remains still unpaid. The total amounts borrowed by Hooper and by him repaid to the bank previous to March, 1913, amounted to $3,500.

In the last-named month the Mercantile Trust Company discovered that Hooper was an embezzler from it, and he was convicted of that crime and sentenced to the penitentiary. Immediately upon the discovery of his embezzlement being made known, officers of the plaintiff company investigated his accounts, and discovered for the first time that, though he had faithfully and correctly reported to them each month the amount of receipts coming into his hands as agent of the plaintiff company, and had correctly reported the disbursements from its account in the Mercantile National Bank, yet, by failing to exhibit to them from time to time the bank balance rendered monthly by that bank, they had not been apprised of the fact that the respective balances upon the books as shown by his reports exceeded the respective balances in the bank by the exact amount of his previous misappropriations hereinabove referred to. Thereupon demand was made upon defendant bank for a restitution of the moneys represented by the total amount of the checks drawn to plaintiff company and deposited in the defendant bank. The demand proving unavailing, this suit was brought as for the enforcement of a trust with respect to the moneys represented by all the checks so deposited.

Subsequently to the discovery of Hooper's peculations, and prior to

the institution of this proceeding, plaintiff brought two suits in the state courts against the defendant Hooper as for a money demand for the moneys covered by the misappropriated checks, as well as other demands inuring to plaintiff, and attached certain property standing in the name of Hooper. Upon the rendition of judgment, this property was sold to the attorney for plaintiff, upon the two several judgments rendered, for the sum of $1,000. The attorney, confessedly, bid it in as the agent and in behalf of his principal, the plaintiff herein. To the claim advanced by plaintiff, defendant has interposed several defenses, including the statute of limitations, as applicable to actions both at law and in equity, and has pleaded in addition the claim that the market value of the property acquired by plaintiff under and pursuant to the execution sales above referred to was largely in excess of the amount claimed to be due from it, and that in consequence no recovery should be had herein.

[1] There can be no doubt, in my mind, that the employé, Hooper, was in no wise expressly or impliedly authorized to do aught with the checks of plaintiff received by him other than to indorse and deliver them for deposit *with plaintiff's designated depository.* In transgressing his authorized function, and in depositing the checks, after indorsement, in the defendant's bank to his own account, he was guilty of a conversion of the moneys represented by the respective checks, such checks, and the moneys so represented, being at all times the property of the plaintiff company. The checks being the property of, and being drawn payable to the order of, plaintiff company, plaintiff could be divested of the title to them and the moneys represented only by some act or conduct upon its part substantially the equivalent of an order or check of its own making the moneys represented by the checks payable to it, payable to the order of Hooper. There is no suggestion, of course, of any such act or conduct. In receiving, then, checks drawn to the order of plaintiff, indorsed by Hooper as secretary, and tendered by him for deposit in his own private account, defendant was at once apprised of the fact that the transaction was essentially irregular, and that there was no apparent authority in Hooper thus to divest plaintiff of its right to and title in the moneys represented by the checks thus offered for deposit. It, itself, became, in this wise, a party to the conversion of the fund, and that it would have been liable therefor in a suit at law as for such conversion seems clear; but such question is immaterial in this action and need not be given consideration. It, in any event, was put upon notice that the money thus deposited and held in the personal account of Hooper was, in truth and in fact, the property of the plaintiff, and not the property of Hooper, and that defendant Hooper held it as a trustee of and for plaintiff.

Defendant bank had the right to assume, of course, that Hooper was intending to act honestly and in good faith toward plaintiff, and that he would be duly responsive to the trust subsisting in him. In this spirit, in the absence of any information coming to it that such payment constituted a misappropriation of plaintiff's property, it had a right to assume that any moneys drawn from the fund represented by the check delivered to it and made payable to some third person would be

intended by Hooper, and in fact be used, in complete recognition of the trust created by the deposit to his own account. As to any moneys, however, which he paid to defendant bank itself, in satisfaction of his own obligations, the bank indubitably knew that such payment constituted a violation of the trust, and by the same token knew that it was participating in the fruits of such violation. There can be no doubt, then, as to moneys paid by Hooper to the defendant bank, the bank would be liable to plaintiff, in equity, at least to the extent that such moneys so paid were taken from the trust fund. Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; Manhattan Bank v. Walker, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959; Central Nat. Bank v. Conn. Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142; Am. Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Globe Savings Bank v. Nat. Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; U. S. Fidelity & Guaranty Co. v. First Nat. Bank, 18 Cal. App. 437, 123 Pac. 352.

[2] It is the law, sustained by an overwhelming current of authority, that a cestui que trust will be entitled, in equity, to follow the trust fund, whithersoever it may go and whatsoever form it may assume, providing always that he is able to identify it. Central Nat. Bank v. Conn. Mut. Life Ins. Co., supra. If, as is the case herein, the trust fund has been blended or commingled by the trustee with his own funds, the right of the cestui to assert his ownership, by lien or otherwise, is preserved. Payments made by the trustee from the commingled fund, as for his own private use or benefit, will be presumed, perhaps conclusively so (In re Hallett, L. R. 13 Ch. Div. 696, 727–729), to have been made from that portion of the blended fund to which he had a right to resort, at least until the depletion of the trust fund has actually commenced. Any payments thereafter made will, of course, have to be regarded as a dissipation, pro tanto, of the trust fund itself. 39 Cyc. 540. To the extent that the trust fund may have been thus dissipated, the cestui que trust, in equity, at least to the extent of following the trust fund into the hands of innocent holders, will be remediless.

There are decisions, although apparently the holdings are not uniform upon the subject (Board of Commissioners v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 15 L. R. A. [N. S.] 1100), to the effect that any subsequent contributions to the undissipated portion of the blended fund by the trustee will be considered as restorations of the trust fund itself, pro tanto. United Nat. Bank v. Weatherby, 70 App. Div. 279, 75 N. Y. Supp. 3; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653. This rule, however, could hardly operate where the trust created was one ex maleficio, and where there could be no legitimate presumption indulged in of an intention to restore from a mere contribution of personal funds to the commingled fund. Neither could it apply, as I view it, to the defendant herein. Defendant was bound to know that a series of trusts in favor of plaintiff existed to the extent that checks payable to plaintiff were deposited, with-

out authority and without proper indorsement, to Hooper's credit. In the absence of controlling information, as to which there is no evidence, it had the right to assume that payments made by Hooper to third parties were not in contravention of any of the trusts; consequently it was not called upon at any time to assume, nor can it be held now to have known, that any personal moneys deposited by Hooper in the blended account were intended by him as restitution to the trust fund, to take the place of moneys which, in truth and in fact, but unknown to defendant, had been abstracted therefrom.

In this connection it should be observed that Hooper did not misappropriate the entire sum converted by him at any one time; his peculations extended over a period of two years and were irregularly carried on. Therefore, in receiving money from him on any specific occasion, in satisfaction of his own obligations due to it, the defendant bank would be charged with the knowledge only of preceding misappropriations, and with the then condition of the trust fund, or funds, considering all payments made therefrom prior thereto. In other words, plaintiff can recover against defendant, in this form of action, under the evidence herein, only to the extent that defendant received to its own benefit, in satisfaction of Hooper's obligations to it, moneys which defendant knew at the time constituted a portion of a trust fund equitably belonging to plaintiff. The lowest state of the account of Hooper, then, between all preceding misappropriations and a given payment by Hooper to defendant bank, would represent the amount of that particular trust fund identified and followable by plaintiff, and the maximum amount, therefore, of such fund for which defendant, because of its participation in the fruits of the fraud, can be holden responsible herein. The sum total of the various amounts from the respective trust funds, thus computed, would be the measure of plaintiff's total recovery.

The burden of showing the existence and identity of a trust fund in the first place devolved upon plaintiff; but the burden of showing a depletion or dissipation thereof, so as to exculpate defendant from the charge of participating in its fruits, falls on defendant. Smith v. Nottley, 150 Fed. 266, 80 C. C. A. 154. The proof in the case is insufficient to show the exact status of the trust funds at the times of the respective payments therefrom to defendant. In order to do justice between the parties, therefore, the court is of the opinion that it ought to reopen the case to allow the parties, if they shall be so advised, to present evidence showing the state of Hooper's account in defendant's bank, from time to time, so that the court may ascertain the amounts of the respective trust funds which went into the coffers of defendant. In the absence of further evidence, under the burden of proof resting upon defendant above referred to, the court will be compelled to assume and find that sufficient of the trust funds at all times remained undissipated to justify the conclusion that all of the moneys paid to defendant on account of Hooper's obligations, up to March 4, 1910, the date of his last voluntary payment, are subject to plaintiff's claim herein. There is no proof that any of plaintiff's money, to the knowledge of defendant or otherwise, went into the purchase of the securities hypothecated by Hooper and sold by the bank in 1914, as herein-

above referred to, and in consequence, under the evidence, no authority for the court to countenance any claim of plaintiff as against that payment made to defendant.

The above views, determinative of the general features of the case and expressive of the final conclusion to be indulged in by the court, has preceded, merely for convenience' sake, the presentation of matters urged by defendant by way of special defense. These have, however, received careful consideration.

[3] The defenses of laches and statutes of limitation may be considered together. It stands as indubitably true that the plaintiff made its demand and prosecuted this suit immediately after becoming advised in fact of the dishonesty of its employé and of the receipt by defendant of moneys belonging to it. Several of the statutes of limitation pleaded by defendant have only to do, however, with actions at law, of which this is not one. Section 338 of the Code of Civil Procedure of the state of California, which has also been pleaded, imposing a three-year limitation upon actions for relief on the ground of fraud or mistake, provides that the cause of action in such a case is not to be deemed to have accrued, and therefore the statute does not begin to run, until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Substantially this is but a codification of the rule announced in Bailey v. Glover, 21 Wall. 349, 22 L. Ed. 636.

In Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, the Supreme Court held that, irrespective of the time of the actual discovery of the fraud, a party will be held to have been deprived of his remedy, if he delays bringing suit for the time prescribed after he was put upon notice sufficient to excite attention and call for inquiry; and this, for the reason that a party will not be permitted to fail to use diligence in informing himself as to wrongs suffered by him. The claim by defendant in this behalf is that, since plaintiff's depositary reported to it regularly the state of its account, it therefore was put upon inquiry from time to time to investigate the acts and conduct of its secretary, Hooper, and, if any investigation by it had been made, his peculations would have been immediately uncovered. In this connection, also, it is asserted that there was a duty resting upon the officers of plaintiff to investigate the acts of Hooper, and that the proper performance of this duty at any time subsequent to 1907, would have resulted in a complete discovery of the wrongs previously committed.

The answer to this, however, to my mind, is that there were no facts which were brought home to the officers of plaintiff sufficient to excite their suspicion or to put them upon inquiry with respect to the unauthorized conduct of Hooper. In good faith, and apparently with ample cause, plaintiff's officers reposed completest confidence in their secretary. Nothing occurred to give rise to the suspicion that he was other than he pretended to be, and therefore nothing arose calling for any investigation of his acts. Plaintiff at all times had a mortgage indebtedness of over $400,000 upon its property, and its income was almost entirely used in payment of interest and fixed charges; the small surplus being accumulated, apparently was left lying in bank until it would amount to sufficient to justify or entitle plaintiff to make a substantial payment upon the principal. For this reason there was not the

occasion which otherwise might have existed requiring plaintiff's officers to be advised, from time to time, of the exact state of the account in the bank. If for any reason knowledge of its bank account could or should be imputed to plaintiff, if it had owed a duty to defendant, if, for instance, the case here had been against the Mercantile National, in which plaintiff had its account and from which it regularly received statements, the ruling of the court upon this branch of the case would be essentially different. Upon the facts adduced, however, I am constrained to conclude that plaintiff is at full liberty to assert that it used due diligence to arrive at the facts, immediately upon notice requiring it to act being brought home to it, and that therefore it is clearly within the exception to the statute relied upon by defendant.

The same reasoning applies largely to the defense of laches. Plaintiff acted promptly upon being apprised of the facts exhibiting defendant's liability, and the long delay which ensued between the time of the first misappropriation by the secretary, Hooper, and the time of suit, was in no wise due to any legal negligence upon the part of the plaintiff. It was due entirely to its utter ignorance of the true state of affairs. There was no legal duty, in the absence of something brought to its attention calculated to upset its confidence in its secretary, requiring it to investigate his acts; consequently there was no negligence in its mere failure so to do. To hold otherwise would make it incumbent on every person, in spite of information or bona fide belief to the contrary, to suspect every other person; it would be to disregard completely the legal presumption that the law has been followed and that every individual is honest and innocent of crime and wrongdoing. So to hold would be to negative our faith in humanity and disavow the confidences upon which the hopes of the world are founded. I can discover no reason why it would be inequitable under the circumstances detailed herein, to permit plaintiff, acting with the promptness it did, to seek to enforce its claim against defendant. Hanchett v. Blair, 100 Fed. 817, 827, 41 C. C. A. 76; London & San Francisco Bank v. Dexter Horton Co., 126 Fed. 593, 601, 61 C. C. A. 515.

Defendant cites a section of the Constitution of the state of California which makes directors and trustees of corporations "jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporations" during the term of office of such director or trustee, etc., and insists that this section establishes as a matter of law, responsibility for the misconduct of Hooper, and therefore establishes knowledge on the part of the directors of such misconduct. The conclusion would not follow from the premise in any event, and in addition it may be said that it is the corporation itself which is suing herein, and not the directors or stockholders, and in consequence under no possible theory could the section of the Constitution have any relevancy.

The above views dispose, also, of the claim advanced by the defendant that, because of the principle that, where one of two innocent persons must suffer by reason of the wrongdoing of another, he by whose negligence that wrong had occurred must take the consequences. There was no negligence on the part of the plaintiff, and there was

no innocency on the part of defendant, because defendant at the time it participated in the fruits of Hooper's misconduct, knew that it was taking to itself property which presumably belonged to plaintiff.

[4] The other matter urged by way of defense has to do with the purchase of property by plaintiff at the execution sales under judgments rendered against Hooper. The claim of defendant in this behalf is as inequitable as is the right asserted by plaintiff. Defendant's position, as I understand it, is that, irrespective of the items entering into the judgments secured by plaintiff in its suits against Hooper, the value of any property obtained by it pursuant to the sales under execution should be deducted from any general judgment to be otherwise recovered herein, on the theory that such value constituted a payment from Hooper to the plaintiff, and that defendant should be the beneficiary of the entire amount thereof. Plaintiff's contention, on the other hand, is that what it received at an execution sale, publicly conducted, as the result of a suit between itself and Hooper, is a matter in no wise affecting the liability of defendant to it because of the acts and conduct urged against defendant in this proceeding.

It is obvious to my mind, however, that the plainest principles of equity would require that, since some of the same moneys sued for herein were sued for in the actions against Hooper, if plaintiff received anything because of such suits and the judgments rendered in consequence thereof, in equity, the amount so received shall be regarded as a payment from Hooper on account, with respect to his indebtedness to plaintiff. Plaintiff would be entitled, however, there being other moneys due to it from Hooper, to credit the amount so received to Hooper's individual indebtedness first, and await a full satisfaction of that before it should be called upon to allow anything to defendant because of such receipts from Hooper.

These conclusions are largely academic, however, since, from a careful examination of the testimony respecting the property obtained by plaintiff under the execution sales and subsequently sold by it, I am persuaded that plaintiff got no more in cash upon its sale of the property than the same was reasonably worth, to wit, as testified to, $2,500. It appears from the evidence that the total amount of plaintiff's judgments against Hooper was $13,612.98. Of that only $5,700 represented money sued for in the case at bar. This left a balance of over $7,000 as an individual indebtedness of Hooper in no wise related to the liability of defendant, and of course the $2,500 received sufficed to satisfy but a fractional part of that. Defendant will be entitled, therefore, to no credit herein because of property acquired by plaintiff at the execution sales.

As indicated hereinabove, the question of the precise liability of defendant to plaintiff will depend upon the status of the respective trust funds at and prior to the time of the participation by defendant in moneys coming from such trust funds. The court is unable from the evidence now before it to determine this matter with accuracy and precision. It, therefore, will make an order that the parties may, on a day to be specified, severally offer evidence with respect to the condition of Hooper's account in the defendant bank, from time to time, during the period herein under review, and upon the coming in of

such evidence the court will then make and enter its decree in consonance with the views hereinabove expressed, fixing the amount of recovery, if any, to be had by plaintiff of and from the defendant.

UNITED STATES v. STICKRATH.

(District Court, S. D. Ohio, E. D. June 22, 1917.)

No. 932.

1. CRIMINAL LAW ⟸4—POWER TO DEFINE CRIME—THREATS TO KILL PRESIDENT OF UNITED STATES—STATUTORY PROVISIONS.
The act of threatening to kill or inflict bodily harm upon the President was rightly denounced as a crime, as was done by Act Feb. 14, 1917.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3.]

2. HOMICIDE ⟸92—THREATS TO KILL PRESIDENT—LANGUAGE OF THREAT—"SHOULD"—"OUGHT"—"HAD."
A statement by defendant that the President ought to be killed, that it was a wonder some one had not done it, and that if he had an opportunity he would do it himself, constituted an offense under Act Feb. 14, 1917, denouncing the offense of threatening to take the life of the President, as "ought" denotes an obligation of duty, and is a stronger word than "should," which implies merely an obligation of propriety or expediency, or a moral obligation, while the word "had" in the conditional clause was not an auxiliary, but a principal verb, and related, not to the present, but to the future, and the thought expressed was that, if the speaker should have an opportunity, he would do it himself.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 121.
For other definitions, see Words and Phrases, First and Second Series, Had; Ought; Should.]

3. HOMICIDE ⟸92—THREATS TO KILL PRESIDENT—ELEMENTS OF OFFENSE—"KNOWINGLY"—"WILLFULLY."
Under Act Feb. 14, 1917, denouncing the offense of knowingly and willfully making any threat to take the life of the President, the words "knowingly"" and "willfully" signify that the offender must have known what he was doing, and with such knowledge proceeded in violation of law, as "knowingly" means with knowledge, while "willfully" means in a willful manner, obstinately, by design, or with a certain purpose; but, when the unlawful threat is knowingly and willfully made, the offense is completed, though the threat is not executed, and though the bad intent with which it was made is subsequently abandoned.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 121.
For other definitions, see Words and Phrases, First and Second Series, Knowingly; Willful—Willfully.]

4. HOMICIDE ⟸92—THREATS TO KILL PRESIDENT—ELEMENTS OF OFFENSE.
Under Act Feb. 14, 1917, the motive which prompts a threat against the President's life is immaterial, nor is it material that the threat is sanctioned by what some person or class of persons may conceive to be a correct national policy, or may adopt as a political faith, or designate as a religion.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 121.]

5. HOMICIDE ⟸92—THREATS TO KILL PRESIDENT—ELEMENTS OF OFFENSE.
Under Act Feb. 14, 1917, a threat against the president's life need not be made to him personally or in his presence, nor communicated to him, nor need it be of such a nature and extent as to disturb or unsettle his

mind to any degree, or take away from him in any measure his free, voluntary action.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 121.]

6. HOMICIDE ⟸140—THREATS TO KILL PRESIDENT—INDICTMENT.

An indictment for threatening to kill or inflict bodily harm upon the President, in violation of Act Feb. 14, 1917, need not state in whose presence the threat was made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 236.]

7. INDICTMENT AND INFORMATION ⟸110(17)—LANGUAGE OF STATUTE—THREATS TO KILL.

An indictment charging that defendant unlawfully, knowingly, and willfully made a threat against the President, to wit, a threat to take his life, or to inflict bodily harm upon him, such threat being uttered and spoken by defendant in words and substance as therein set out, was sufficient, since it is generally sufficient to charge a statutory offense in the substantial words of the statute, and the indictment apprised defendant with all reasonable certainty of the nature of the accusation, and enabled him to prepare his defense, and to plead any judgment rendered against him as a bar to any subsequent prosecution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291–294.]

Pemberton W. Stickrath was indicted for an offense. On demurrer to an indictment. Demurrer overruled.

Stuart R. Bolin, U. S. Dist. Atty., of Columbus, Ohio.
Timothy S. Hogan, of Columbus, Ohio, for defendant.

SATER, District Judge. On February 14, 1917, Congress enacted a law which provides that:

"Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both."

The indictment charges that the defendant on April 6th—

"did unlawfully, knowingly, and willfully make a threat against the President of the United States, to wit, a threat to take the life of or to inflict bodily harm upon the said the President of the United States, said threat being then and there uttered and spoken by the said Pemberton W. Stickrath in words and substance as follows, to wit: 'President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself'—contrary to the form of the statute," etc.

The sufficiency of the indictment is challenged by demurrer on the following grounds: (1) The person or persons to whom the threat was made are not named; (2) the threat was not communicated to the President; (3) the language employed by the defendant and set forth in the indictment does not amount to a threat; (4) the offense charged is not sufficiently described.

[1] The act is expressed in plain and unambiguous terms, and it must therefore be held that the Congress meant what it plainly expressed. If there is any room left for its construction, such construc-

tion must be with reference to the history and situation of the country, to ascertain the reason, as well as the meaning, of its provisions. Preston v. Browder, 1 Wheat. 115, 120, 121, 4 L. Ed. 50. In this country sovereignty resides in the people, not in the President, who is merely their chosen representative. To threaten to kill him or to inflict upon him bodily harm stimulates opposition to national policies, however wise, even in the most critical times, incites the hostile and evil-minded to take the President's life, adds to the expense of his safeguarding, is an affront to all loyal and right-thinking persons, inflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people as the sovereign power. The statute in question was enacted, not only for the protection of the President as the representative and chosen chief executive of the nation, but also to preserve the tranquility of the people and their peace of mind. Its passage came at a time when this country was about to be driven into and to engage in an epoch-making and substantially worldwide war, participation in which it had earnestly sought to avoid. It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aims and might, by direction or indirection, or both, endeavor to embarrass and cripple it in the great struggle upon which it was about to be forced to enter, and might by threats assail the President, and thereby inspire others to attempt his life, if they themselves should not undertake the commission of that crime. The enactment was opportune, not only on account of our past record of three presidential assassinations and the peculiar stress to which the country was about to be subjected, but that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed. In so far as diligent inquiry has disclosed, the statute under consideration is as unique as it is forceful. There are laws in many of the states against threats to extort money, to gain property or some other advantage, or to compel a person to act against his will but no enactment of a similar nature by the English Parliament, by Congress, or by the Legislature of any of the states has been found. The nearest approach to it is shown in the margin, and is found in article 1442, Vernon's Cr. St. 1916 (Texas Penal Code).[1]

[2] The language in which the threat set forth in the indictment is couched is sufficient to send the case to trial, if the indictment is otherwise sufficient. The mildest construction that can be put on the first of the quoted sentences is that "President Wilson should be killed." But "ought" is a stronger word than its frequently used synonym "should." "Should" may imply merely an obligation of propriety or expediency, or a moral obligation; but "ought" denotes an obligation of duty. Webster's Dict.; State v. Blaine, 45 Mont. 482, 124 Pac. 516. Indeed, the word "ought" may be used in the mandatory sense of

[1] Article 1442: "If any person shall threaten to take the life of any human being, or to inflict upon any human being any serious bodily injury, he shall be punished by a fine of not less than one hundred nor more than two thousand dollars, and, in addition thereto, he may be imprisoned in the county jail not exceeding one year."

"must." Jackson v. State, 32 Tex. Cr. R. 192, 22 S. W. 831. The language of the averred threat imports a surprise that the duty which should be performed by some one had not been done. The word "had" in the conditional clause of the last of the quoted sentences is not an auxiliary, but a principal, verb, and relates, not to the past, but to the future. If the defendant had wished to convey the thought that the killing of the President was past fulfillment, his language would have been "If I had had an opportunity, I would have done it myself." "Had" is the equivalent of "should have," and the thought expressed is, "If I should have an opportunity, I would do it myself." It is expressive of expectation and intention of fulfillment, but less vividly so than if it had been said, "If I shall have an opportunity, I will do it myself."

[3] It is the threat which is "knowingly and willfully" made that is condemned by the statute. "Knowingly" means "with knowledge." West v. Wright, 98 Ind. 335, 339. "Willfully" is defined by Webster to mean: "In a willful manner; obstinately; by design; with a set purpose." Doing a thing knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it. Felton v. U. S., 96 U. S. 699, 702, 24 L. Ed. 875; Potter v. U. S., 155 U. S. 438, 446, 15 Sup. Ct. 144, 39 L. Ed. 214. The words "knowingly and willfully" are used in the statute in substantially the same sense as in section 201 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1127 [Comp. St. 1916, § 10371]), which makes it a penal offense to obstruct or retard the passage of the mail, and the interpretation given them in U. S. v. Claypool (D. C.) 14 Fed. 127, 128, is applicable. As used in the statute and indictment, they are intended to signify that the defendant, at the time of making the threat charged against him, must have known what he was doing, and, with such knowledge, proceeded in violation of law to make it. They are used in contradistinction to "ignorantly" and "unintentionally." The offense denounced by the statute is completed at the instant the unlawful threat is knowingly and willfully made. It is not the execution of such threat, or (as claimed by defendant) a continuing intent to execute it, that constitutes the offense, but the making of it knowingly and willfully. If it be thus made, the subsequent abandonment of the bad intent with which it was made does not obliterate the crime. The probabilities that there will be at once set in motion the evil consequences resulting to the public from its promulgation (aside from those attendant on its actual execution) are vastly greater than the probabilities that the threat will be carried out.

[4, 5] There are statutes, such as sections 135, 136, and 140 of the Criminal Code (Comp. St. 1916, §§ 10305, 10306, 10310), which are directed against force or threats unlawfully employed or made against any member of a given numerous class. Section 145, relating to threats of informing or of withholding information for the purpose of extorting money, has its counterpart in many state statutes. The statute under consideration, however, runs against the commission of the specific act of threatening to kill or to injure, not any member of the public at large, or any member of a numerous class, but a single per-

son—the incumbent of the presidential office, whoever he may be at any given time. It contains no reference to the purposes for which a threat may be made. The motive which prompts its utterance is immaterial. The prohibited crime is not the less odious because it is sanctioned by what some person or class of persons may conceive to be a correct national policy, or adopt as a political faith, or designate as a religion. Davis v. Beason, 133 U. S. 333, 345, 10 Sup. Ct. 299, 33 L. Ed. 637; Knowles v. U. S., 170 Fed. 409, 411, 95 C. C. A. 579 (C. C. A. 8).

The situation in these respects is like that which arises from violations of section 211 of the Penal Code (Comp. St. 1916, § 10381). The person who knowingly deposits or causes to be deposited in the mail any obscene, lewd, lascivious, or other nonmailable matter is, by that section, guilty of an offense, whether in so doing he is actuated by malice or by a desire to correct a depraving habit and to improve the morals of those practicing it. U. S. v. Harmon (D. C.) 45 Fed. 414. The mailing of such matter is prohibited, regardless of the relationship of the sender and the addressee, and regardless, also, of the effect that the receipt of the article sent may have on the mind of the particular addressee. U. S. v. Musgrave (D. C.) 160 Fed. 700. The use of decoy letters by government officials in ferreting out crimes against the postal law is sanctioned by the highest authority. Grimm v. U. S., 156 U. S. 604, 610, 611, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. U. S., 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Rosen v. U. S., 161 U. S. 29, 42, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. That the nonmailable matter sent in response to a decoy letter does not arouse impure and libidinous thoughts in or produce any effect on the mind of the recipient constitutes no defense. U. S. v. Musgrave (D. C.) 160 Fed. 706.

If the defendant knowingly and willfully threatened to take the life of the President, the motive by which he was actuated will constitute no defense; nor is it necessary that the threat, even if communicated to the President, should have been of such a nature and extent as to disturb or unsettle his mind to any degree, or to take away from his acts in any measure that free, voluntary action which alone constitutes consent. The definitions of "threat" which are pressed upon the court's attention, some of which are found in 38 Cyc. 290, 28 Am. & Eng. Ency. Law, 141, State v. Benedict, 11 Vt. 236, 34 Am. Dec. 688, and State v. Brownlee, 84 Iowa, 473, 478, 51 N. W. 25, are not pertinent or helpful in determining either the interpretation or force of the statute or the sufficiency of the indictment. It is not to be presumed that the President, or any courageous successor to the presidential chair, will be disturbed, or intimidated, or deterred from action, by threats of the character mentioned, even if they be communicated to him. Considering the magnitude of the country and his remoteness in point of distance from the great majority of its inhabitants, to require as a prerequisite to conviction the communication to him of such threats, would operate to defeat almost entirely the purpose of the law, although but an inconsiderable number of persons are so deficient in correct thinking, morals, or patriotism as to be ca-

pable of such unlawful utterances. That the President should be required to travel as a witness to and from places at which offenders, real or alleged, may be tried, or that it should be necessary that government employés and law-observing citizens should inform him of threats made against him, and thereafter present themselves in court to testify to such fact of communication, was not in the legislative mind when the statute was enacted.

[6] Nor was it necessary that the threat should have been made to him personally or in his presence (38 Cyc. 295; State v. Brownlee, 84 Iowa, 473, 51 N. W. 25), or that the indictment should state in whose presence the threat was made, as will appear from an examination of the forms which have successfully passed the scrutiny of the courts. See 18 Ency. Forms, Pl. & Pr. p. 279 et seq., and notes.

[7] The indictment follows closely the language of the statute creating the offense. The offense is purely statutory. Under such circumstances, it is, as a general rule, sufficient for the indictment to charge the defendant with acts coming fairly within the statutory description, in the substantial words of the statute, without any further expansion of the matter. U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Pounds v. U. S., 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62; Byrne, Fed. Cr. Proc. § 146; McFain v. State, 41 Tex. 385; Longley v. State, 43 Tex. 490, 492, 493. The indictment apprises the accused, with all reasonable certainty, of the nature of the accusation against him, and he is thereby enabled to prepare his defense, and will be able to plead any judgment that may be rendered against him as a bar to any subsequent prosecution for the same offense. It is sufficient in form and substance.

Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598, on which the defendant relies, was, I think, correctly decided, but it is not pertinent. It will be conceded that the rule would be different, were an offense charged under the first clause of the statute. In that event it would not be sufficient to charge the offense in the statutory words alone. The letter, or an adequate statement of its contents, would have to be set out. Tynes v. State, 17 Tex. App. 123.

The demurrer is overruled.

In re A. J. ELLIS, Inc.

(District Court, D. New Jersey. April 19, 1917.)

BANKRUPTCY ⊂=314(1)—PARTIES ENTITLED TO PROVE CLAIMS—MORTGAGE TRUSTEE.

The trustee in a mortgage given by a corporation to secure an issue of bonds, who has foreclosed upon and sold the mortgaged property, cannot prove a claim for a deficiency against the estate of the mortgagor in bankruptcy, at least in a state where, as in New Jersey, he is not authorized to take a deficiency decree in the foreclosure suit, nor to sue for the deficiency at law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469, 471, 478, 483, 485.]

In Bankruptcy. In the matter of A. J. Ellis, Incorporated, bankrupt. On review of order of referee. Affirmed.

Runyon & Autenreith, of Jersey City, N. J., for trustee in bankruptcy.

Collins & Corbin, of Jersey City, N. J., for New Jersey Title Guarantee & Trust Co.

DAVIS, District Judge. A. J. Ellis, Incorporated, desiring "to raise money for the purpose of discharging and paying certain debts against the said corporation and its real estate, * * * incurred in its business, and to borrow money for the transaction of its business and franchises, * * * by a resolution of its board of directors authorized the making and issuing of its negotiable coupon bonds, each of the denomination of five hundred dollars ($500), numbered consecutively from 1 to 200, inclusive, * * * to the amount in the aggregate" of $100,000. On June 15, 1910, the said corporation made and issued its 200 bonds, numbered as aforesaid, and made payable to bearer, or to the registered holder thereof, on June 15, 1920. To secure the payment of said bonds the said A. J. Ellis, Incorporated, executed and delivered to the New Jersey Title Guarantee & Trust Company, as trustee, its mortgage on certain of its real estate and personal property. Thirty-six of said bonds were paid in full and canceled. Default was made in the payment of interest and taxes on the remaining 164 bonds, whereupon, in accordance with the terms of the mortgage, the same became due and payable, and the mortgage was foreclosed. The proceeds of the foreclosure sale were insufficient to pay the indebtedness on the bonds. The deficiency, with costs, amounted to $37,727.47. The foreclosure sale was made on December 9, 1915. A. J. Ellis, Incorporated, was adjudicated a bankrupt on March 4, 1915, and the New Jersey Title Guarantee & Trust Company proved before the referee in bankruptcy claim for the deficiency of $37,727.47, which was disallowed by the referee. The order of the referee disallowing the claim is before the court for review.

Several objections were filed to the claim, but by agreement of counsel all were withdrawn, except the objection that the trustee for the bondholders is not a proper party to prove the claim in bankruptcy, and that the claims on the individual bonds, aggregating the said deficiency, must be proved by the individual bondholders. The trustee, on the other hand, maintains that it has authority, as agent of the bondholders, to prove the claim of deficiency for them.

The trustee is the proper person to prove the claim for deficiency, counsel say, because: 1. The mortgage creating the trusteeship contains a covenant that the mortgagor will pay all of the bonds when they become due. This is a covenant between the mortgagor and the trustee. 2. No one bondholder could enforce collection of the amount due on his bond, because (1) recourse was primarily against the mortgaged security, which had to be taken by the trustee; (2) because a single bondholder could not collect the entire debt and could not collect the amount due on his bond without proceeding to collect on the other bonds. 3. The trustee was "the holder of the whole bonded

debt." 4. The mortgagor promised to pay the bonds at the office of the trustee.

It is true that the mortgagor promised to pay all the bonds when they became due; but, so far as the trustee is concerned, it made no provision for paying them, except with the mortgage security. Counsel is in error in the contention that the trustee is the holder of the whole bonded debt due from the bankrupt to the bondholders. It had been made, by the mortgage, holder of certain securities for the benefit of the whole bonded debt. The trustee had the authority, and exercised it, by realizing, by foreclosure, upon the mortgage security for the benefit of all the bondholders pro rata. In that, the trustee acted for all the bondholders. The only relation which, in any way, ties the trustee either to the mortgagor or the bondholders is the property covered by the mortgage. All the property of A. J. Ellis, Incorporated, was, in general, subject to prior claims, responsible for the payment of the bonds. Certain of its property, however, was specifically set apart to secure the payment of these bonds, and this property was vested in the trustee for this purpose alone. The relation of the mortgagor and of the bondholders to the trustee began and ended with that security; and when the trustee sold the mortgage security and applied the proceeds thereof to the payment of the bonds, it exhausted its authority. The fact that the mortgagor promised to pay the bonds at the office of the trustee has no significance. Any other place might have been designated.

A careful reading of the trust mortgage will reveal that the authority of the trustee was confined to the mortgage security. Even if such were not the case, and the mortgage had conferred upon the trustee the naked authority to prove a claim for any deficiency, or to institute a suit at law therefor, the trustee could not have done so, for it is not the holder of the bonds nor are the bonds payable to it. "Who may maintain a suit is a matter of law, not subject to control by the private conventions of parties." The trustee might have a stronger case, if the decree in the foreclosure proceedings might have been rendered for the full amount of the debt which it secured, as may be done in Minnesota and in some other states. In New Jersey, a separate suit at law upon the bond is necessary to secure judgment for deficiency in the foreclosure of mortgages.

"That in all proceedings to foreclose mortgages hereafter commenced, no decree shall be rendered therein for any balance of money which may be due complainant over and above proceeds of the sale or sales of the mortgaged property, and no execution shall issue for the collection of such balance under such foreclosure proceedings."

"That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit."

Sections 47 and 48, Comp. Stat. N. J., vol. 3, pp. 3420, 3421.

The cause of action arising out of the bonds in this case was not merged in the deficiency decree. The trustee could not prosecute a separate action at law upon the bonds in order to secure a deficiency judgment; neither can it prove this deficiency claim, which, however, need not be reduced to judgment in order to be proved. In re McAusland (D. C.) 235 Fed. 173. There is some authority in apparent conflict with the conclusion herein reached (Grant v. Winona, etc., S. W. R. R. Co., 85 Minn. 422, 89 N. W. 60; Laing v. Queen City Ry. Co. [Tex. Civ. App.] 49 S. W. 136), yet the decisions in those cases are explained in part, at least, by the provisions contained in the mortgage and the provisions of the statute in those jurisdictions. A deficiency decree in those jurisdictions may be entered in the foreclosure proceedings. The following cases seem to justify the above conclusion:

Hybart v. Parker, Common Bench Reports (N. S.) 209 (1858). The defendant and others in this case were adventurers and shareholders in a company formed upon the cost-book principle for working certain mines. On page 212, the court said:

"There being a difficulty in enforcing the payment of calls by the shareholders in cost-book mines, the adventurers, in order to get rid of that difficulty, agree amongst themselves that the amount of calls due from any one of them shall be considered as a debt due to the purser, who shall have power to sue for it, thus violating the law in two respects: First, by agreeing that one of the partners may sue his copartner; secondly, by agreeing that an action shall be brought upon a contract by one who is no party to it, and between whom and the person sued there is no privity. They might as well agree that no pleas shall be pleaded except payment. This is neither more nor less than the case of an action brought for a debt due to the company by a person who is a mere servant of the company, and who has no connection whatever with the cause of action in respect of which he is suing."

Evans v. Hooper, Queen's Bench Division, 45 (1875). In this case, on page 48, the court said:

"The declaration states a policy of insurance, in which the defendant is the person insured, and the British Marine Insurance Association are the insurers and underwriters. The policy was signed on their behalf by their manager, and there is a rule which professes to authorize the manager to sue the person insured for contribution in case of deficiency of funds. If the matter stopped there, that would amount simply to an attempt by an unincorporated company to authorize their manager to sue on their account. Such an agreement to authorize an agent to sue on behalf of the partnership is a contract that the law does not recognize."

Gray et al. v. Pearson, Law Reports, 5 Common Pleas, 568. The court in this case, on page 574, said:

"I am of the opinion that this action cannot be maintained, and for the simple reason—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure—that the proper person to bring an action is the person whose right has been violated. * * * The plaintiffs are bare agents, who, in making the payments they did, were not bound to go beyond the funds of the association. They disbursed no money of their own, or, if they did so, it was not by the authority of the defendant. They were simply agents for the persons whose rights are alleged to have been violated; that is to say, of all the other members of the association except the defendant, or of the persons to whom the payments in respect of which they sued should have been made. It is, in effect, an attempt to substitute a person as nominal plaintiff in lieu of the persons whose rights have been violated."

On page 576 the court further said:

"This is an action brought by the plaintiff to recover contributions or calls due not to them, but a body which they in the capacity of managers represent. There is no privity between the plaintiffs and the defendant. The contract is between the defendant and the other members of the association. The power of attorney—assuming that the plaintiffs are properly substituted for John Gray—enables them to sue not in their own name but in 'the several and respective names' of the members of the association. This is an attempt to do that which has been frequently but fruitlessly attempted before, viz. to get rid of the difficulty of a large number of persons suing in their own names, to appoint a public officer without obtaining an act of Parliament or a charter of incorporation."

In the case of Knorr v. Bates et al., 14 Misc. Rep. 501, 503, 35 N. Y. Supp. 1060, 1062, the court said:

"Who shall be defendant in an action the law prescribes, and it is not competent to parties, by private convention, to supersede the legal provision."

In the case of Mackay v. Randolph Macon Coal Co. et al., 178 Fed. 881, 102 C. C. A. 115, the mortgage was foreclosed by the trustee, and there was a deficiency of $2,236,566.32, and a decree for that amount was entered in the foreclosure proceedings. The trustee proved the claim for this deficiency for the bondholders in bankruptcy. The bondholders, "being apprehensive that the trustee under the mortgage might not be a 'creditor,' * * * made due proof of the same before the referee, and asked that they be allowed as claims against the estate. The referee, being of the opinion that the bonds had been merged in the deficiency judgment, disallowed the claims, and his ruling was affirmed on appeal to the District Court. The bondholders seek a review of that action." The Circuit Court of Appeals for the Eighth Circuit said:

"It is manifest that the appeal turns mainly upon the question whether the cause of action arising out of the bonds was merged in the deficiency decree. * * * In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties. * * * Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) The trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds. (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee. The deficiency decree, therefore, must be referred to the covenant in the mortgage, and, like the mortgage itself, is collateral to the bonds, and constitutes no bar to an action thereon. The debt underlying both is the same, but the promises are distinct and give rise to separate causes of action."

In the case at bar it is maintained on behalf of claimant that in the trust mortgage itself "there is clear implication of agency, broad enough to warrant the proof that was filed" by claimant. The mortgage did not and could not give the trustee authority to prove the claim for deficiency.

The order of the referee disallowing the claim is affirmed, and the petition dismissed.

UNITED STATES v. CHESAPEAKE & O. RY. CO.

(District Court, E. D. Kentucky. October 14, 1916.)

No. 2980.

RAILROADS ⟸229—SAFETY APPLIANCE ACT—CONSTRUCTION.

Safety Appliance Act April 14, 1910, c. 160, § 4, 36 Stat. 299 (Comp. St. 1913, § 8621), which provides that a car properly equipped, which has become defective or insecure while in use, "may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired," without liability for the penalties imposed, does not permit a railroad company to move, without penalty, from one point to another, a defective car, not known to be defective, and which is not so moved for the purpose of repair, although in fact it is hauled to the nearest available point for repair, and is there repaired.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

At Law. Action by the United States against the Chesapeake & Ohio Railway Company. On demurrer to certain paragraphs of the answer. Demurrer sustained.

Thos. D. Slattery, U. S. Dist. Atty., of Covington, Ky., for United States.

Galvin & Galvin, of Cincinnati, Ohio, for defendant.

COCHRAN, District Judge. This cause is before me on plaintiff's demurrer to defendant's answer to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and thirteenth paragraphs of the petition. It is a prosecution under the Safety Appliance Act. The violation charged in each of these paragraphs is the hauling from Covington, Ky., toward Silver Grove, Ky., about 10 miles away, of an interstate car with a defective coupling apparatus. The answer presents the same defense to each of these paragraphs. That defense is that each of the cars was received from a connecting railway at Cincinnati, Ohio, just north of Covington, to be hauled to Silver Grove, a terminal on defendant's road and where it maintained its yard; that it was in a safe and proper condition when it left Cincinnati; that defendant had no inspectors or repairmen and made no inspections or repairs at Covington; that it had inspectors, repairmen, and all the facilities for making repairs at Silver Grove; that the defect complained of was discovered and repaired at that point; and that Silver Grove was the first point at which such repairs could have been made after the defect occurred and the discovery thereof. It is not alleged that

the defect was discovered at Covington and the car hauled to Silver Grove to be repaired. Indeed, the implication, if not admission, is that it was not discovered until the car reached Silver Grove. The case presented by the answer, therefore, is this: The defect arose between Cincinnati and Covington, after defendant began to haul the car; it hauled the car in its defective condition from Covington to Silver Grove; it did not discover the defect until the car reached Silver Grove; and no provision had been made by it at Covington, or, for that matter, at any point between Covington and Silver Grove, for discovering the defect.

Beyond question, under the Safety Appliance Act as it stood before the amendment of April 14, 1910, the haulings of these cars were violations thereof. According to the construction placed on the act by the Supreme Court, though a defect arose from no fault of the railroad company, and though it was ignorant thereof and in no fault in not discovering it, if the railroad company hauled it any distance for any purpose, it violated the act. The amendment was enacted to relieve the statute of, at least, some of its absoluteness. The question is: To what extent it did so. It provides that, in case the coupling apparatus becomes defective whilst the car is being used, it "may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired." It will be noted that the only hauling of a defectively equipped car which the amendment permits is from the place where the defective condition was first discovered to the nearest repair point, and, as it has been construed, then only for the purpose of repair. It says nothing about hauling such car before such discovery. Possibly there is room to say that it did not occur to the amendment, if we may personify it, that there would be any violation of the act if it was hauled before discovery, at least if there was no fault on the part of the railroad company in not discovering it sooner, and, even more than this, to wit, that it is the presupposition of the amendment that there would be no violation in such a case. It would seem to be just as harsh to punish a railroad company for hauling a defective car, when it was not at fault in discovering its condition, as for hauling it after discovery to a repair point for repairs, when it could not be repaired at the place of discovery. If the permission of the amendment is limited to the latter hauling, what we have then is this: If a car becomes defective out on the road at a point where it cannot be repaired, and it is at once discovered, there is no violation of the act in hauling the car to the nearest point for repairs; but if it is not discovered there is a violation in hauling the car from that point thereto, though there may be no fault in not discovering it before reaching such point, and it is discovered and repaired thereat.

The decisions of the federal courts which have had to deal with this question, however, go far toward holding, if they have not actually held, that the amendment goes no further. The reasoning upon which this position is based is that, as under the original act, any hauling of a defectively equipped car was a violation thereof, and the amendment only permits hauling of such a car after the discovery to the nearest repair point for repairs, any other hauling and hence a hauling before

discovery, though without fault, in not discovering, is a violation thereof. In the case of C., B. & Q. R. R. v. United States, 211 Fed. 12, 127 C. C. A. 438, a decision of the appellate court of the Eighth circuit, a car was received by the defendant from the Atchison, Topeka & Santa Fé Railroad Co., at Kansas City, Mo. The defendant has a yard therein known as the "Twelfth Street yard." Whether the car was received at this point does not clearly appear. But before it received the car it was inspected and found to be in proper condition, and it was hauled by defendant from that yard across the Missouri river, over its bridge and main line, to its Murray Street yard. When it reached there the defendant for the first time discovered that the coupling appliance was out of repair. It was held that, if the car was in a defective condition in the Twelfth Street yard, there was a violation of the act, notwithstanding it was not discovered until it reached the Murray Street yard. The decision was based on two reasons—that the defect was of such a character that it could have been repaired at the Twelfth Street yard, and the car was not hauled to the Murray Street yard for repairs. Possibly, if the car was defective whilst in the Twelfth Street yard, defendant was not without fault in not discovering it there; and it is to be noted that the lower court instructed the jury that, if the defect arose whilst the car was in transit between the two yards, there was no violation of the act.

In the case of United States v. Trinity & B. V. R. Co., 211 Fed. 448, 128 C. C. A. 120, a decision of the appellate court of the Fifth circuit, a car was hauled from Tom Ball, through Houston, to Galveston. It was hauled from Houston in a defective condition. It was inspected at Tom Ball and found to be in good condition. Defendant had no inspectors or repair shops at Houston, but did have them at Galveston. It did not discover the defective car until it reached Galveston. Houston was a few hours' run from Tom Ball and Galveston a few hours' run from Houston. It was held that the defendant was liable. It was stressed, however, that it was not shown that the hauling to Galveston was necessary to repair the defect, and it could not have been repaired, except there. Judge Call said:

"Bear in mind that under the Safety Appliance Act of 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605–8612]), and the amendments, ignorance of defects does not excuse. The duty to have and maintain in good order the safety appliances required is a positive duty imposed on the carrier, * * * and that the defendant in the instant case seeks to avoid responsibility for the violation of this duty by pleading the proviso of the act of 1910. By all the canons of construction, it must clearly bring itself within the terms of the proviso before it can demand immunity."

The case of United States v. Chesapeake & Ohio Ry. Co., 213 Fed. 748, 130 C. C. A. 262, a decision of the appellate court from the Fourth circuit is not in point. The case came within the express terms of the amendment. The question was whether certain hauling after the discovery of the defective condition was permitted thereby. A statement in Judge Pritchard's opinion as to the purpose of the amendment may be quoted. It is:

"Any movement of a defective car was held to be a violation of the act as originally passed. It was undoubtedly the purpose of Congress in adopting

the amendment of 1910 to somewhat relax the rigid rule which had theretofore been announced as to the time within which repairs of defective cars should be made."

The case of Chesapeake & Ohio Ry. Co. v. United States, 226 Fed. 683, 141 C. C. A. 439, another decision of the appellate court of the Fourth circuit, is most in point of all the cases cited as bearing on the question here. The car in question was brought by a train into Fulton Street yard in Richmond, Va. It was hauled from there to the Second Street yard, and from there to a siding in the Ninth Street yard to be unloaded. Inspectors were maintained at the Fulton Street yard and Ninth Street yard, but not at the Second Street yard. It was inspected at the Fulton Street yard and found in good condition, and again at the Ninth Street yard and found to be in bad condition. It was in fact defective when in the Second Street yard, and hauled from there to the Ninth Street yard. It was held that defendant was liable, notwithstanding it was ignorant of the defective condition of the car at the time it was so hauled, and there was no intimation that it was thought that defendant was in fault in not discovering it sooner. Judge Knapp said:

"Without multiplying citations, it is sufficient to say that the original act as construed by the courts made the carrier liable for any and every movement on its line, in interstate commerce, of a car whose coupling apparatus was out of order. Under no circumstances could such a car be hauled or used without violating the statute; and the penalty was incurred, when a car was moved in a defective condition, even if the carrier had been vigilant to discover the defect and was actually unaware of its existence. Indeed, it was the severity of this absolute prohibition, which did not exempt the necessary movement to a repair shop, that led to the remedial amendment above quoted. But the relief thereby granted is limited by its express terms and manifest intent, and there is no warrant for its further extension. It permits the transfer without penalty of a disabled car to 'the nearest available point' where it can be repaired, provided such transfer is necessary because the defects cannot be remedied at the point where they are first discovered, and that is the only movement which does not subject the carrier to liability."

In view of these decisions, I cannot see my way clear to uphold the defense, and hence must sustain the demurrer.

MILLER v. NORTHERN BREWERY CO.

(District Court, D. Oregon. May 21, 1917.)

No. 7005.

1. GUARANTY ⊂⊃77(2)—RIGHT OF ACTION—NECESSITY OF PROCEEDING AGAINST PRINCIPAL—"ABSOLUTE GUARANTY"—"CONDITIONAL GUARANTY."

A guaranty of the faithful performance of all the terms and covenants of a lease, including the payment of rent, was an absolute and not a conditional guaranty, and the lessor could sue thereon without exhausting his remedy against the lessee; a "conditional guaranty" being one importing the happening of some contingency other than the default of the principal debtor, and being usually an undertaking to be liable for the principal's default in case satisfaction cannot be obtained from the principal without reasonable diligence, while an "absolute guaranty" is one under

which the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 89.

For other definitions, see Words and Phrases, First and Second Series, Absolute Guaranty; Conditional Guaranty.]

2. CORPORATIONS ⇐484(3, 4)—CORPORATE POWERS—GUARANTOR OR SURETY.

As a general rule no corporation has power, without express authority conferred by the corporate articles, to become a surety or guarantor for another by any form of contract or indorsement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815.]

3. CORPORATIONS ⇐484(3)—CORPORATE POWERS—GUARANTEEING PAYMENT OF RENT.

A corporation authorized to manufacture, buy, sell, and deal in beer and other liquors, and to do all things incident to or convenient in carrying out such purposes, had authority to guarantee the payment of rent under a lease to persons who agreed to handle its beer in any saloon conducted upon the leased premises, and who further agreed that their failure to handle its beer should operate as an immediate assignment and transfer of the lease to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815.]

At Law. Action by Alex E. Miller against the Northern Brewery Company. On demurrer to the complaint. Demurrer overruled.

Sol Bloom and W. M. Gregory, both of Portland, Or., for plaintiff.
Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an action to recover against the defendant upon its guaranty. The defendant, by its corporate powers, is authorized:

"To manufacture, produce, buy, sell and deal in and with beer, ale, malt liquors, malt, ice and other similar products, brewers' supplies, tools, implements and machinery and utensils of all kinds, and to do all things incident to or convenient in carrying out the foregoing purposes."

On September 18, 1911, the plaintiff entered into a lease of certain premises to E. J. Blazier and August Kratz, for a term of 10 years, at a certain rental, payable in monthly installments. On the same date the defendant corporation entered into a contract of guaranty with the plaintiff, whereby it is stipulated that:

"The undersigned, for itself, its successors and assigns, does hereby guarantee the faithful performance of all of the terms and covenants of the foregoing lease on the part of the said E. J. Blazier and August Kratz, the lessees therein named, including the payment of the rentals therein provided for."

On the same date, also, the defendant entered into an agreement with Blazier and Kratz, whereby Blazier and Kratz agreed to handle, in any saloon or saloons that might be conducted upon the leased premises, only the draught and home-bottled beer manufactured by the Northern or Star Brewery Company. It was further agreed that default of the said Blazier and Kratz in selling the product of the defendant company over their counter should operate as an immediate assignment and transfer to the defendant of all the right, title, and interest of the said lessees in and to said lease, and that thereupon the

defendant should have the right to assume control, under the terms of said lease, of said property. The prayer is for certain unpaid rentals upon said lease.

The defendant company has interposed a demurrer to the complaint, and two grounds are urged in support thereof, namely: (1) That the defendant company is not liable, for the reason that the act of guaranteeing the payment of the rentals upon the lease was ultra vires and beyond the power of the company to undertake; and (2) that the plaintiff is not entitled to sue upon such guaranty until after he has exhausted his remedy against the lessees in the lease. I will discuss the last contention first.

[1] On the part of the plaintiff it is urged that the guaranty of the defendant company is absolute, and not conditional, and that therefore he is not required to exhaust his remedy against the principal before he is entitled to proceed against the guarantor. The question thus hinges upon whether this is an absolute or a conditional guaranty of which we are treating.

"A conditional guaranty imports the happening of some contingency other than the default of the principal debtor. The usual form of the conditional guaranty is an undertaking whereby the guarantor is liable for the principal's default in case the satisfaction of the principal obligation cannot with reasonable diligence be obtained from the principal. An absolute guaranty of payment differs from a conditional guaranty against loss as the result of nonpayment of a debt in that in the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, while in the second the contract is in the nature of a guaranty of collection, no liability being incurred until after, by the use of due diligence, the guarantee has become unable to collect the debt from the principal debtor." 12 Ruling Case Law, § 13, p. 1064.

The distinction is very well illustrated by two cases which I shall cite:

In Pierce et al. v. Merrill et al., 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56, the defendants guaranteed payment of a note and mortgage at the times and according to the terms expressed therein, and it was held that the guaranty was not one with a condition precedent for the enforcement of defendants' liability—that it was absolute. It was said by the court, quoting from the local statute, which is simply a statement of the law as it prevailed prior to the adoption of the same, that:

"A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor."

And further:

"To hold that payment was not to be made by defendants until after a foreclosure of the mortgage would be to ignore their agreement that payment should be made 'at the times and according to the terms of said note and mortgage.'"

In Burton et al. v. Dewey et al., 4 Kan. App. 589, 46 Pac. 325, the guaranty was against any loss by reason of a loan negotiated, and it was held to be a conditional guaranty, and that the guarantee was not entitled to recover as a result merely of the nonpayment of the debt, nor "until it is shown that the debt is not, by reasonable effort, collectible from the principal debtor."

The guaranty in the case at bar is for the faithful performance of all of the terms and covenants of the lease, including the payment of rentals; and I am impressed that the proper construction of such guaranty is that it is absolute in its terms, and not conditional, and that the defendants' contention, therefore, cannot prevail.

[2] Now, as to the question whether the guaranty was ultra vires of the power of the corporation, the general rule is that, without express authority conferred by the corporation articles, no corporation has the power, by any form of contract or indorsement, to become a surety or guarantor for another. Carney v. Duniway, 35 Or. 131, 138, 57 Pac. 192, 58 Pac. 105. So it has been held that:

"A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is 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." Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 567, 19 Sup. Ct. 817, 823, 43 L. Ed. 1081.

[3] But it is insisted upon the part of the plaintiff that the act of the defendant company in guaranteeing the payment of rents under this lease was not strictly beyond its corporate powers, but that it was incidental to the authority conferred by the articles of incorporation. In the case of Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101, which is a case almost parallel to this, it is held that the company did not exceed its corporate authority in guaranteeing contracts of this nature. The court there said:

"The purpose of the defendant's organization was to manufacture and sell beer. Doubtless it was competent to make any contract, which was convenient and adapted to further that purpose, which was not against public policy. No doubt, it was within its competency to rent a place for the sale of its beer by its agents or servants. To rent a place where one of its customers should retail its beer would seem, in a similar manner, to further the purpose of its incorporation. At least, it is not clearly foreign to that purpose."

And so, in the case at bar, the defendant company was engaged in the manufacture and sale of its beer, and it not only entered into the obligation of guaranteeing the payment of the rental upon the leased property wherein its beer was to be sold, but it went further, and entered into an agreement with the lessees whereby the default or refusal of the lessees to sell its beer over their counters would operate as an immediate assignment and transfer of the lease to the defendant. So that this case is even stronger against the defendant than the Winterfield Case.

Another case, from Michigan, is very much in point, that of Timm v. Grand Rapids Brewing Co., 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186. In that case the purpose of the brewing company, as stated in its articles, was "the manufacture and sale of malt and all kinds of malt and fermented liquors and aerated and charged waters." The corporation became the surety upon a bond of a saloon keeper, who agreed to sell its beer; and it was held, after very careful and well-reasoned consideration by the court, that the act of the corporation was not beyond its corporate authority.

In view of these authorities, and the principles therein promulgated, I am impelled to the conclusion that the defendant in the present case is liable, under the allegations of the complaint.

The demurrer will therefore be overruled.

THE TOLEDO.

(District Court, D. New Jersey. March 14, 1917.)

ADMIRALTY ⇐19 — JURISDICTION — MARITIME TORTS — INJURY TO MARINE CABLE.

Admiralty has jurisdiction of a suit for the negligent injury by a vessel of a marine cable resting on the bottom under navigable waters, although the ends of the cable are supported on the shore.

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

In Admiralty. Suit by the Postal Telegraph Cable Company against the dredge Toledo. On exceptions to libel. Exceptions dismissed.

Exceptions to libel based upon ground that injury to a cable laid upon the bottom of the waters of Kill von Kull, and attached to the land on each side of the Kill von Kull, is not an admiralty and maritime tort.

Vredenburgh, Wall & Carey, of Jersey City, N. J., for libelant.
Foley & Martin, of New York City, for claimant.

DAVIS, District Judge. Libelant instituted proceedings in the above-stated cause against the dredge Toledo, her tackle, etc., for the recovery of damages alleged to have been done on the 8th day of July, 1916, by the dredge Toledo to a submarine telegraphic cable laid on the bottom under the waters of the Kill von Kull from the shore at Elizabeth, N. J., to the shore at Staten Island, N. Y. The injury is alleged to have been done about 200 feet from the New Jersey shore, at a point admittedly in the tidal and navigable waters of the United States, "at a place where the jurisdiction of admiralty in cases of tort normally attach, at least in all cases where the wrong was of a maritime character." Claimants filed exceptions to the libel on the ground that it did not set forth an admiralty and maritime cause of action; the cable alleged to have been damaged not being a maritime object, instrument, or facility of navigation, because it rested upon and was incorporated with the soil under the waterway, and operated as an integral part of the libelant's system of telegraphic wire extending throughout the United States. The whole question at issue is based upon "the objection to the jurisdiction of the court, upon the theory that the cable was a land structure, and that no maritime damage occurred of which jurisdiction can be had by admiralty."

The decisions seem to be against the contention of claimants. Admiralty has taken jurisdiction in a number of cable cases, in which, however, the question of jurisdiction was not raised. Stephens v. Western Union Telegraph Co., 22 Fed. Cas. 1301; Ladd v. Foster (D.

C) 31 Fed. 827; Albina Ferry Co. v. The Imperial (D. C.) 38 Fed. 614, 3 L. R. A. 234; The City of Richmond (D. C.) 43 Fed. 85; The William H. Bailey, 103 Fed. 799, affirmed 111 Fed. 1006, 50 C. C. A. 76; The Anita Berwind (D. C.) 107 Fed. 721. There are two recent cases in which the point in issue here has been raised and decided adversely to claimants' contention. Postal Telegraph Cable Co. v. P. Sanford Ross, Inc. (D. C.) 221 Fed. 105. In this case, Judge Chatfield of the Eastern district of New York, reviews the authorities and holds that, notwithstanding the cable is laid on the bottom of tidal waters of the United States and attached to the land at each end of the submarine cable, admiralty nevertheless has jurisdiction. In the case of Thomas v. Lane, 2 Sumn. 1, 9, Fed. Cas. No. 13,902, Mr. Justice Story said:

"I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately, claimed to have any jurisdiction over torts, except such as are maritime torts; that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide."

Of this rule Mr. Justice Hughes, in the case of the Atlantic Transport v. Imbrovek, 234 U. S. 52, 59, 34 Sup. Ct. 733, 734 [58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157] said:

"This rule—that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of The Genesee Chief, 12 How. 443 [13 L. Ed. 1058]), of navigable waters for tide waters."

In the case of the Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. 209, 215, 16 L. Ed. 433, the court said:

"The jurisdiction of courts of admiralty in matters of contract depends upon the nature and character of the contracts, but in torts it depends entirely on locality."

In the case of The Plymouth, 3 Wall. 20, 35, 18 L. Ed. 125, the court said:

"The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters—where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

Mr. Justice Hughes again said, in the case of The Raithmoor, 241 U. S., 166, 176, 36 Sup. Ct. 514, 516 [60 L. Ed. 937]:

"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 awaiting 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."

In the case of Postal Telegraph Cable Company v. P. Sanford Ross, supra, Judge Chatfield said:

"The accident, therefore, occurred within the physical limits of admiralty jurisdiction, it was occasioned by the operations of the anchor and the handling of the boat, and the cable itself is akin rather to matters connected with the ocean than to those of the land, although it was supported at each end upon the shore."

He further says:

"But suppose an injury were caused to the Atlantic cables, on the high seas, by a steamer. Could it be held that, because the cable had a landing on shore, it was a land fixture, and was not an object wholly within the maritime jurisdiction, where it lay supported by the bottom and not by its own buoyancy? If so, no damage by a boat to a sunken dry dock or vessel could lie in admiralty, if there were a shore mooring, and if it could not at the time be navigated."

This decision was followed in the case of United States v. North German Lloyd (D. C.) 239 Fed. 587, as reported in the New York Law Journal on Tuesday, January 20, 1917. This was a case in which it was alleged that the anchor of the Princess Alice had been negligently allowed to injure the government cables extending from Ft. Wadsworth to Ft. Hamilton. The question of jurisdiction in that case was raised, and Judge Manton held that admiralty had jurisdiction.

It would seem that the cases cited above were, on principle, correctly decided. When a vessel on the high seas or navigable waters of the United States commits a tort by negligently injuring a cable, the contention that the cable was lying on the bottom of the river or sea, and the ends thereof ultimately reached the land, and therefore admiralty does not have jurisdiction, ought not prevail, when all the other elements necessary to constitute a maritime tort are present.

The exceptions will therefore be dismissed.

THE ROSE REICHERT.

(District Court, S. D. New York. April 17, 1917.)

COLLISION ⇐154—SUITS FOR DAMAGES—COSTS.

Where, in a suit in personam for collision against respondents, who were at the time towing libelant's vessel under a contract and had engaged another tug to assist, respondents brought in such tug, which was adjudged solely in fault, the respondents in personam are entitled to recover their costs against libelant; the suit being one sounding in tort, and not for breach of contract.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308.]

In Admiralty. Suit for collision by the Booth Steamship Company, Limited, against Frederick B. Dalzell and W. Freeland Dalzell, doing business as Fred B. Dalzell & Co., in which the tug Rose Reichert, the Reichert Towing Line, Incorporated, claimant, and the New York Central & Hudson River Railroad Company were impleaded. On settlement of costs.

Haight, Sandford & Smith, of New York City, for libelant.

Burlingham, Montgomery & Beecher, of New York City, for respondents Dalzell.

Foley & Martin, of New York City, for impleaded claimant.

Harrington, Bigham & Englar, of New York City, for impleaded respondent.

MAYER, District Judge. Counsel have requested that the court indicate in a formal memorandum the views entertained in respect of the allowance of costs to be made in the interlocutory decree to be entered as the result of the trial of this action.

The action was brought by Booth Steamship Company, Limited, owner of the steamship Francis, for damages sustained by the Francis, resulting from a collision on December 6, 1915, with a car float of the New York Central & Hudson River Railroad Company, which was made fast to Pier 5, New York Dock Company, while in tow of the tugs Dalzelline and Carroll B, owned by Fred B. Dalzell & Co., and of the Rose Reichert, owned by the Reichert Towing Line, Incorporated. Libelant filed its libel in personam on or about December 11, 1915, against Fred B. Dalzell and W. Freeland Dalzell, doing business as Fred B. Dalzell & Co. Respondents then, by petition under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi), brought into the suit in rem the tug Rose Reichert and in personam the New York Central & Hudson River Railroad Company.

The case having duly been tried, the court held the Rose Reichert solely at fault, and allowed the libelant a decree against the Reichert, with costs, and further allowed the New York Central costs as against Dalzell Bros. Such provision as was to be made in respect of costs because of the dismissal of the libel as against Dalzell Bros. was reserved until the settlement of the interlocutory decree. The awards of costs in favor of libelant against the Rose Reichert and in favor of the New York Central against Dalzell Bros. are not contested.

The sole question is whether Dalzell Bros. shall have costs against libelant. Obviously, the Rose Reichert should pay but one bill of costs. She is liable for her tort only to the person upon whom she inflicted the injury, which in this case was libelant. The Rose Reichert did not bring any person or res into the action, but was brought in. Therefore that she should pay costs only to libelant seems too clear for further discussion. As between libelant and respondents Dalzell, the libel inter alia sets forth:

"Third. On or about the 4th day of December, 1915, the libelant, through its agent, entered into a contract with the said respondents for the towing of the said steamship Francis from the Morse's Dry Dock and Repair Yard, in the borough of Brooklyn, city of New York, to Pier No. 4, New York Dock Company, East River, borough of Brooklyn, city of New York."

"Fifth. Said collision and damage were not caused by or through any fault of the libelant, or the officers and crew of the steamship Francis, but were caused wholly through the fault and negligence of the respondents' agents or employés, in the following among other particulars which will be shown at the trial: (1) In that they did not keep a proper lookout. (2) In that they did not tow the steamship Francis properly. (3) In that they did not maneuver the said steamship so as to prevent collision with the said car float."

The allegation of paragraph "third" was admitted by these respondents in their answer, but the allegations of paragraph "fifth" were denied. It was shown at the trial that the respondents contracted to move libelant's steamship, and engaged the services of the tug Rose Reichert to assist in the operation. It also appeared, and the court held, that the tug Dalzelline, belonging to respondents, was without fault, and that the tug Rose Reichert was solely responsible for the collision.

The argument of libelant is that, because of the contract between libelant and these respondents, and because there was no contractual relationship between the tug Rose Reichert and libelant, therefore libelant is not to be charged with costs. The theory apparently is that as between libelant and these respondents the master of the Rose Reichert was the agent of the respondents. This whole contention necessarily rests upon the proposition that the libel was brought to recover for the breach of a contract. As was said in The Oceanica (D. C.) 144 Fed. 301:

"The misconduct complained of was not the result of a breach of maritime contract. The injuries to the barge were sustained solely in consequence of the negligence of the towing steamer. And, according to the universally accepted doctrine, this action is brought ex delicto against the ship, for which she may be held liable, irrespective of any responsibility that may arise as a result of a breach of contract. The Barnstable, 181 U. S. 465, 21 Sup. Ct. 684, 45 L. Ed. 954; The Malek Adhel, 2 How. 210 [11 L. Ed. 239]; The Quickstep, 9 Wall. 665 [19 L. Ed. 767]; Ralli v. Troop, 157 U. S. 386 [15 Sup. Ct. 657, 39 L. Ed. 742]."

The Oceanica was reversed, but on this particular point it appears quite clearly that the Circuit Court of Appeals agreed with the view of the District Court. 170 Fed. at page 898, 96 C. C. A. 69. See also The Quickstep, 9 Wall. 665, at page 670, 19 L. Ed. 767.

The reasoning of these cases, it seems to me, fully applies to the case at bar. The action here was in no sense an action for damages for the breach of a maritime contract. It was clearly an action in tort, arising out of the negligence of the Rose Reichert. The respondents Dalzell did not in any manner commit any breach of their contractual obligations to libelant.

There is really no difference in principle between the award of costs in such circumstances in admiralty and the award of costs in any other branch over which the court has jurisdiction. A plaintiff (called in admiralty a libelant) must sue a proper defendant (by whatever name called in admiralty), and if the action is brought against the person not liable there is no reason why the person bringing the action should be permitted to escape the requirement of paying costs to the person wrongly sued who has been brought into court (whether in personam or in rem) by reason of the mistake of him who has brought the action. There may be times when it is difficult for a plaintiff to determine beforehand who is the person liable, but that difficulty is one of the perils of litigation, which any litigant is likely to encounter.

On the facts as developed in this case, therefore, I am of opinion that the respondents Dalzell should have costs against libelant.

THE SATURNUS.

(District Court, S. D. New York. April 24, 1917.)

1. SHIPPING ⇐104—LIABILITY OF VESSEL—LIEN FOR BREACH OF CONTRACT.
The maritime law does not give a lien on a vessel for an alleged breach of contract by failing to proceed to the designated berth for loading, and this general proposition is not different in the event that the cargo is later loaded on the vessel at another place.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 404–410.]

2. MARITIME LIENS ⇐57—LOCAL STATUTES—ENFORCEMENT IN ADMIRALTY.
Courts of admiralty are not inclined to recognize local statutes purporting to establish a lien, where the maritime law gives none, unless the right is unequivocal.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96.]

In Admiralty. Suit by the Midland Linseed Products Company against the steamship Saturnus. On exceptions to libel. Exceptions sustained.

Everett, Clarke & Benedict, of New York City, for libelant.
Burlingham, Montgomery & Beecher, of New York City (Chauncey Belknap, of New York City, of counsel), for claimant.

MAYER, District Judge. Libelant sues in rem to recover $1,287 as damages for breach of a contract of affreightment by the steamship Saturnus, the amount in question representing the cost of lighterage and towage of a cargo of linseed cake from Edgewater, N. J., to Erie Basin.

Libelant had an agreement with one Schilperoorot and one Folkers for the sale of 16,000 tons of linseed cake f. o. b. vessels New York, payment in New York against full set of ocean bills of lading. It was provided that the Holland government should tender steamers to libelant to load cargoes according to the terms of the Baltimore charter party, Form C, with certain exceptions as to demurrage. It is alleged that, under this charter party and the general custom of the port of New York, it was the duty of any steamer so tendered to proceed to any proper berth designated by libelant.

On February 14, 1917, the agents of the Saturnus advised libelant that the steamship was tendered for cargo under the terms of the above referred to agreement, and libelant thereupon duly designated its pier at Edgewater as the berth for loading. It is alleged that the steamship wrongfully and negligently refused to proceed to that berth, and that libelant thereupon, under protest, lightered the cargo to Erie Basin and loaded it on board of the steamship there, receiving bills of lading therefor from the master. The claimant of the Saturnus has excepted to the libel on the following grounds:

"First. It appears from the libel that the damages claimed by libelant arose from the alleged breach of a contract for the sale of the goods, which is not an admiralty and maritime cause of action and is not within the jurisdiction of this honorable court.

"Second. The breach of contract alleged in the libel does not give a maritime or other lien against the S. S. Saturnus."

The first ground presents an interesting question as to whether the agreement to tender ships is separable from the rest of the contract, and, if so, whether it is a maritime contract within the jurisdiction of this court. That question may be passed by because the case may be disposed of on the second ground of exception.

[1] I am of opinion that the general maritime law does not give a lien on a vessel for the alleged breach of contract by failing to proceed to the designated berth for loading, and that this general proposition is not different in the event that the cargo is later loaded on the vessel as in the case at bar. It is undoubtedly the law that no right in rem exists where the contract remains wholly executory. An instructive opinion to this effect is that of Judge Brown in Scott v. The Ira Chaffee (D. C.) 2 Fed. 401, and this was soon followed by Judge Addison Brown in The Monte A. (D. C.) 12 Fed. 331. See, also, The Eugene (D. C.) 83 Fed. 222; The Margaretha, 167 Fed. 794, 93 C. C. A. 184.

I am unable to see that the later loading of the cargo affects the rights of the parties or the remedies as between them, as those rights or remedies existed at the time of the breach complained of. There are apparently but two cases in support of libelant's contention in this regard, and they are The J. C. Stevenson (D. C.) 17 Fed. 540, and Hoadley v. The Lizzie (C. C.) 39 Fed. 45. Per contra are The General Sheridan, 10 Fed. Cas. No. 5,319, The Hiram (D. C.) 101 Fed. 138, and The Ask (D. C.) 196 Fed. 165.

Libelant correctly states that the court must choose between these different points of view. I have no hesitation in following The Hiram, which I think essentially is the same as Scott v. The Ira Chaffee, supra, or, in any event, merely an extension of the principles laid down by Judge Brown; and these seem to me to more fully accord with the doctrines of maritime law, which do not favor the binding of the res as between cargo and vessel until the vessel and the cargo are reciprocally bound by the presence of the cargo on the vessel.

[2] Finally, libelant contends that it is entitled to a lien on the vessel under the New York Lien Law, Consol. Laws, c. 33 (Laws 1909, c. 38) § 80. In the first place, courts of admiralty are not inclined to recognize local statutes purporting to establish a lien where the maritime law gives none, unless the right is unequivocal. The purpose of the New York statute is to provide a security to persons rendering service to a vessel in reliance upon the promise of compensation contracted for by the master, owner, charterer, builder, or consignee of the vessel, etc. This is not such a case.

The libel, therefore, must be dismissed, with costs, and, in order to avoid any technical question, should the case be appealed, the libelant may amend by annexing as exhibits copies of the bill of lading, the sales agreement, and the Baltimore charter party, Form C.

TRICE v. COOLIDGE BANKING CO. et al.

(District Court, S. D. Georgia, S. W. D. May 17, 1917.)

BANKRUPTCY ⇐296—JURISDICTION OF SUITS TO SET ASIDE FRAUDULENT TRANSFERS.

Where more than four months before bankruptcy the bankrupt executed a mortgage in fraud and without consideration, pursuant to an agreement by the mortgagee to give him a fictitious credit, and this fraudulent transfer was subsequently perfected by ex parte foreclosure of the mortgage in a city court of limited jurisdiction without affirmative equitable powers, the bankruptcy court had jurisdiction at the suit of the trustee to review the transaction and set it aside, and was not prevented by comity from exercising such jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414.]

In Equity. Suit by C. A. Trice, trustee of George Duren, bankrupt, against the Coolidge Banking Company and another. On plea to the jurisdiction. Plea overruled.

C. E. Hay, of Thomasville, Ga., and E. K. Wilcox, of Valdosta, Ga., for plaintiff.

George L. Patterson, of Valdosta, Ga., for defendants.

SPEER, District Judge. The act of Congress provides for a trustee. He represents the creditors, and his principal duties are to collect the assets of the bankrupt estate and to advance the interest of the creditors. Now, this trustee before the court, in assuming his trust, finds that the assets of the estate have been misappropriated. I say this, because, for the purposes of the issue now before the court, we must assume the averments of the bill to be true. The assets have reached the control of a certain bank and of the wife of its cashier. This was done by the execution (it is true before the four months period) of certain mortgages on personalty and of certain transfers of real estate. These are charged to have been executed in fraud. The mortgage was executed without legal consideration, but pursuant to an agreement by the bank to give the prospective bankrupt a fictitious credit, by means of which he could delude the business public and acquire the stocks of merchandise which have finally reached the hands of the coconspirator, namely, the bank. It would be difficult to conceive of a fraud more aggravated. This was perfected by the foreclosure in an ex parte way of a mortgage in the city court of Thomas county, a court of limited jurisdiction, without affirmative equitable powers. The defense, if any, would be made by the mortgagor, and, if he is in conspiracy with the mortgagee, why, of course, no defense is made, and the judgment of foreclosure is inevitable.

But it is said that the court of the United States, with all the powers created by the act of Congress, has no power, at the suit of the trustee, to review this transaction or to set it aside. I cannot agree with the learned counsel who would maintain this position, notwithstanding my respect for his undoubted talents. I am very sure that, in accordance with the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat.

544), particularly as expressed by the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), that the court has jurisdiction to set aside and cancel and put to naught a scheme of this kind, which, if successfully perpetrated, would deprive the trustee, and through him the creditors, of all the assets which otherwise might be utilized for the payment of creditors. It is true there are a number of cases which have much to say about comity between the courts, but they are generally cases where the possession of the assets is involved. Where one court has possession, the other court cannot interfere through motives of courtesy, and comity is courtesy. But that does not deprive the court, empowered by Congress, of its jurisdiction to find fraud, and, so far as its decree can go, to insure compliance with the Bankruptcy Act. When the decree is had, the trustee may appear before the state court, present the decree of this court, make suitable representation, and, if that court improperly denies the relief, take it to the appellate court.

There is a further consideration. This property is in the hands of the sheriff, at the instance of the bank. Here is a claim for the value of the property, and the sheriffs and their bondsmen and the bank as well, may be responsible for any decree which might be granted here. If we had no such power, where such fraud is designed, how easy it would be to utilize this ex parte mortgage foreclosure procedure, and utterly defeat the purpose of that uniformity in the distribution of the assets of a bankrupt, which was the grand purpose of Congress in the enactment of the bankruptcy law.

For these reasons I hold that the court has jurisdiction, and that the plea should be overruled.

TWIN FALLS SALMON RIVER LAND & WATER CO. et al. v. CALDWELL et al.*

(Circuit Court of Appeals, Ninth Circuit. May 7, 1917.)

No. 2725.

1. WATERS AND WATER COURSES ⇐222—IRRIGATION RIGHTS—CAREY ACT.
All persons using or contracting for the use of water for irrigation purposes in Idaho do so with reference to the general irrigation law of the state, contained in Rev. Codes Idaho, § 3252 et seq., which provides that no user shall be entitled to the use of more water than can be beneficially applied to the land for the benefit of which the appropriation is made, and if the land is within an irrigation project created under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422, as amended by Act June 11, 1896, c. 420, § 1, 29 Stat. 413 [Comp. St. 1916, §§ 4685, 4686]), also with reference to the provisions of such act and of the state law and contracts for carrying it into effect which give a lien upon the land for any balance due on the water right to take precedence of all other liens or rights.

2. WATERS AND WATER COURSES ⇐222—IRRIGATION RIGHTS—CAREY ACT "DETERMINED."
A contract between the state and a company, which undertook to construct an irrigation system under the Carey Act, recited that the company had acquired a water right for the irrigation of certain public lands within the terms of the act, "together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands." The company was required to organize an operating company which should sell shares or water rights to settlers on the lands which should entitle each to a proportionate interest in the operating company and its property, rights, and franchises; "it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water, * * * but shall entitle the purchaser to a proportionate interest only therein." It further provided that the company should construct a reservoir of a stated capacity, "which amount in addition to the normal flow of said stream during the irrigation period has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated, and the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated." The company issued bonds to procure money for the work secured by assignment of the contracts with settlers and the liens given by the statute. When the system was completed and in operation, it was found that the water supply was sufficient to irrigate only about one-third of the quantity of land included in the project and insufficient to properly irrigate the land for which contracts had been sold. *Held*: (1) that the settlers held their contracts and land subject to the liens in favor of the mortgagee given by the statute; (2) that they were entitled under their contracts to one-hundredth of a second foot of water per acre provided such quantity could be beneficially applied, but were not entitled to 2¾ acre feet, the word "determined" in the contract between the state and the company being used in the sense of estimated only; (3) that the first purchasers of contracts were entitled to no preference over later purchasers, but that they were entitled to an injunction restraining the company from executing further contracts.

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

*Rehearing denied October 8, 1917.

3. WATERS AND WATER COURSES ⟸222—RECLAMATION OF ARID LAND—GRANT TO STATE—CAREY ACT.

The action of the Land Department in approving an irrigation plan adopted by a state under the Carey Act, and segregating the lands embraced therein, is not a conclusive determination that the state is entitled to the land, but whether or not the state has "actually furnished" an ample supply of water for the reclamation of any particular tract of such land to entitle it to a patent under Act June 11, 1896, c. 420, § 1, 29 Stat. 413 (Comp. St. 1916, § 4686), is a question of fact to be determined by the department.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold S. Simms, in their own behalf and in behalf of all persons similarly situated with them, against the Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, trustee, and A. C. Robinson. Decree for complainants (231 Fed. 769), and defendants appeal. Reversed in part.

This case grows out of the establishment and construction of an irrigation system known as the Salmon River Project under and in pursuance of an act of Congress approved August 18, 1894 (28 St. Lg. 372, 422), and amendments thereto, known as the Carey Act, and of certain legislation of the state of Idaho.

The purpose of the act of Congress is therein expressly declared to be to aid the public land states in the reclamation of the desert lands situate therein, and in the settlement, cultivation, and sale thereof in small tracts to actual settlers. To carry into effect that object, the act provides that the Secretary of the Interior, with the approval of the President, is authorized upon proper application of such public land states to enter into a contract with each of them in which there may be such desert lands as are described by Congress in certain designated previous acts, binding the United States to donate, grant, and patent to the state, free of cost of survey or price, such desert lands, not exceeding 1,000,000 acres, as the state would cause to be irrigated, reclaimed, occupied, and not less than 20 acres of each 160-acre tract cultivated by actual settlers, within 10 years next after the passage of the act, as thoroughly as required of citizens who may enter under a certain preceding act of Congress approved March 3, 1877, and the act amendatory thereof approved March 3, 1891; provided, however, that before the application of any such state is allowed, or any contract is executed, or any segregation of any of the desert lands from the public domain is ordered by the Secretary of the Interior, such state shall file a map of the land proposed to be irrigated, together with a plan showing the mode of the contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said desert land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for its irrigation and reclamation, the Secretary of the Interior being by the act empowered to make necessary regulations for the reservation of the land applied for by the state, to date from the date of the filing of the map and plan of irrigation, such reservation, however, to be of no force in the event such map and plan of irrigation be not approved as required by the act. The act further empowers any state, entering into a contract with the United States through the Secretary of the Interior, to make all necessary contracts to cause the said desert lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of the act of Congress; the state, however, being prohibited from leasing any of such lands or using or disposing of them in any way except to secure their reclamation, cultivation, and settlement. And the act of

Congress further provides that, as fast as any such public land state shall furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said desert lands are cultivated, reclaimed, and irrigated by actual settlers, patents shall be issued to the state or its assigns therefor, provided that the said public land states shall not sell or dispose of more than 160 acres of such desert lands to any one person, and that any surplus of money derived by any such state from the sale of such lands in excess of the cost of their reclamation shall be held as a trust fund and be applied to the reclamation of other desert lands in such state.

By an act approved June 11, 1896 (29 St. Lg. 413, 434), Congress further provided that under any law theretofore or thereafter enacted by any state, providing for the reclamation of arid lands in pursuance and acceptance of the terms of the grant made by the above-mentioned act of August 18, 1894, "a lien or liens is hereby authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation: Provided, that in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part."

By section 1613 et seq. of the Revised Codes of Idaho, that state accepted the grant so made by Congress, subject to all of its terms and conditions, and provided that the selection, management, and disposal of such desert lands situated in Idaho should be vested in its state board of land commissioners, and further provided that any person, company of persons, association, or incorporated company, constructing, having constructed, or desiring to construct ditches, canals, or other irrigation works to reclaim lands under the provisions of the Idaho statute, should file with the board of land commissioners a request for the selection on behalf of the state by the board of the land to be reclaimed, designating it by local subdivisions, which request should be accompanied by a proposal to construct the ditch, canal, or other irrigation works necessary for the complete reclamation of the land asked to be selected, and which proposal should be prepared in accordance with the rules of the board and in accordance with the regulations of the Department of the Interior, and should be accompanied by the certificate of the state engineer of Idaho that application for permit to appropriate water has been filed in his office, together with the state engineer's report thereon, and shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed; such perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.

Upon the presentation to the state engineer of such proposals, in the prescribed form and setting forth the prescribed facts, that officer is by the state statute required to examine the same and make a written report to the board of land commissioners "stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters of the state will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable. and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in

character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder"—with a provision for further and personal examination by himself or through a qualified assistant in the event such further examination be necessary to enable him to report intelligently thereon to the board, his disapproval ending the proceeding. In the event of a favorable report by the engineer and the approval thereof by the board of land commissioners, the register of the board is required to file in the local United States Land Office a request for the withdrawal of the land described in the proposal, and upon the withdrawal of such land by the Department of the Interior the board of land commissioners is by the state statute required to enter into a contract with the parties submitting the proposal, which contract shall contain "complete specifications of the location, dimensions, character, and estimated cost of the proposed ditch, canal, or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the state is to dispose of the lands to settlers."

Passing provisions of the state statute not here important to be noticed, it further provides that any citizen of the United States or any person having declared his intention to become a citizen (excepting married women), over the age of 21 years, may make application under oath to the board of land commissioners to enter any of the desert lands in an amount not to exceed 160 acres for any one person, which application shall state that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation, and settlement, in accordance with the act of Congress and the laws of Idaho relating thereto, and that the applicant has never received the benefit of the provisions of the laws of the state to an amount greater than 160 acres including the number of acres specified in the application, and which application shall be accompanied by a certified copy of a contract for a perpetual water right entered into with the person, company, or association authorized by the board of land commissioners to furnish water for the reclamation of such lands, with other requirements not necessary to mention. Upon the filing of such application, together with a partial payment of 25 cents an acre, the board is required to issue a certificate of location of the land to the applicant, such certificate to be recorded when issued in a book to be kept for the purpose; all such lands to be disposed of by the board at a uniform price of 50 cents an acre, half to be paid at the time of entry, and the remainder at the time of making final proof by the settler.

Further provisions of the state act provide for the disposition of the proceeds of sale, and section 1628 is as follows:

"Within one year after any person, company of persons, association or incorporated company, authorized to construct irrigation works under the provisions of this chapter, shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the state, the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the register of the state board of land commissioners, a judge or clerk of any court of record within the state, or commissioners to be designated by the board, within the state, and make final proof of reclamation, settlement, and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the board. The officer taking this proof shall be entitled to receive a fee of two dollars, which fee shall be paid by the settler and shall be in addition to the price paid to the state for the land: Provided, that when the register of the board takes final proof, all fees received by him shall be turned into the state treasury. The

commissioners appointed by the board are hereby authorized to administer oaths. All proofs so received shall be submitted by the register to the board, and shall be accompanied by the final payment for said land, and upon approval of the same by the board the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the state by the United States, the proofs shall be forwarded to the Secretary of the Interior, with the request that a patent to said lands be issued to the state. When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the state of Idaho shall, through the state board of land commissioners, make proof of such fact, and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior."

The next section (1629) provides that, upon the issuance of a patent to any lands by the United States to the state, notice shall be forwarded to the settler upon such land, whereupon it shall be the duty of the board of land commissioners, under the signature of its president, attested by its register, to issue a patent to said land from the state to the settler, and the state statute further provides that the water rights acquired under the state law shall attach to and become appurtenant to the said desert lands as soon as title thereto passes from the United States to the state, and that any person, company, or association furnishing water for such land shall have a first and prior lien on such water right and the land upon which the said water is used for all deferred payments for the said water right, such lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of the said land, and to remain in full force and effect until the last deferred payment for the water right is paid according to the terms of the contract under which such water right is acquired, and that the contract for the water right upon which the said lien is founded shall be recorded in the office of the recorder of the county in which the land is situated.

The state statute further provides that, upon default of any of the deferred payments secured by any such lien, the person, company of persons, association, or incorporated company holding or owning the said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right, with certain provisions respecting the manner of making the sale, and that at such sale no person, company of persons, association, or incorporated company owning and holding such liens shall bid in or purchase any land or water right at a greater price than the amount due on such deferred payment for such water right and land, and the cost incurred in making the sale of the land and water right, with certain provisions with respect to the redemption of such land and water rights not important to be stated.

The plaintiffs in the case (appellees here), who brought the suit not only for themselves but in behalf of all others similarly situated, are settlers upon their respective tracts embraced by the laws referred to, and hold contracts for water for the irrigation thereof issued by the appellant Twin Falls Salmon River Land & Water Company, the corporation which, pursuant to the Idaho statutes, contracted with that state for the construction of the system and subsequently with the plaintiffs and other settlers. It also issued bonds, to secure the payment of which it assigned as collateral the settlers' contracts to the appellant Robinson, and executed a trust deed on all of its interest in the system to the appellant Commonwealth Trust Company of Pittsburgh, as trustee—all for moneys advanced with which to construct the works.

The appellant Salmon River Canal Company, Limited, is a corporation organized by the construction company with the consent of the state board of land commissioners for the purpose of operating the system and ultimately taking title to it for the same purpose.

The state entered into the contract with the construction company April 30, 1908, and the opening for entry of the lands to holders of water right

agreements was advertised for June 1st of the same year, and contracts covering an aggregate of about 73,000 acres were entered into with the settlers, including the complainants, prior to the bringing of the present suit.

The gist of the bill, as said by the court below, is not that the construction work was improperly done, but that this acreage is greatly in excess of the capacity of the water appropriated for the purpose of supplying its needs, even during ordinary seasons; that the construction company has sold water rights far in excess of the supply, that being, according to the bill and the contention of the appellees, sufficient for about 30,000 acres only, the purchasers of which, including the complainants, should, as alleged and here contended, be preferred and all subsequent purchasers eliminated and their contracts for water canceled.

That there is no other source of supply is undisputed.

The complainants having refused to pay the installments due from them under their respective purchases, on the ground, as alleged, that the construction company has failed to comply with the terms of its contract, and the trustee and the collateral holder having brought suits of foreclosure to enforce such payments, the purpose of this suit, as prayed in its bill, is to obtain a decree adjudging, among other things, that the amounts due from the settlers and contract holders of water rights in the system constitute a trust fund for the purpose of carrying out the objects of the contracts and the furnishing of all of the land, having water rights appurtenant to it under the system, with ample and sufficient water "not less than one-half miner's inch per acre continuous flow, or 2¾ acre feet per acre if delivered by periods, upon demand of the several owners thereof measured and delivered not more than one-half mile from each quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons"; that the lien claimed by the defendant trustee be adjudged subordinate to the rights of the complainants and other water contract holders in the system; that the trustee and all holding under it be enjoined from collecting any money due from the contract holders; that the defendant Robinson be enjoined from collecting any money upon the water contracts assigned to him by the construction company; that such assignments be adjudged void; and that a receiver be appointed by the court with certain specified powers, etc.

The defendants to the bill put in issue, among other things, its chief allegations to the effect that the contract between the construction company and the respective complainants was for a specific amount of water for their respective tracts, at one place in the bill alleged to be "one one-hundredth of one cubic foot of water per acre per second of time for each share or water right sold," with a proportionate interest in the canal, reservoir, and other irrigation works; that the complainants could not successfully reclaim their lands and produce crops with less than 2¾ acre feet per acre during each irrigating season; and that in no case, according to the contract, "should water rights or shares be dedicated to any lands in said segregation or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor."

The court below declined to admit evidence offered by the defendants for the purpose of showing that the complainants and those in behalf of whom they also sued did not need and could not use the amount of water demanded by them, holding that to be a question the defendants could not raise, to which ruling an exception was reserved, and the ruling is here assigned as error.

The trial resulted in the following decree, from which the present appeal was taken:

"It is ordered, adjudged, and decreed: That the defendant Twin Falls Salmon River Land & Water Company contracted with the state of Idaho and with the settlers holding agreements for the purchase and sale of water rights that it, the said defendant, would provide a system of canals and reservoirs on what is known as the Salmon River Project, in Twin Falls county, state of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers'

agreements at the rate of 2¾ acre feet per acre, measured at the points of delivery from the system into the consumers' laterals; and further that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, trustee, and A. C. Robinson be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

"It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to: (1) The amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land & Water Company et al. v. Vineyard Land & Stock Co., now pending in this court, and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at the time of such application, and upon the submission of such proof for the entry of final decree.

"Dated this 29th day of November, 1915. Frank S. Dietrich, Judge."

Samuel H. Hays, of Boise, Idaho, for appellant Twin Falls Salmon River Land & Water Co.

J. H. Richards, O. O. Haga, and McKeen F. Morrow, all of Boise, Idaho, for appellants Commonwealth Trust Co. and Robinson.

Pasco B. Carter, of Boise, Idaho, for appellant Salmon River Canal Co.

C. O. Longley and E. A. Walters, both of Twin Falls, Idaho, for appellees.

Albert N. Edwards, of St. Louis, Mo., amicus curiæ.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] In the consideration of the case it is to be remembered that the United States owned the land, and the state of Idaho the water. The object and the terms and conditions of the grant concerning which the Secretary of the Interior was authorized to contract with the state have been set out in full in the foregoing statement. Among the requirements is an application on the part of the state for such of the lands authorized to be granted as it would agree to cause to be irrigated, reclaimed, occupied, and cultivated as specified, preceding such application with a map of the land proposed to be irrigitated and a plan showing the mode of the proposed irrigation sufficient to thoroughly irrigate and reclaim it and to prepare it to raise ordinary agricultural crops. The act of Congess also authorized the state entering into such contract with the United States through the Secretary of the Interior to itself make all necessary contracts for the reclamation of such lands and to induce their settlement and cultivation in accordance with and subject to the provisions of the congressional act, which further provided that as fast as any such state should furnish satisfactory proof according to the rules and regulations prescribed by the Secretary of

the Interior of the reclamation, irrigation, and cultivation by actual settlers of any of such lands, patent should be issued to the state or its assigns therefor, provided the state should not sell or dispose of more than 160 acres to any one person, and that any surplus money derived by the state from such sale in excess of the cost of reclamation be held as a trust fund and applied to the reclamation of other desert land in the state. By the act of June 11, 1896 (29 St. Lg. 413), patents were authorized to be issued to the states for any of the lands so granted, without regard to settlement or cultivation, when an ample supply of water is furnished therefor.

It is therefore obvious that the act of Congress which lies at the foundation of the case authorized the making of a contract by the United States, through the Secretary of the Interior, with any state in which are situated the specified desert lands, and the making of contracts by such states for their reclamation and irrigation; and such contracts were made in the instant case.

[2] It is also apparent from the language of the act of August 18, 1894, that the grant to the public land states containing the specified desert lands was not a grant in præsenti, but, on the contrary, such states were made the agency through which the lands might be reclaimed, and the terms and conditions were therein prescribed by Congress, on the performance of which the title of the United States thereto should pass by patent of the government; Congress by its subsequent act of June 11, 1896 (29 St. Lg. 413, 434), having also authorized a lien or liens to be created by the state under any law theretofore or thereafter enacted, which liens should be "valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers," and further providing that:

"When an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation."

Section 1629 of the Revised Codes of Idaho provides, among other things:

"Upon the issuance of a patent to any lands by the United States to this state, notice shall be forwarded to the settler upon such land. It shall be the duty of the board, under the signature of the president attested by its register, to issue a patent to said lands from the state to the settler. The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

At all the times in question the right to appropriate and divert the unappropriated water of any natural stream of the state to benefi-

cial uses was expressly given by the Constitution of Idaho (section 3, art. 15, Const.), and section 3252 et seq. of its Revised Codes, contain, among other things, provisions for the appropriation of such waters, and, among them provisions to the effect that such appropriations can be made only for some beneficial purpose and shall be initiated by an application to the state engineer for a permit to make the appropriation, culminating in a license issued by that officer to the appropriator, with a provision to the effect that no such license shall be issued confirming the right to the use of more than one second foot of water for each 50 acres of land irrigated, unless it be shown to the satisfaction of the engineer or a court that a greater amount is necessary, and to the effect that no user under such appropriation shall be entitled to the use of more water than can be beneficially applied on the land for the benefit of which the right is given.

That the laws of the state applicable to the appropriation and use of the nonnavigable waters of the state are controlling is, of course, clear; and that all parties contracting with respect to such waters and desert lands do so with at least the presumed knowledge of both the federal and state laws is also plain.

The record shows that, under those laws, the purpose and particulars of which, so far as pertinent, are set forth in the statement of the case already made, certain named individuals, under permit of the state engineer, undertook to appropriate of the waters of Salmon river 1,500 cubic feet per second for the purpose of reclaiming and irrigating, under the legislation of Congress and of the state, 150,000 acres of desert lands, including not only desert lands of the United States embraced by the grant, but also certain school sections of desert land belonging to the state; their proposal and request to that end, dated August 12, 1907, being approved by the state board of land commissioners on the same day.

It appears further that all of the property, rights, and franchises acquired by those individuals under their appropriation and the said accepted proposal and request subsequently passed, with the consent of the state board of land commissioners, to the Twin Falls Salmon River Land & Water Company, with which company that board, on behalf of the state of Idaho, on the 30th day of April, 1908, entered into a written contract pursuant to the act of Congress and the provisions of the state statute, which contract provided, among other things, in paragraph I, that the company would construct the irrigation works described in the proposal and request of August 12, 1907, and would sell shares or water rights in the system from time to time as provided in the contract, to the person or persons filing upon the government land embraced by the grant by Congress, and also to the owners of other lands susceptible of irrigation from the system or from any extension or enlargement thereof, such shares or water rights to be sold on the terms subsequently specified in the contract, and would also transfer the ownership, management, and control of the system to the purchasers of shares or water rights, in the manner also subsequently provided for in the contract.

After describing, in paragraphs II and III, the reservoir, dam, ditches, canals, laterals, and rights of way pertaining to and being parts of

the irrigation system so agreed to be constructed by the company, paragraph IV reads:

"The party of the second part (the construction company) is the owner of that certain water right evidenced by permit No. 2659 for 1,500 cubic feet per second of the waters of Salmon river in Twin Falls county, state of Idaho, issued by the state engineer of the state of Idaho, to be used for the irrigation of the lands described in Exhibit A herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands, and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated. And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated."

Paragraph V provides, in substance, that upon the execution of the contract, and when the actual construction of the canal is inaugurated, the state will, after notice given in conformity with law, throw open the lands covered by the grant, or a specified portion thereof, for settlement under regulations prescribed by its board of land commissioners; and by paragraph VI the state agreed not to approve any application for such lands until the person or persons applying therefor should furnish to the board of land commissioners a copy of the contract entered into by such person or persons with the construction company for the purchase of sufficient shares or water rights in the system for the irrigation of the lands applied for, such shares or water rights to be evidenced by stock in the Salmon River Canal Company, Limited, which the contract provides the construction company should cause to be organized; and by paragraph VI the construction company further agreed as follows:

"That to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon (to) the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the state board of land commissioners."

By paragraph VII the state agreed to sell the lands covered by the government grant to it to such persons as might be entitled to file upon the same, for the sum of 50 cents an acre, half of which should be paid at the time of the application for entry thereof made to the board of land commissioners, and the remaining half at the time of the making of final proof thereon.

By paragraph VIII, the construction company agreed that:

It would sell or cause to be sold to the person or persons filing upon any of the government lands embraced by the grant, or to the owners of any other

lands susceptible of irrigation from the system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, "a water right or share in said canal for each and every acre filed upon or purchased from the state or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth ($1/100$) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the board, which system, according to said plans, has been determined by the state engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for the lands hereinafter described or for lands which are susceptible of irrigation from said system as follows:

"To the person or persons filing upon any of said lands at a price not exceeding forty dollars ($40) per share to be paid for as follows:

"One-fifth (⅕) in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent. (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed thirty dollars ($30) per share provided said water rights are purchased within one year after the purchase of the lands from the state and not exceeding forty dollars ($40) per share at any time thereafter; said payments upon said state lands to be made one-seventh ($1/7$) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent. (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents ($2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any railroad filing its plat with the state board of land commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

"This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor."

Paragraph IX of the contract between the state and the construction company, after reciting the necessity of providing a convenient method for transferring the ownership and control of the system from the company to the purchasers of water rights and for the purpose of detemining their rights among themselves and between them and that company, and for the purpose of operating and maintaining the system, provided that, as soon as the granted lands should be thrown open for settlement, the construction company would cause a corporation, to be known as the Salmon River Canal Company, Limited, to be organized, with articles of incorporation substantially as annexed to the contract, with an authorized capital stock of 150,000 shares, intended to represent one share for each acre of land which might be thereafter irrigated from the system; the entire capital stock to be delivered to the construction company to enable it "to deliver to purchasers of water rights the shares of stock representing the same," and one share

to be delivered for each acre of land entered or filed upon, with other provisions not necessary to be noticed. Paragraph IX of the contract also contains the further provision that, whenever it is certified by the chief engineer of the company and the state engineer that certain portions of the canal are completed for the purpose of operation, the same may, with the consent of the state land board, be turned over to the canal company for operation; such transfer and operation, however, not in any manner to lessen the responsibility of the construction company under the contract.

Paragraph X is as follows:

"The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV and VIII of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

"While the party of the second part shall retain control of the said Salmon River Canal Company, Limited, water shall be measured to users from the place of diversion at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

"It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

"The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said system during the irrigation season, to wit, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited."

By paragraph XI the construction company agreed to so construct the system as that the water conducted through it should be available at a point not to exceed one-half mile measured in a direct line from each quarter section of land to be reclaimed and irrigated, and that it would construct and place in position all headgates and other devices for the control and measurement of the water in the main canals and reservoirs and in the main laterals; it being intended that the settler should, under the directions of the chief engineer of the construction company, furnish but one measuring gate or device for his own use, and that for each year after January 1, 1911, while the construction company retains control of the canal company, the latter should charge and assess the purchasers of water rights 35 cents an acre, which amount, if insufficient to maintain and keep the system in repair, would be supplemented by additional funds by the construction company up to January 1, 1913, after which date the actual cost of maintenance should be paid by the settlers.

The contract also provided for the diligent and continuous prosecution of the work by the construction company, and its completion within five years, and for the right of the construction company to

mortgage its right, title, and interest in the system, the form of such mortgage to be approved by the Attorney General of the state, and also stated the estimated cost of the work as $2,500,000 and upwards, and also declared that the price at which water rights and for which liens are therein authorized and created against the separate legal subdivisions of land therein described are necessary in order to pay the cost and expenses of reclamation and interest thereon, and that the existing laws under which the contract is made are understood and agreed to be a part thereof.

Under and in pursuance of the contract between the state and the construction company, the latter caused to be organized a corporation called Salmon River Canal Company, Limited, and it caused to be prepared a printed form of a contract, one of which was executed with each of the settlers when purchasing their respective tracts of the desert lands, including the complainants. That contract recited the making of the contract between the construction company and the state; the fact that it had entered upon the construction of the irrigation system for the purpose of diverting the waters that had been appropriated; that the state board of land commissioners had notified it that it might proceed to sell and contract for the use of the water; that the purchaser had made application to the company to be permitted to purchase the particular piece of land, which application had been accepted subject to the approval of the board of land commissioners, which approval had been given; and that for a certain consideration stated the construction company agreed that, in pursuance of its contract with the state, the purchaser should be entitled to a certain stated number of shares of the capital stock of the Salmon River Canal Company, Limited, the certificate of which company should be and was as follows:

"Salmon River Canal Company, Limited.

"..... Shares. ....., 19...

"This is to certify ..... is the owner of ..... shares of the capital stock of the Salmon River Canal Company, Limited.

"This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

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in accordance with the terms of the contract between the state of Idaho and the Twin Falls Salmon River Land & Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land & Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the State of Idaho. Salmon River Canal Company, Limited,

"By ————, President.

"Attest: ————, Secretary."

The contract with the settlers further provides that the water to which the purchaser is entitled and should receive through the irrigation system should be used upon and become dedicated and appurtenant to the specific piece of land so purchased; and, further, that the laws of the state and the contract made with it by the construction company should be regarded as defining the rights of the respective parties

to the settler's contract, and should regulate the provisions regarding the shares of stock to be issued to the purchaser by the canal company; that the latter company should have power to levy all necessary assessments upon all users of the water in proportion to their respective holdings of stock, but that no such charges should be made until after January 1, 1911, from which date the annual charge for maintenance should not, during the period prescribed in the contract between the construction company and the state, exceed 35 cents for each acre, which payment the purchaser agreed to make to the canal company on the 1st day of April of each year.

The contract between the construction company and the settlers also contains provisions concerning the amount paid and to be paid for the water right, for the assignment by the purchaser of the stock in the canal company to the construction company as security, and the agreement by the purchaser that immediately upon transfer to him of the legal title to the land he would execute to the construction company a mortgage or deed of trust thereon as security for the performance by the purchaser of the provisions of the contract; such mortgage or deed of trust to be in such form as the state board of land commissioners should approve.

It is thus seen that the scheme devised to take the benefit of the congressional grant involved the legal appropriation of the necessary water, a proposed plan by the appropriator for the construction of the necessary irrigation system, which plan should have the approval of the state board of land commissioners, and subsequently the approval of the Secretary of the Interior. Upon the approval of the latter officer, the segregation from the public domain of that portion of the desert lands in Idaho embraced by the grant and included in the proposed reclamation project followed. The construction of the system necessarily required the furnishing from some source of the money with which to do the work; the compensation to the construction company for the liability assumed by it in procuring the required money and in doing the work must of necessity come from the sale of the lands and of rights to the appropriated water; and of that fact both Congress and the state were, of course, well aware, as is shown by the legislation that has been referred to. In the execution of the project, the contract between the state and the construction company, and the contract between that company and the settlers, were made. Manifestly, they are to be read together and in connection with the statutes of Congress and of the state, to which the contracts expressly referred. The construction company, the settlers, and the parties who furnished the money for the building of the system, receiving as security therefor the liens authorized both by Congress and the state, are therefore, each and all, charged with full knowledge of the laws and of the provisions of the contracts. The difficulties that have arisen grow out of the fact, discovered, unfortunately, too late, that, instead of the appropriation of the waters of the stream amounting in fact to 1,500 cubic feet per second, the supply, as shown by the record and according to the practical concession of the parties, was only about one-third of that amount—wholly insufficient for the reclamation and irri-

gation of the entire tract segregated by the Secretary of the Interior, and also insufficient, it is claimed, for at least the proper irrigation of all of the lands covered by contracts of sale actually issued by the construction company to settlers.

Turning to the statutes (above referred to) of the state that owned the water that was authorized to be appropriated, it is seen that no user under such appropriation shall be entitled to the use of more water than can be beneficially applied on the land for the benefit of which the right is given. None of the decisions of the Supreme Court of the state that have been cited hold that the statute does not mean what it plainly says. We make this observation in view of the suggestion made in the opinion of the learned judge of the court below, where it is said:

"If the right granted is too great and the settler attempts to use water wastefully, that is a matter of which the state and other appropriators upon the stream may complain; it is no concern of the defendants."

The contracts of sale by the construction company cannot, in our opinion, be held to convey to the settlers a right to more water than can be beneficially applied on the land agreed to be conveyed to them.

The court below held and adjudged, as has been seen, that that company contracted with the state and the settlers to furnish them with water "at the rate of two and three-fourths acre feet per acre measured at the points of delivery from the system into the consumers' laterals; and further that it would not sell rights in excess" of its available supply. The point of delivery thus adjudged by the court is in entire conformity with the express language of the contract between the state and the construction company, and in view of the fact, shown by the record and which is here undisputed, that the construction company has already sold water rights far beyond the available supply of water, we are also of opinion that the court below was entirely right in enjoining it from making any further sales.

We are, however, unable to find anything in either of the contracts justifying the court in adjudging that the amount of water agreed to be furnished to the settlers should be "at the rate of two and three-fourths acre feet per acre." The only place in either of them where "two and three-fourths acre feet per acre" is mentioned is in paragraph IV of the contract between the state and the construction company, which we repeat:

"IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1,500 cubic feet per second of the waters of Salmon river in Twin Falls county, state of Idaho, issued by the state engineer of the state of Idaho, to be used for the irrigation of the lands described in Exhibit A herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated. And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated."

It must be remembered that in paragraph I of the contract between the state and the construction company it is expressly provided that the company should sell shares or water rights in the system to be constructed, not only to those filing on the government lands embraced by the grant made by Congress, but to the owners of other lands susceptible of irrigation from the system or from any extension or enlargement thereof; and the paragraph last quoted (the fourth) contains substantially the same provision; so that it is readily seen that the statement in paragraph IV forming the basis of the ruling of the trial court now under consideration simply is that the construction company is the owner of the water right evidenced by the permit issued by the state engineer of 1,500 cubic feet per second of the waters of Salmon river, which water right is by the contract "dedicated for use upon said lands," that is to say, the lands embraced by the congressional grant and the other lands susceptible of irrigation from the system, and, further, that it is agreed and understood that the contemplated dam should be so constructed as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the stream during the irrigating period, "has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated"—not only the lands covered by the grant from Congress, but also the other lands under the system.

The word "determined," so used, was evidently used in the sense of estimated; for in the nature of things it could not then—in advance of even the beginning of any work or the actual diversion of any of the water—be known what would be the exact capacity of the system. It was necessarily but the estimate of the proposer of the plan approved by the state engineer and the state board of land commissioners, and subsequently by the Secretary of the Interior in segregating the tract applied for from the public domain. How greatly all of them erred in their estimate is shown by the record in the case; the capacity of the system being, as has been said, only about one-third of what it was then thought it would be.

There is in the record no evidence even tending to show any fraud on the part of any one connected with the undertaking. And in so far as concerns the construction company, compensation for the responsibilities assumed by it and for its efforts could come only from the success of the enterprise; so, too, in respect to those who furnished the money with which to build the works, their security for the money loaned depended upon its success.

[3] In the very recent decision by the Supreme Court of Idaho, rendered January 26, 1917, in the case entitled State of Idaho and Robert Rayl, Plaintiffs, v. Twin Falls Salmon River Land & Irrigation Company, a Corporation, and Salmon River Canal Company, Limited, Defendants, and A. E. Caldwell et al., Interveners, 166 Pac. 220, which was an application for a writ of mandate to compel the construction company to sell to the owner of a school section of desert land within the Salmon River Project, a water right, Chief Justice Sullivan, in the course of his opinion denying the writ, held that the action of

the Secretary of the Interior in approving the proposed plan for the irrigation of the lands applied for by the state and in making the order segregating those lands from the public domain was a conclusive determination against the United States that the state of Idaho was entitled to a patent therefor for the benefit of the settlers. One of the justices of the court (specially concurring for certain reasons) dissented from that view on the ground that that is a question for the determination of the Department of the Interior "and, possibly for the federal courts"; the other of the three justices of the court concurred "in the conclusion of Chief Justice Sullivan under the facts of this particular case."

We are not sure that the latter concurrence can, in view of the many points discussed by the learned Chief Justice, be properly held to be a concurrence in his holding respecting the effect of the action of the Secretary of the Interior in approving the proposed plan that was adopted by the state officials and in making the segregation asked for by the state; but, so conceding, we feel bound to hold to the contrary in view of the express language of the grant authorizing the issuance of the government patents, providing, in effect, as we construe the two acts of August 18, 1894, and June 11, 1896, that an ample supply of water for the land be actually furnished as a condition precedent to the issuance of such patents. It is obvious that whether or not such a supply is actually furnished is a pure question of fact; and that all questions of fact in relation to all of the public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other federal courts as to render the citation of cases unnecessary. To what extent the Secretary of the Interior will, in determining the facts, take into consideration the approval of the plan by himself as well as by the state officials, and his order segregating the tract applied for from the public domain, will be for him to consider and determine.

But we cannot at all agree to the contention on the part of the appellants that no specific amount of water was sold to the settlers; for, turning to the contracts, it is seen that the construction company did, by paragraphs IV, VIII, and X of its contract with the state, in effect, expressly promise and agree that the water rights of the respective settlers should be "one-hundredth of a second foot per acre for each acre of land to be irrigated"; and by its contract made with the settlers it distinctly agreed that their respective water rights should be that specific amount, the certificate of stock in its holding and operating company (the Canal Company) delivered to such settlers expressly declaring that it "entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time" for the irrigation of his land, and "also entitles the owner to a proportionate interest in the dam, canal, water rights, and all other rights and franchises of the Twin Falls Salmon River Land & Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the state of Idaho."

We therefore regard it as clear that the water rights the respective

settlers are entitled to under and by virtue of the contracts of the parties are one-hundredth of a cubic foot of water per acre per second of time during the irrigating season, with an incidental proportionate interest in the dam, canal, water rights, and all other rights and franchises of the construction company, based upon the number of shares finally sold in accordance with the contract between that company and the state; such amount to be measured to the users, as is expressly declared in paragraph X of the contract between the state and the construction company (during the time the latter retains control of the canal company), "at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system."

It therefore appears by the express declaration of the contract between the parties that the specific amount of water sold to the respective settlers is not a constant flow of that amount, but to be delivered and received in rotation; and such, as we understand, is the almost if not quite universal custom under similar systems of irrigation works. It may be that such amount so used may prove insufficient for the proper irrigation of these lands, but it is most obvious that the interests of all of the parties concerned demand the utmost care in the distribution and use of the water, to the end that the best results possible may be obtained. When the well-known fact is remembered that desert lands after cultivation can produce profitable crops with less water than when new, and that a very considerable quantity of the lands embraced within the present project have, according to the record, been abandoned, with the possibility that more may be, it is at least to be hoped that of the remainder a success may be made for all concerned.

The suggestion made on behalf of the appellees to the effect that their rights are prior to those of the settlers subsequently purchasing, and that they are entitled to have such subsequent purchases as conflict with their asserted rights annulled by a decree of the court, is conclusively answered by this express provision of paragraph VI of the contract between the state and the construction company:

"That to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon to the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the state board of land commissioners."

It results from what has been said that those portions of the interlocutory decree appealed from which adjudge the settlers entitled to

water at the rate of 2¾ acre feet per acre and enjoin the appellants Commonwealth Trust Company of Pittsburgh, trustee, and A. C. Robinson, from collecting or enforcing payments from them until such adjudged amount of water is furnished them, must be and is reversed, and the cause remanded, with directions to the court below to modify the decree accordingly, and for further proceedings in accordance with the views above expressed; each party to pay their own costs in this court.

THE LIVIETTA.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1917.)

No. 2967.

1. SALVAGE ⟸26—COMPENSATION—ELEMENTS OF AWARD.
The following elements are to be considered in determining the amount of a salvage award: (1) The labor of the salvor in rendering the salvage service; (2) the promptitude, persistence, skill, and energy displayed in saving the property; (3) the value of the property employed by the salvors in rendering the service and the danger to which it was exposed; (4) the degree of danger from which the vessel and cargo were rescued and the value of the property.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–64, 68, 84.]

2. SALVAGE ⟸28—COMPENSATION—ELEMENTS OF AWARD—DERELICT.
Where the officers and crew of a vessel, which took fire at sea, left her, but were standing by in the lifeboats when salving vessels came to her assistance, she was not a derelict, in such sense as to have that considered as an element of the salvage award.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 69, 71.]

3. SALVAGE ⟸27—SALVAGE AWARD—PERCENTAGE OF SAVED VALUE.
Where the value of the property saved as the result of salvage operations is small, the percentage of such value awarded to the salvors, in order to give fair compensation for their services, is necessarily large, and such cases do not furnish a criterion of the percentage which should be awarded where the award value is large.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66.]

4. SALVAGE ⟸31—RESCUE OF BURNING VESSEL AT SEA—AMOUNT OF COMPENSATION.
When the Italian steamship Livietta was a few hours out from Port Arthur with a cargo of gasoline and kerosene in cases, there was an explosion in No. 3 hold, which partially wrecked the engine room, caused a leak, and made it impossible to work the engines, and also set the vessel on fire. The crew took to the boats, but stood by. An hour or two afterwards two other vessels appeared and undertook to give assistance. Later two others came to help. It required 5½ days to get the Livietta beached on the Louisiana shore, extinguish the fire, pump her out, and tow her to Port Arthur. Two of the salving vessels rendered service during practically all of that time, and the other two for shorter times. There was danger, owing to the nature of the cargo; but the sea was not unusually high, the salvors were prudent, and neither vessels nor crews were injured. The work was done with reasonable promptness and skill. The salved value of ship and cargo was $253,000, and the value of the salving vessels nearly $200,000. *Held*, that a reasonable allowance for all the services against vessel and cargo was $50,000.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 58.]

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit in admiralty by the Gulf Refining Company, D. M. Picton & Co., and the Steele Towing & Wrecking Company against the steamship Livietta, Dall-Orso & Co., claimants, and R. Ligo, master, as bailee and claimant of her cargo. Decree for libelants, and claimants appeal. Remanded, with instructions.

F. D. Minor, of Beaumont, Tex., and T. Catesby Jones, of New York City (Harrington, Bigham & Englar, of New York City, and Minor & Minor, of Beaumont, Tex., on the brief), for appellants.

D. Edward Greer, of Houston, Tex. (W. T. Armstrong, of Galveston, Tex., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

Outline of Facts.

BATTS, Circuit Judge. November 9, 1915, the Italian steamship Livietta left Port Arthur, Tex., for Montivideo. She was an ordinary cargo steamer of 2,697 gross tons, 290 feet long, with four holds. Her engine room was situated amidships. Her decks were steel; the bulkheads between the engine room and hold No. 2, and the engine room and hold No. 3, were steel, and extended from the upper deck to the bottom. The bulkhead between holds 1 and 2 and holds 3 and 4 was steel up to the 'tween decks, and of wood in the 'tween decks. The cargo, 60,000 cases of gasoline and 20,000 cases of kerosene, was stowed in the four holds. In holds Nos. 1 and 4 were 10,000 cases of kerosene at the bottom, and the rest of the cargo space was filled with gasoline. The Livietta left Sabine Pass at 8:30 a. m., and arrived abreast of the Sabine buoy off Calcasieu Pass about noon. Her course was then changed to E. S. E. The ship was making at the time 8 miles an hour. While on this course, at 4:20 p. m., the ship being about 35 miles from the buoy off Calcasieu Pass, in latitude 29 deg. 15 min. north, and longitude 92 deg. and 42 min. west, an explosion occurred in hold No. 3.

The master, coming on deck from his cabin in the poop, found hatch No. 3 in flames. When the ship left port, two sections of the covers on each hatch had in accordance with terms of the charter party to the Texas Company for the carriage of the cargo, been taken off to permit ventilation. The remaining hatch covers of No. 3 were blown off by the explosion. The master calculated that the vessel was about 20 miles from the Louisiana coast, the nearest land. The first officer, in accordance with orders of the master, put the vessel to port, heading for land. The chief engineer then came on deck and informed the captain that serious damage had been done in the engine room, and that it was impossible for the men to remain below. He stated that the gangway from the bridge house to the engine room, which had been fastened to the bulkhead between No. 3 hold and the engine room, had been destroyed, and said that it was impossible to go down into the engine room to ascertain the extent of the damage. The second engineer reported that at the time of the explosion he was sounding the fresh-water tank, and that the explosion destroyed the floor of the

engine room. He said that, the stairway having been blown to pieces, he ran to the deck, using the boiler room gangway.

When the explosion occurred, the usual valves necessary for navigation were open. There were three sea cocks, one of which was for the circulating pump. The connection between the circulating pump and the surface injection was broken, permitting the water to come into the ship through a 4½-inch opening at the bottom of the engine room. The doors in the water-tight bulkhead between the engine room and hold No. 2 were open. The explosion dislocated the ventilator which led to the shaft tunnel. Water in the engine room could thus find its way both to the forward and after cargo compartments. The master, after securing this information with respect to the effect of the explosion in the engine room, ordered the engine stopped and the lifeboats lowered. The boats, ordered to remain near the ship, were anchored 200 meters to the windward.. There was then little wind and little sea, and the flames in hold No. 3 were about as high as the funnel of the ship.

As night came on, two ships were observed approaching, one from the east and one from the west. Signals from the lifeboats were made with a night lantern and flash light. The boat approaching from the east was the E. L. Russell, with barges in tow, and the one from the west was the Gulfstream, bound out from Port Arthur. Both vessels were owned by the Gulf Refining Company. At a distance of about one-half a mile from where the lifeboats were anchored, the Russell sounded her whistle and began to operate her search light, whereupon the lifeboats were rowed toward her; the officers and crew going aboard when she was reached, about 8:30 p. m.

Capt. Lico said that he tried to make the master of the Russell understand that he desired to stay with his ship, but none of the officers or crew of the Livietta could speak English, and none of the officers or crew of the Russell could speak Italian. The Russell went around the Livietta, anchored her barges, and went to the Gulfstream. The Gulfstream had communicated by wireless with the Gulf Refining Company at Port Arthur, had asked for instructions, and had been directed to stand by. After having gone around the Livietta several times, the Russell approached near enough to permit a line to be thrown over a chock lead in the port bow chock of the Livietta. This did not require any one from the Russell to go abroad the Livietta, nor was it necessary for them to approach the after part of the ship, where the fire was burning. After making the line fast, at about 12 o'clock, the Russell began towing and continued for a period of about six hours, moving the Livietta four or five miles toward shore. During all of this period there was very little wind and sea. In the early morning hours the towing hawser parted, and the Russell left the Livietta and went up alongside the Gulfstream, made fast, and began taking fuel oil.

During the course of the night, several other vessels passed close to the steamship Livietta. One of these was the steamship Louisiana, owned by the Texas Company, to whom Capt. Ibersen by wireless reported. Capt. Ibersen testified that he was prevented by the Russell from getting near the burning vessel, but that he stood by until

daylight, and, as he could render no further assistance, because of the interference of the Russell, proceeded to Port Arthur. He stated that the sea was smooth and the wind a moderate breeze.

As the result of communications from the Gulfstream, the tug John Sealy, under charter to the Gulf Refining Company, and owned by D. M. Picton & Co., left Port Arthur at 11 p. m. the night of the 9th, and arrived the next morning, bringing Capt. Bliss, the port superintendent of the Gulf Company, who took charge of the salving operations. The Sealy made fast to the Russell, and provisions brought out by her for the Russell were transferred. Capt. Bliss ordered 10 men of the crew of the Livietta to go abroad the Sealy. The Russell and the John Sealy then cast off from the Gulfstream, which proceeded on her voyage. The John Sealy, after going around the Livietta, went to the Russell and secured a heaving line. She went alongside the Livietta on her port side near the bow. Some of her men went aboard the forward deck and made a hawser fast to the starboard bow chocks of the Livietta. At this time the Livietta was deep in water, which was level with the portholes amidships. The engine room compartment was full of water. The fire was still confined to holds Nos. 3 and 4 in the after part of the ship. A number of the crew of the Livietta went aboard her at this time, some of them going into the forecastle for their belongings, while others assisted the crew of the Sealy in fastening the hawser. This last statement is denied. About a half an hour was taken in making fast the hawser, a 10-inch manila rope. After the hawser was made fast, the Sealy steamed ahead of the Russell and passed a line from her stem to the Russell. The two tugs then towed tandem toward the Louisiana shore. About three-quarters of an hour after the towing began, the hawser to the Livietta parted; the parting being caused by the chafing of the hawser against the sharp stem of the Livietta, it having been made fast to the starboard bow bitt of the Livietta, and the helm of the Livietta being hard aport, with consequent sheering off to starboard.

The Sealy again went alongside, and the line was made fast as before; the crew of the Livietta again going on board. The hawser again parted from the same cause. The Sealy then went alongside the Livietta for the third time. The hawser was now made fast to the port bow bitt, and the towing proceeded until the Livietta was beached in four fathoms of water, about two miles off the Louisiana shore. When the Livietta was beached her stern swung to the westward, and dunnage on the starboard boat landing forward the No. 3 hatch caught fire. The Sealy went alongside, and some of her crew went aboard and put out the fire. This was the first time any effort had been made to put out fire on the Livietta; it being about 24 hours after the Russell had first sighted her.

The Russell then went to Port Arthur with Capt. Bliss, returning without him the next day. The Sealy remained near the Livietta. On the morning of November 11th efforts to extinguish the fire in the hatches were begun. The Sealy went alongside and began playing water on the fire, pumping from about 8 a. m. until 2:15 p. m. The Sealy then went to Port Arthur for Capt. Bliss. In the meantime, at about 1:15 p. m., the Russell arrived, began pumping,

and continued until 5:30 p. m., when the fire was declared extinguished. The Russell then went off and anchored for the night. During the night the fire broke out afresh, but no effort was made to extinguish it until the next day.

About daybreak of November 12th the steam tug Senator Bailey, which had been hired by the underwriters interested in the Livietta and her cargo, arrived from Galveston. As she approached, the Russell hove up anchor and went alongside the Livietta, taking the lee berth. She then began pumping water on No. 3 and No. 4 hatches. When the Bailey arrived she went alongside, taking the weather berth, and also began pumping on Nos. 3 and 4 hatches. About 8 a. m. the Sealy arrived and joined in the pumping. At 1 p. m. the fire had been extinguished, and the pumping ceased shortly thereafter.

Mr. Anderson, the underwriters' surveyor, who had come out on the Bailey, insisted upon pumping the ship out and floating her. He wanted to use both the Russell and Bailey for this purpose. Capt. Bliss, however, insisted upon using the Russell alone. The Russell pumped from 1:55 p. m. until 4:40, lowering the water about two feet according to the salvor's testimony, and about five inches according to the testimony of Anderson. During this period some feeling developed between Anderson and Bliss; Bliss at first threatening to throw off the Bailey's lines to the Livietta. At 4:40 p. m., however, Bliss accepted the services of the Bailey, which then began to pump. At 10:15 the ship started to swing to anchor, and she floated at 11 p. m. At 7:15 the next morning, November 13th, both tugs stopped pumping, and the anchor was hove up.

The Bailey got alongside the Livietta to pump her out as she was being towed to Port Arthur by the Sealy and Russell. These towing operations began at 9:20 a. m., and the vessel came to anchor at Sabine bar at 9:15 p. m. on November 13th. She did not go into Sabine that night on account of the character of the channel. The water in the Livietta gained during the tow to the pass, and all the attending vessels had to pump during the night to keep her afloat. The next morning she was docked at Port Arthur, and the pumping was resumed and continued till Monday morning.

Two libels were filed in the lower court, the first by the Gulf Refining Company, as owner of the steam tug E. L. Russell, and by David M. Picton & Co., as owners of the steam tug John Sealy; libelants demanding a salvage award against the hull and cargo of $300,000. The second was by the Steele Towing & Wrecking Company, as owners of the steam tug Senator Bailey; libelants demanding a salvage award of $50,000 for services rendered the hull and cargo. By supplemental libel it appeared that the Gulf Refining Company had purchased the Senator Bailey, together with all claims and causes of action for salvage asserted by the Steele Towing & Wrecking Company.

Bonds were demanded of the claimants of the Livietta and her cargo in the sum of $350,000. An application for the reduction of the bond having been made, the court appointed appraisers, who filed a report to the effect that the ship was worth $191,000, and it was agreed that the cargo was of the value of $62,029.31. The ship was released on

a bond for $100,000, filed by the claimants of the vessel, and bond for $35,000, filed by claimants of the cargo.

Trial resulted in a salvage award to the Gulf Refining Company and D. M. Picton & Co. in the sum of $48,750 for salvage services to the steamship, and of $26,250 for salvage services to her cargo. The amount of the award against the ship was reduced $750, and against the cargo $250, because of the conduct of Capt. Bliss with reference to the tug Senator Bailey. Other facts which may appear to be pertinent will be hereafter stated.

[1] The following elements are to be considered in determining the amount of a salvage award: (1) The labor of the salvor in rendering the salvage service. (2) The promptitude, persistence, skill, and energy displayed in saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which it was exposed. (4) The risk incurred by the salvors. (5) The degree of danger from which the vessel and cargo were rescued, and the value of the property.

In this case each of the elements appears, but the court is, nevertheless, of the opinion that the very large award is not warranted. The labor was considerable; there was a reasonable promptitude, skill, and energy displayed in rendering the service; the value of the property employed by the salvors was large; the risk incurred was substantial; the value of the property saved was considerable, and the degree of danger from which the property was rescued was great; but we nevertheless conclude that the misfortunes of the Livietta and of the owners of the cargo should not be increased by the payment of so large a sum as has been awarded by the District Court.

Service Rendered by the Gulfstream.

The first explosion on the Livietta occurred at 4:20 p. m. Tuesday, November 9th. About night the Gulfstream approached the burning vessel, and before ascertaining her name sent messages to Capt. Bliss at Port Arthur, and later advised that she was standing by to pick up boats. Bliss asked to be kept posted. Messages to him at 9:16 advised that Russell was standing by and picking up men in boats, and one at 9:35 stated that burning vessel was an Italian, with Texas Company oil cargo, and that Russell had anchored barges and was going to put hawser on steamer, and asked that Russell be sent stores and Sealy to help. Bliss advised that he was leaving on Sealy with ample provisions, and directed Gulfstream to stand by until arrival of Sealy, and to see that Russell got line on ship. After the line of the Russell parted at about 6 the next morning (Wednesday, November 10th) she went alongside the Gulfstream and received stores and fuel oil. Upon the arrival of Capt. Bliss at about 7 a. m., he went aboard the Gulfstream, and at 8:15 communicated with his office. Shortly thereafter the Gulfstream proceeded on her voyage. Her service extended over not exceeding 15 hours.

Services Rendered by the Russell.

On the afternoon of the 9th, the Russell, en route from Tampa to Port Arthur, with three tank barges in tow, about 5 or 6 o'clock sighted

a fire, being at that time perhaps 14 miles from the burning ship. Slightly changing her course, the Russell reached the Livietta about 7 p. m. The master states that when he got in the vicinity of the ship explosions were occurring, the flames reaching as high as 100 feet. Getting within about half a mile, he slowed down. Using the searchlights, he could see four lifeboats filled with people. These boats, being filled with the crew of the Livietta, came up to his tug. The crew, 26 in number, was taken aboard the Russell. The Russell anchored the barges and then went to the Gulfstream, ascertaining from the captain that the latter had communicated with Capt. Bliss at Port Arthur. At about 10 or 11 he proceeded to the Livietta, having in the meantime been informed as to the character of the burning cargo. He tried to get a line on the bow of the Livietta, but was not close enough. Undertaking to get a big hawser on the Livietta, there was nothing to climb on, and he was compelled to hitch up a six-inch line on the port side. At 11:30 or 11:40 p. m., he got a six-inch line through the chock. According to his statement the sea was choppy, and he could not get his boat to hang onto the ship. At that time the fire was burning in No. 4 hold, and its flames increasing and the explosions continuous. He towed the Livietta that night about five miles, being compelled to tow slowly, because the vessel's helm was hard aport. The wind was blowing across the vessel, and he took precautions to keep it that way, to prevent the hatches forward from catching fire. The towing continued from 11:30 until 6 the next morning, at which time the line parted 15 or 20 fathoms from the ship. He then returned to the Gulfstream, two or three miles away, taking stores and fuel oil from her. While there the John Sealy came up with Capt. Bliss aboard. After this the Russell and Sealy went alongside on the port bow, and, taking the hawser of the Russell, some of her crew went aboard the Livietta. The hawser was pulled up by a small line and made fast to the starboard chock on the bow of the Livietta, this requiring 20 or 25 minutes. The two tugs then started towing the ship toward shore, and after pulling about an hour the hawser parted. The tugs were stopped, the Sealy went back on the port side near the bow of the Livietta, and the hawser, after being wrapped, was again fastened as before. The towing then proceeded until about 2 o'clock, when the hawser again parted. The hawser was again attached, this time, however, on the port, and there was no further chafing. The towing then proceeded until about 4:30, when the ship grounded in four fathoms of water. When the ship was beached, the master testified that the sea was so rough that the hawser could not be unfastened, and it was cut. He said the sea was so rough it was impossible to go alongside the Livietta, and on this account no effort was made to put out the fire. The Livietta having been beached, the Russell left for Port Arthur, taking Capt. Bliss and the captain and a portion of the crew of the Livietta. Having arrived at Port Arthur during the course of the night, the Russell left again at 5:30 a. m. for the Livietta, arriving about 1 o'clock in the afternoon. The Sealy had in the meantime gone alongside the Livietta and begun pumping water on the fire. Upon her arrival the Russell also commenced playing water on the fire, and at 1 o'clock the fire was practically out, and at 5:30 the Russell

stopped pumping. The Sealy in the meantime, at about 2:30, had left for Port Arthur. The Russell stood by, and during the night (of the 11th) the fire broke out again in hold No. 4, but the master of the Russell, on account (he stated) of the darkness, and of the character of the sea, thought it unsafe to attempt to fight the fire at that time. At 6 o'clock the next morning the Russell went alongside the Livietta again and began pumping on the fire. At 8 o'clock the Sealy was back again. Just before the arrival of the Sealy, the Senator Bailey came up and commenced pumping on the fire. The fire was extinguished about 11 o'clock, but the pumping was continued until 1, to cool the decks and prevent a recurrence of the fire. After extinguishing the fire on the afternoon of the 11th, suction hoses of the tugs were put in the holds of the Livietta, and pumping to float the ship began. The Russell pumped by herself for two or three hours, and then the Bailey began to pump. The Livietta was floated about 11 o'clock. The pumping continued until about 8 o'clock the next morning, at which time the pumping was stopped and the tow to Port Arthur began. In the meantime the anchor and rudder had been gotton in workable condition. In the tow to Port Arthur on the morning of the 13th, the Russell and Sealy were pulling the ship, and the Bailey went alongside, furnishing steam for the steering gear. When Sabine bar was reached at 9 o'clock Saturday evening the vessels anchored on account of the character of the channel at Sabine Pass. Water in the Livietta gained during the tow to Sabine Pass, and the ship was getting low in the water again. The Russell's pump having choked up from trash, the pumping by that vessel had to be stopped, and, notwithstanding the Bailey was pumping during this time, the Livietta got so low that the water was coming over the deck again. When the Russell's pumps had been cleared, and she began pumping again, the water was lowered and the tow was proceeded with; the vessels reaching the docks of the Gulf Refining Company at Port Arthur about 2 o'clock in the afternoon. The Russell continued to pump water out of the ship all of Sunday, Sunday night, and Monday morning.

The services of the Russell may be thus summarized: From 5 p. m. Tuesday, November 9th, to 7 p. m., going to Livietta; from 7 p. m. to 10 p. m. Tuesday, picking up crew, anchoring barges, going around Livietta to determine conditions and proper approach; from 10 to 11:30, getting a line to Livietta; from 11:30 p. m. Tuesday to 6 a. m. Wednesday, towing Livietta toward shore; from 6 a. m. Wednesday to —— a. m. going to Gulfstream, taking stores and fuel oil; from —— a m. Wednesday to —— a. m. Wednesday, going alongside Livietta with Sealy and fastening hawser; from —— a. m. Wednesday to 4:30 p. m. Wednesday, towing Livietta toward shore; from 4:30 p. m. Wednesday to 1 a. m. Thursday, going to Port Arthur with Capt. Bliss and part of crew of Livietta; from 1 a. m. to 5:30 a. m. in port at Port Arthur; from 5:30 a. m. Thursday to 1 p. m., returning to Livietta; from 1 p. m. Thursday to 5:30, pumped on fire; from 5:30 p. m. Thursday to 6 a. m. Friday, stood by; from 6 a. m. Friday to 1 p. m., pumping on fire and to cool decks; from 1 p. m. Friday to 8 a. m. Saturday, pumped to float Livietta; during this period anchor and rudder of Livietta put in workable condition; from 8 a.

m. Saturday to 9 p. m., towed Livietta to Sabine Pass; from 9 p. m. Saturday to —— a. m. Sunday, cleaning pump and pumping to keep Livietta afloat; from —— a. m. Sunday to 2 p. m., towing to Port Arthur; from 2 p. m. Sunday to ——a. m. Monday, pumping.

The service was substantially continuous from 5 p. m. Tuesday, November 9th, to —— a. m. Monday, November 15th, the period from 5:30 p. m. Thursday to 6 a. m. Friday being the only time with regard to which question may be raised as to whether she was doing all that could be done.

The Services of the John Sealy.

In response to the suggestion of the Gulfstream, received at 9:35 p. m. Tuesday, November 9th, the John Sealy left the Gulf Refining Company's docks at 11 p. m., reaching the Livietta about 7 o'clock on the morning of the 10th. Passing the burning ship, she went on to the Gulfstream, about two miles away; the Russell lying along the lee of this ship, the tug tied up alongside the Russell and delivered the provisions and stores brought out for her. The crew of the Livietta was transferred from the Russell to the Sealy under directions from Capt. Bliss. The provisions delivered, the Sealy went over to the Livietta, and the master went aboard her with some of the crew. By the time they were aboard, the Russell came up and threw out a heaving line, and the ten-inch hawser was hauled up and made fast to the Livietta, after which the two tugs proceeded to tow the vessel toward the shore. Shortly after the Livietta was beached a fire broke out in dunnage on port landing, forward of hatch No. 4. The Sealy went alongside and put out the fire, some of her crew going aboard. During the night, after the beaching of the Livietta, the Sealy remained about 150 feet from her. The next morning at 7:30 the tug was taken alongside the Livietta, and two streams of water were put on the fire in hatches 3 and 4. She continued to fight the fire until 2:15, after which she went to Port Arthur, arriving about 9:30. She made report to Capt. Bliss, who had gone in on the Russell the day before. The same night, about 12 o'clock, she again left for the scene of the fire with Capt. Bliss aboard, taking water and stores, and arrived on Friday, the 12th, at about 8 o'clock. The fire having during her absence again started, she went alongside the Livietta and participated in the fight against it with the Russell and the Senator Bailey. Her master went aboard, and finding the deck raised at one point about 15 inches as the result of the fire, about 60 rivets were cut and the deck pried apart, in order to get streams of water under the deck. After putting out the fire, the Sealy helped to tow the Livietta to Port Arthur, and in the pumping operations at Sabine bar, and in getting the ship into the canal at Port Arthur on Sunday afternoon. The tug continued to pump until Monday. The salvage work of the Sealy was almost continuous from about 9 o'clock of the night of the 9th, when she began to prepare to go to the wreck, until Monday morning of the following week.

The Services of the Senator Bailey.

The Senator Bailey left Galveston under a contract with interested underwriters, and performed no salvage service until the morning of

the fourth day; that is, Friday, November 12th, when at about 8 a. m. she began to pump to put out the fire, and continued until the fire was out at about 1 p. m. After the fire had been extinguished on that day, the Russell began pumping to float the ship, and pumped for two or three hours alone; Capt. Bliss declining the services of the Bailey. Not being able to reduce the water in a satisfactory way, Capt. Bliss then permitted, at about 4:40 o'clock p. m., the Bailey to begin to help in the pumping. She pumped until about 8 o'clock the next morning, Saturday, November 13th, at which time the pumping was stopped and steps were taken to tow the Livietta to Port Arthur. The Bailey went alongside the Livietta and furnished steam for the steering gear. When the bar at Sabine was reached, about 9 o'clock Saturday evening, the vessels anchored. Water had gained in the Livietta during the tow, and she went so deep that she was in danger of sinking. The Russell's pump having choked up with trash, the principal pumping at the most critical period was done by the Bailey. On Sunday morning the Bailey participated with the Russell and Sealy in taking the Livietta to Port Arthur, and stood by during the balance of the day, ready to pump, if necessary. The service of the Bailey was continuous from about 8 o'clock on the morning of Friday until —— o'clock Sunday afternoon.

Services of the Barges.

To begin the salvage service promptly it was necessary that the barges Allegheny, Mingo, and Pettibone be anchored. They remained at anchor until November 13th, when they were towed into Port Arthur. They performed no direct service.

The charter values of the several vessels were: Tug Sealy, $50 per day; tug Russell, $100 per day; tug Bailey, $100 per day; steamship Gulfstream, $1,000 per day; the barges detained, but not participating in the salving, $250 per day.

The Promptitude, Skill and Energy Displayed in Saving the Property.

The foregoing recital of the operations of the tugs Russell, Sealy, and Bailey indicates that there was no lack of promptitude in performing the needed service. Upon the arrival of the tug Russell, no immediate effort was made to tow the burning vessel ashore, but prudence required that the condition of the vessel and the risks to be assumed and to be guarded against should be given careful examination and consideration. There was no absence of promptitude on the part of the Gulfstream. It communicated with Capt. Bliss, even before it arrived at the Livietta, and thereby helped to promptly organize the effort to save the vessel and her cargo. Capt. Bliss acted with prompt energy.

With reference to the skill displayed, no complaint has been made, except with reference to the manner in which the hawser was made fast when the towing began on the morning after the beginning of the fire. Twice the hawser was worn in two by the fact that it came in contact with the stem of the vessel. The hawser was finally, on the third attempt, properly fastened, and the towing proceeded without

further delay. It may be that absence of skill was shown in not continuing the pumping after the fire first appeared to have been extinguished. Certainly, if it had been continued at that time, much more of the cargo could have been saved, and the injury to the vessel would probably have been materially less. Possibly the beaching of the vessel could have been accomplished earlier than it was, and possibly the fire could have been sooner extinguished; but, on the whole, the salvors showed about all of the promptitude prudence would permit, and all of the skill and energy required for the preservation of the property.

The Value of the Property Employed by the Salvors, and the Danger to Which This Property was Exposed.

The District Judge found the values as follows: The E. L. Russell, $50,000; the John Sealy, $25,000 to $30,000; the Bailey, $90,000 to $100,000; value of the three anchored barges, about $160,000. Neither of the vessels had cargoes. The Gulfstream was exposed to no danger. The barges were not subjected to any danger, and their value can be considered in connection only with the time actually lost by them.

There seems to be great diversity of opinion as to the extent of the danger to which the vessels actually engaged in the salving were exposed. The Livietta was loaded with 600,000 gallons of gasoline and 210,000 gallons of kerosene, and a part of this cargo was afire. Some of the witnesses testified that the flames were shooting up from 50 to 100 feet. It was also stated that explosions were continuously occurring, whereby cases of gasoline were blown high in the air, where they exploded. There were generalizations to the effect that the exploded cans fell around the vessels approaching the Livietta. The other evidence would seem to indicate that this is one of the exaggerations incident to admiralty cases and the inevitable outcome of fires. At all events, however, it can very reasonably be insisted that with 60,000 cases of gasoline and 21,000 cases of kerosene aboard, and with two of the four holds in which this inflammable material was contained burning, the element of danger to any vessel which had to approach close enough to place a hawser on the Livietta was not absent.

It is, however, to be kept in mind that none of the salving vessels acted without deliberate caution. Before any effort at all was made to tow the Livietta, the Russell went around her a number of times, and finally made a line fast at about 100 feet from the nearest point of the fire. The direction of the wind was such as to carry the smoke, flames, and exploding cans away from the Russell, when she approached to attach the line on the first night. The conduct of her master on that and subsequent occasions indicates that he regarded it as reasonably safe to do that which was involved in towing the Livietta. After the line parted on the first night, the Russell laid by, without any effort to do more, and from that time until the making fast of the hawser by the Sealy on the next morning, incurred no risk of any kind. When the Sealy attached the hawser on the second day, the fire had been burning for many hours, and the vessel had been going down in the

water during all that period. A very considerable part of the kerosene and gasoline was in water. The boiler fires had been extinguished. There was no serious danger to a vessel properly approaching; and while the Sealy was attaching the hawser at the point most remote from the fire, there seems to have been no hesitancy on the part of the members of her crew and the crew of the Livietta in going back to the after part of the ship where the fire was burning. During the towing on the second day the wind was abeam, or lacked only a few points of being abeam, during the entire time. This was doubtless, in part, the result of careful and skillful handling of the tow; but apparently neither of the towing vessels was in any character of danger during that operation. The small fire that broke out after the vessel was beached was extinguished by members of the crew of the Sealy, who went aboard the burning steamer. Photographs taken at the time indicate that they were in no great danger, and that, if they were, they entirely failed to realize that fact.

No effort was made to extinguish the fire in the holds until the next morning. The Sealy stood by, claiming that the sea was too rough to safely pump during the night. The Russell went to Port Arthur. The pumping to extinguish the fire was not begun until much of the cargo and the engines had been submerged, and there is nothing to suggest that anybody assumed that any great danger from fire existed during the period of this work. When during the course of the ensuing night the fire again started, no danger ensued to the salvors; the Sealy having gone to Port Arthur and the Russell standing by without effort to extinguish the fire. On the following day the fire was put out; all of the vessels participating, and each being so placed as to be subjected to a minimum of danger.

The condition of the sea during the salvage operations is the subject of controversy, but there is no contention that it was at any time seriously high. Capt. Lico says that about midnight on the evening after the fire started "the wind was fairly strong from the southeast, with a rough sea." The master of the tug John Sealy stated that he would not undertake to put out the fire after the beaching, because of the "high sea." The master of the Russell would do nothing with reference to the fire, which broke out after being apparently extinguished, because of darkness and the rough sea. The salvors are entitled to very little regard for prudently abstaining from action when the sea was rough. Photographs and other evidence indicate that the sea was "choppy" and rough in that degree which is normal when a moderate southeast wind is blowing on the Gulf, during most of the period of the salving operations.

Our conclusion is that no very great danger in fact existed to any of the vessels engaged in the salving. The testimony shows that the persons in charge were familiar with oil and gasoline fires, and realized the extent of the danger to which the vessels under their charge were subjected. Whatever dangers existed were realized and prudently avoided.

It must further be kept in mind that the dangers were such as the salvors were very willing to incur. The evidence indicates that there would have been no difficulty in getting other vessels to assume these

risks. There is no disposition to minimize the dangers, and no disposition to inadequately reward those by whom they were incurred, but the case is to be distinguished from one in which the salving vessel and crew are subjected to great danger in order to save passengers, cargo, and ship, under circumstances where the loss would be total, but for the courageous conduct of the particular salvors.

The Personal Risk Incurred by the Salvors.

This element has already been, in a large measure, discussed. The salved ship was loaded with a cargo of an inflammable and explosive nature. There had been an explosion, the cause of which was not understood. During the course of the burning further explosions had occurred. The flames were going high into the air, and cans of kerosene and gasoline were being thrown into the air. It was necessary on three occasions to go aboard the vessel to fasten the hawser. It was necessary on another occasion to go aboard to put out a small fire, and again to pry up the deck to get the water underneath. The sea was "choppy" and sometimes rough. There was no absence of danger. But we do not quite agree with appellees in characterizing the conduct of the officers and crew of the John Sealy as perilous and foolhardy. Indeed, the conduct of the salvors throughout was marked with decided prudence, and the conclusion of the officers undoubtedly was that men could be sent aboard without any very great danger.

The Degree of Danger from Which the Vessel and Cargo were Saved, and the Value of the Property.

The value of the Livietta as salved was fixed at $191,000, and the value of the cargo that was saved was placed at $62,029.31, or a total of $253,029.31. The extent to which the Livietta and her cargo were in danger is the subject of controversy. It is insisted, on the one hand, that but for the beaching they would in two or three hours have gone down, and the loss would have been total; on the other, that because of the buoyancy of the cargo the vessel would not have sunk, and that the fire would have been extinguished by the water.

We think the danger of a total loss was very real, and certainly the conditions were such that no one would have been justified in accepting expert theories, rather than in promptly taking her to shallow water. The depth of the sea at the place of the explosion was 50 or 60 fathoms, and, of course, if the vessel had sunk, the loss would have been total. There had been an explosion aboard. The cause was not known. The extent of the damage to the vessel could not be determined. She was gradually going down, and there was certainly every indication of extreme danger.

It is not difficult to conclude that the facts, some as they could then be seen, and others as they have since developed, were in accord with the appearance of danger. Water was coming in through a 4½-inch opening. The place and extent of the opening could not be ascertained. The ship's pumps could not be used. Before the vessel could be beached, water was coming through the portholes. Even after the fire had been extinguished, and the vessel had been taken to Sabine Pass,

she was apparently in great danger of sinking. In addition to the danger of sinking was the danger from fire and explosions. The first explosion had seriously injured the vessel, and there were possibilities of explosions more destructive. The fire had extended from hold No. 3 to hold No. 4. A change in the wind or the position of the vessel would have endangered the cargo in holds 1 and 2, and everything on and above decks. If the contention that the vessel would not have sunk is correct, a part of the cargo would have been saved by the water which came into the holds; but we will not now predicate a judgment on a theory no one would have been justified at the time in acting upon.

We are warranted, we think, in concluding that, but for the help promptly given, the Livietta and her cargo would have been a total loss. It is to be remembered, however, that she was on an ocean path that was constantly used by vessels from which she could have received help. The danger was not of that character which would have existed if she had been far out at sea, or in waters rarely used.

[2] Counsel devote much time to a discussion of whether or not the Livietta had become a derelict. At the time of the approach of the Russell no one of her officers or crew was aboard her; but it cannot be said that she was abandoned. They were in lifeboats alongside, and were there doubtless for the purpose of again going aboard, if it appeared feasible and safe, and of securing the services of other vessels to salve her, in any event. Even if she may have been a technical derelict, it would not be proper to apply to her the legal consequences, so far as the amount of salvage is concerned, which have sometimes been applied to vessels given up as totally lost.

Going over the entire record, and giving particular consideration to the matters which have heretofore been mentioned, we are of the opinion that the award should be substantially reduced, and have concluded that $50,000 would be a reasonable amount for the services rendered and for the accomplishment of the public policy involved in encouraging, by liberal rewards, services of the kind performed by the salvors in this case.

[3] Our attention has been called to a number of cases in which awards have been made of large percentages of the total values of the salved vessels. In a number of these cases 50 per cent. of the salved value was awarded, and in some cases a much larger per cent. In no case cited, however, in which the award was as much even as 30 per cent., was the amount awarded nearly as large as we give in this case. In one case only of all those cited by libelants was the amount we award exceeded. In that case, The Camanche, 8 Wall. 448, 19 L. Ed. 397, a wrecking company sent equipment from New York to San Francisco, and engaged in arduous work, largely by divers; an agreement of 27 per cent., amounting to $110,000, was approved. The case could hardly be used as the basis for criticism of the award we make herein. If the values in the instant case had been small, we would have been compelled to award a larger per cent., though it would probably have been a smaller amount. If the work had been the same, and the amount saved had been $20,000, it would not have been possible to make a proper award, except by exceeding 50 per cent. We are giving only

about 20 per cent. of the salved value, but we believe it compensates for the labor performed and the risk incurred, and leaves a sufficient margin of award to amply conserve the public policy involved.

[4] The trial judge reduced the amount of his findings from $75,000 to $74,000, upon a consideration of the conduct of Capt. Bliss with reference to the Senator Bailey. In reducing the award, we have not permitted to influence us the efforts of Capt. Bliss to save for his company all the legitimate rewards of labor done and dangers incurred. The circumstances were not such as to develop refinements of courtesy; and we think the conduct of Capt. Bliss, if not entirely in conformity with the rules of etiquette, was at least entirely in accord with the promptings of nature.

Nor have we reduced the award on account of the fact that libelants primarily demanded a sum in excess of that to which we think them entitled. Zeal of counsel, manifested by excessive demands, is not to be taken as seriously as such action on our part would imply. Besides, any possible effect of exaggeration by libelants of the amount and value of the services should be held canceled by the disposition to diminution displayed by the claimants.

No reason has been suggested to us why the cargo should pay a larger percentage of award than the vessel. The $50,000, therefore, determined upon as the total amount of the award, is apportioned $37,500 against the Livietta and $12,500 against her cargo. The case will be remanded, with instructions to the court below to render judgment in accordance with this opinion.

SANTIAGO et al. v. ROSES et al.

(Circuit Court of Appeals, First Circuit. May 8, 1917.)

No. 1226.

1. COURTS ⟸489(13)—FEDERAL COURTS—JURISDICTION—ADMINISTRATION OF ESTATES.

In a suit to have a mortgage and proceedings for its foreclosure declared void, and to have plaintiffs declared the only heirs at law of the mortgagors, the federal District Court for Porto Rico has no jurisdiction to make such declaration respecting plaintiffs' heirship, as no federal court has original jurisdiction of the administration of estates of deceased persons.

2. MORTGAGES ⟸86(3)—VALIDITY—SUFFICIENCY OF EVIDENCE.

In a suit to have a mortgage executed by a person acting under a power of attorney declared void, evidence *held* insufficient to charge the mortgagees with fraud in procuring the execution of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 197, 1364.]

3. MORTGAGES ⟸319(3)—PAYMENT—SUFFICIENCY OF EVIDENCE.

In a suit to have a mortgage and proceedings for its foreclosure declared void, evidence *held* insufficient to show that the mortgage debt was completely satisfied and paid, or that a receipt in full and cancellation of the mortgage were demanded and refused on false and fraudulent pretexts.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 863, 875, 915, 1366.]

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4. JUDGMENT ⊜461(4)—SETTING ASIDE—EVIDENCE—NOTICE.
Evidence *held* insufficient to show that the mortgagors had no notice of the foreclosure proceedings.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895.]

5. JUDGMENT ⊜957—EVIDENCE TO IMPEACH JUDGMENT—OVERCOMING PRESUMPTION OF REGULARITY.
Where the record of the proceedings to foreclose a mortgage in a Porto Rican court recited that the mortgagors had interposed no objection, and that one of the mortgagors was himself appointed trustee of the land, and contained a petition, purporting to have been filed on behalf of the mortgagors, reciting that they had no opposition to offer, and naming an appraiser whose appointment they requested, clear and convincing proof was necessary more than 20 years after the proceedings to overcome the presumption in favor of their regularity.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1826.]

6. LIMITATION OF ACTIONS ⊜19(1)—LIMITATION APPLICABLE—REAL ACTIONS.
Civ. Code Porto Rico, § 1864, providing that real actions with regard to real property prescribe after 30 years, applies only when want of good faith appears on the defendant's part, in view of section 1858, providing that ownership and other property rights in real property shall prescribe by possession for 10 years as to persons present and 20 years with regard to those absent with good faith and with a proper title.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85.]

7. PRINCIPAL AND AGENT ⊜43(3)—REVOCATION OF AUTHORITY—DEATH OF PRINCIPAL.
Where an objection to the validity of a mortgage executed by a person acting under a power of attorney, on the ground that one of the mortgagors had died a few days before the mortgage was executed, was never raised or suggested until 22 years later, more than 15 years after the termination of the foreclosure proceedings, and over a year after the only surviving child of such mortgagor attained majority, and in the foreclosure proceedings, a petition by the mortgagors, reciting that they had no opposition to offer was signed by her father as her legal representative, and it did not appear that he was not her legal representative, the mortgage could not be avoided by mere proof of her mother's death before the mortgage was executed, without evidence charging the agent or the mortgagees with knowledge thereof, in view of Civ. Code Porto Rico, § 1640, providing that what has been done by the agent when he was not aware of the death of the principal shall be valid and of effect with regard to third persons, who may have contracted with him in good faith.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 71.]

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

Suit by Maria Leonor Santiago y Muniz and others against Miguel Roses y Artau and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Perry Allen, of New York City (Henry G. Molina, of San Juan, Porto Rico, on the brief), for appellants.

Howard Thayer Kingsbury, of New York City (Frederic R. Coudert, of New York City, on the brief), for appellees.

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

DODGE, Circuit Judge. By this bill in equity, filed May 13, 1913, the appellants (hereinafter called plaintiffs) attack the validity of proceedings completed in 1898, to foreclose a mortgage dated April 11, 1891.

The mortgage purports to have been given by six persons in all, as owners of the mortgaged property. Two of said persons, living when the bill was filed, are plaintiffs in this suit. The remaining plaintiffs, eight in number, allege themselves to be the heirs at law of one or another of the four other mortgagors, deceased prior to the filing of the bill.

The mortgagees were the persons then composing the firm of Roses & Co., of Arecibo, Porto Rico, to which firm the mortgage purports to be given. The bill alleges that said firm, having entered into possession of the mortgaged property in 1901, continued in possession until 1909, and in that year dissolved and divided its property, allotting the mortgaged property here in question to three of the defendants named in the bill, then members of said firm, who have since continued in possession thereof.

The bill alleges all of the ten plaintiffs named to be citizens and residents of Porto Rico. It names fifteen persons in all as defendants, and alleges that they are all the partners of said firm and of its successor, a firm which in 1899 is alleged to have taken over all the assets and assumed all the liabilities of the original firm, thereafter continuing its business until its dissolution in 1909. Of the three defendants alleged to be in possession of the property, one, according to the bill, is a citizen of the United States and a resident of Porto Rico; the other two are Spanish subjects and reside in Spain. All the remaining twelve defendants are Spanish subjects, according to the bill, and all but two of them, who reside in Porto Rico, reside in Spain, according to the bill. None of said twelve defendants are alleged to be now in possession of the property.

The mortgage was executed on behalf of the mortgagors named in it by one Delgado as their attorney in fact. It purported to secure the payment of 2,550 pesos, with interest at 12 per cent., on or before March 25, 1892. The bill alleges that one of the mortgagors named had in fact died on April 7, 1891, four days before the date of the mortgage.

The bill further alleges that Roses & Co. fraudulently induced the mortgagors to execute the mortgage. It does not deny Delgado's authority to execute the mortgage, except so far as the above allegation that one of their number had died amounts to such denial. It does not allege that the debt purported to be secured by the mortgage was not in fact owing by the mortgagors named to the mortgagees, though it refers to said debt as one which "the said firm alleged to be owed it by Antonio Santiago y Heredia," the husband of one and father or grandfather of the other mortgagors named, who appears to have died some months before the execution of the mortgage, in January, 1891, or earlier.

The bill goes on to allege that during 1892 the mortgagors paid the mortgage debt in full and requested cancellation of the mortgage, and that Roses & Co. "for various false and fraudulent pretexts" failed

to cancel it, and on the contrary proceeded to foreclose it by proceedings begun in the court of first instance, in Arecibo, in April, 1892, wherein Roses & Co. were adjudged owners of the property in October, 1897. Of these proceedings, according to the bill, no sufficient notice was given, and they were falsely and fraudulently pursued by Roses & Co. for the purpose of unlawfully depriving the plaintiffs of their property.

The bill prays (1) that the plaintiffs be declared "the only heirs at law" of the respective mortgagors; (2) that the mortgage be declared void so far as it purports to convey the interest of the mortgagor alleged to have died before its execution; and (3) also void as to all the plaintiffs, and that it and the record thereof be canceled; (4) or in the alternative, for repayment of the amount paid in satisfaction of the mortgage debt; (5) that the foreclosure proceedings be declared void; (6) that the plaintiffs be declared owners of the property and its present possessors ordered to vacate it; (7) for an accounting of rent and profits since Roses & Co. took possession; and (8) for payment to the plaintiffs of the amount thereby ascertained to be due them.

[1] 1. As to the first of the above prayers, the federal District Court for Porto Rico is without jurisdiction to grant it. The terms in which the request is made are as follows:

"That the complainants Perpetua, Maria, and Mariana Diaz y Santiago be declared to be the only heirs at law of Antonia Santiago y Muniz; that the complainant Beatriz Gonzalez y Santiago be declared to be the only heir at law of Saturnina Santiago y Muniz; that the complainants Isidra, Victoria, Maria, and Cipriana Andujar y Santiago be declared to be the only heirs at law of Carmen Santiago y Muniz; and that all the complainants be declared to be the only heirs at law of Antonia Muniz y Galarza."

Declarations of heirship such as the federal District Court is thus asked to make in the case of each of the four mortgagors above named might apparently have been made, upon their respective deaths, and upon proper petition and proof, by the local district court of the last domicile, of the decedent, or of the place where her property was situated, if she left no will or no valid will. The provisions of the Porto Rico Revised Statutes regarding them, in force since March 9, 1905, are sections 1558, 1559, of the Compilation published by the Bureau of Insular Affairs, War Department, in 1913. The alleged dates of death of three of said four mortgagors are subsequent to the enactment of these provisions. The alleged date of death of one (Saturnina) is April 7, 1891, at which time Porto Rico was under Spanish law, which is understood, however, to have had similar provisions upon the subject. No application to any local court for any declaration of heirship in either of the four cases has ever been made, so far as appears.

It is certain that no federal court has original jurisdiction of the administration of estates of deceased persons, such as would be necessary for the purpose of making such declarations of heirship. See Amsterdam v. Puente, 3 P. R. Fed. 447; Aran v. Fritze, Id. 509, 521; Ramos v. Arsuaga, 6 P. R. Fed. 85. Obviously, therefore, no such court has power to make such declarations in a case like this, wherein its jurisdiction depends entirely on diverse citizenship of the opposing parties,

and involves no rights in dispute between them in or to the estates in question.

The bill alleges the death of Antonia, Saturnina, and Carmen Santiago, and of Antonia Muniz, on various dates after the giving of the mortgage and before the bill was filed. It does not allege, as to either of said persons deceased, whether she left a will or not. It alleges their respective surviving children and only heirs at law to be the plaintiffs named in the above quotation from the bill. All these allegations are denied in the answer for want of knowledge or information. Evidence offered by the plaintiffs, which the defendants did not undertake to contradict, tended to prove that the above-named four persons died upon the alleged dates. If it can be said that there is evidence tending to show that Antonia Muniz left no will, there is certainly no evidence tending to show whether the other persons deceased left wills or not, even if the federal District Court could properly undertake to determine whether they died testate or intestate.

As to all the plaintiffs, therefore, except the two survivors of the original mortgagors (Maria Leonor and Florentina Santiago), it may well be true, as the defendants claim, that no rights in them entitling them to maintain such a bill as this have been established. That, under Porto Rican law, rights in or to real estate pass by descent, so as to vest in heirs at law independently of any will or declaration of heirship, is not made clear. The opinion of the District Court suggests this question, but, without passing upon it, determines the case on other grounds. Neither party having satisfied us regarding the actual state of Porto Rican law with reference to the matter, we shall assume, without deciding, that all the plaintiffs, without distinction, may have rights entitling them to maintain such a suit as the present, although no local court has so declared.

[2] 2. All the remaining prayers for relief are based on allegations apparently meant to be understood as charging the defendant firm with fraud, first in the execution of the mortgage, and later in connection with the proceedings to foreclose it. The District Court found none of these charges proved, and it is for the appellants to satisfy us that the evidence required a contrary finding.

As has been stated, there is no attempt to deny that Delgado's power of attorney from the mortgagors, so far as it was concerned, was originally valid, and gave him the authority it purported to give him. The plaintiffs put it in evidence. It was executed before a notary in Utuado, February 25, 1890, more than a year before Delgado executed the mortgage on their behalf, which he did before a notary in Arecibo, April 11, 1891. The power of attorney expressly authorized Delgado, among other things "to constitute, modify, and cancel mortgages and other liens." According to the record, the six persons who gave it "did not sign, because they could not do so, and a witness, Mayol, signed for them." But, even if they had undertaken to deny their due execution of the power, the fact that they were unable to sign it would be of little significance in a country where such papers have to be executed, as this was, before a notary, and to form part of his records.

The only allegations of fraud inducing the execution of the mortgage are in the following terms:

"That the firm Roses y Compania was a very powerful and wealthy business house, doing a very great business in Arecibo and a very large proportion of the business of Utuado, especially the production and exportation of coffee and the furnishing of supplies to the coffee producers, and the complainants were comparatively poor and ignorant people, owning a few pieces of land whereon they produced coffee and other fruits, and from the sale of the former, always to [said firm], and consumption of the latter were able to support themselves and their families. That [said firm], taking advantage of their influential position in the community and of the ignorance of the complainants and their parents, induced them falsely and fraudulently through and by means of said [Delgado], who was in the employ and under the influence of [said firm], to execute the aforesaid mortgage of their own property to secure a debt which the said firm alleged to be owed it by Antonio Santiago y Heredia," etc.

From the mortgage itself, put in evidence by the plaintiffs, it appears that the debt it purported to secure was not a debt claimed by the firm to be due it from Antonio Santiago y Heredia, but a debt claimed to be due it from the plaintiffs themselves as his "successors." It recites that Delgado has—

"arranged this day pursuant to a due liquidation the current account which the said Santiago estate owes to [said firm], to satisfy the same at a certain date, with interest, by means of a mortgage of the described property to respond for the debt and the amounts determined upon for unpaid interest and costs."

Also that Delgado, in the name of his principals, as the "members constituting the estate" of said Antonio—

"recognizes and confesses that the latter are joint debtors of [said firm], in the sum of 2,550 pesos * * * as the balance of a commercial account arranged on this date, and obligates them to satisfy said amount on [March 28, 1892], together with interest," etc., "* * * mortgaging at the same time * * * the property * * * to respond for the payment of said 2,550 pesos, together with 450 pesos for interest and 500 pesos for costs and damages in the event of judicial proceeding."

That the mortgage itself, and not the above allegations in the bill, truly describes the debt it was executed to secure, appears from accounts current on the firm's book. An account with said Antonio begins in 1886, and shows a balance of 5,602.26 pesos due from him at the end of February, 1890. This amount is charged under date of March 1, 1890, against his "succession." Subsequent charges and credits during subsequent months indicate that the "succession" continued to do business with the firm by sending it coffee from time to time, and by obtaining from it cash and merchandise at various times, and that as the result of said transactions the balance in the firm's favor on April 17, 1891, was reduced to only 2,512.08 pesos. Under that date there is credited to the "succession" 2,550 pesos for "the amount of the mortgage obligation which they have constituted in our favor on the 11th inst.," leaving 37.92 pesos to the "succession's" credit in the account as thereafter continued by later charges and credits until the end of 1897. There is no suggestion of any complaint made at the time that the mortgagors were under no indebtedness to the firm.

Nowhere in their bill do the plaintiffs distinctly allege that the debt which the mortgage purported to secure was not in fact owing to the

firm from the mortgagors. The nearest approach to such an allegation is to the effect that—

"the owners aforesaid of the said property, ignoring their rights in the matter and thinking that they were legally bound to satisfy * * * the mortgage debt of 2,550 pesos with interest, * * * did completely satisfy and pay the same in the office of the said firm."

We find nothing in the record amounting to proof that the debt secured was not in fact owing, or that in recognizing it as such and executing the mortgage to secure it Delgado acted "in the employ or under the influence of" the firm, or otherwise than in good faith toward his principals. Two items charged to the "succession" in the account under date of April 7, 1891, for "cash delivered to B. Delgado," amounting to 302 pesos in all, appear to be mainly relied on in support of these charges; but no proof was offered that the 302 pesos were paid to Delgado for other than legitimate purposes, or that the "succession" got no benefit from the payments. The only testimony having anything like direct reference to Delgado's doings in the matter of the mortgage was in substance as follows: Diaz, surviving husband of one mortgagor (Antonia), and father of three of the plaintiffs, said the mortgage did not come to his knowledge until some months after it was given. Florentina, one of the mortgagors, and Andujar, her husband, stated that Delgado obtained the power of attorney for the purposes of a then pending lawsuit wherein the heirs were interested; that Santiago's widow shortly afterward "became very angry, and immediately caused the power of attorney to be withdrawn, because Delgado had constituted without her consent a mortgage in favor of the firm." Andujar stated that he, with two other sons-in-law, went to Delgado, at some time not fixed, who turned over to them the copy of the power of attorney. But Andujar also stated on cross-examination that the widow became "angry," because she claimed that the true amount of the debt to the firm was only 1,300 pesos, which the "succession" could have paid without mortgaging property—a claim which no evidence was offered to support. Martinez, keeper of the records of the Arecibo district court, who said he had known Delgado for 30 years, testified that about the year 1890 Delgado "was engaged in securing lawsuits," he was "what we usually call pettifoggers (pica pleitos)." As all the witnesses testified in person before the District Judge, we cannot hold it reversible error on his part that he declined to find the defendants charged with fraud in procuring the execution of the mortgage, upon allegations like the above, unsupported except by evidence of the above character, given more than 20 years after the events to which it related.

[3] The allegations of fraud practiced after the mortgage had been given are that, although the mortgage debt of 2,550 pesos was completely satisfied and paid, as above, and although the owners of the property—

"thereupon requested from [said firm] a receipt in full for the said amount and the corresponding cancellation of the mortgage, * * * [said firm] for various false and fraudulent pretexts given by it has ever failed to cancel the same, and, on the contrary, have proceeded to foreclose the mortgage as hereafter stated."

The allegations charging fraud in connection with the foreclosure proceedings are that the owners—

"were never notified as to any legal proceedings whatever established by [said firm] against them for the purpose of foreclosing the mortgage heretofore mentioned and completely satisfied and paid as aforesaid; that the aforesaid legal proceedings were falsely and fraudulently pursued on the part of [said firm] with the object of unjustly and illegally depriving the complainants of the property, and that the aforesaid decree of foreclosure and grant to [said firm] * * * is null and void, and should be so adjudged by this court."

As to the above allegations that the firm proceeded to foreclose the mortgage, notwithstanding it had been paid in full, there is no attempt to show that the firm received anything from the mortgagors before the mortgage became due on March 28, 1892, except a shipment of coffee, for the proceeds whereof the "succession" is credited on the firm's books February 17, 1892, for 820.59 pesos, in the same manner that prior like shipments had been credited. To show that this shipment was made on account of the mortgage debt, there is only the testimony of Diaz and Andujar. Neither undertakes to say that it was so understood or accepted by the firm, or that any receipt for it was ever asked or given. Of course, no receipt in full could then have been claimed.

The record of the foreclosure proceedings shows that they were begun by a petition bearing date March 21, 1892, but in the record thereof March 29, 1892, is afterwards recited as the date of their actual beginning. Before anything except the coffee above referred to was received by the firm from the "succession," the foreclosure proceedings had progressed by successive steps in April, June, and July, 1892, to a sale on August 19, 1892, at which sale no bidders appeared, and which was followed, February 22, 1893, by a petition that the mortgaged property be adjudged to the firm at two-thirds its appraised value of 4,000 pesos. The allegations that the mortgagors were without notice of these proceedings are further considered below; but it is now to be noticed that the alleged full payment of the mortgage before foreclosure, rests in addition to the above coffee shipment, upon two payments of 2,000 and 500 pesos, respectively, to the firm, for which its books give credit to the "succession," in the above account, on March 22, 1893, and November 16, 1893, respectively—both made after the mortgaged property had been offered at public sale, as above.

Diaz testified that he made the payment of 2,000 pesos to a representative of the firm in person, and that the money came from one Ramos, to whom the "succession" had sold part of the mortgaged property for 4,200 pesos in March, 1893, with the understanding, according to Andujar and Ramos, that the mortgage should be discharged out of what Ramos paid. But his testimony does not go far enough to prove any understanding with the firm, as to this payment, that it was to be then so applied, and such an understanding can hardly be presumed, in view of the stage to which the foreclosure proceedings had then progressed, as above. A fire in his store, according to his testimony, has since destroyed a receipt then given him.

Ramos testified that the later payment of 500 pesos was made to

the firm by him; but he, like Diaz, fails to show that what he then paid was to be applied in reduction of the mortgage then in process of foreclosure. It is to be noticed that, according to Ramos, the property was treated between him and the "succession," in their dealings of March, 1893, as then subject to a mortgage of 2,500 pesos, without reference to any reduction thereof by the shipment of coffee now claimed to have reduced it in February, 1892, by more than 800 pesos.

As to the allegations that after the mortgage had been fully paid, a receipt in full and cancellation were demanded, but refused by the firm on "various false and fraudulent pretexts," the only evidence relied on in support of them is to the effect that four or five years later, in 1898, after the firm had been for some time in possession of the mortgaged property under final decree in the foreclosure proceedings, Andujar, Diaz, and one, Serrano went to the firm to find out what Ramos had paid on account of the property; he having demanded the deed thereof from the "succession." They were shown the firm's books, upon which there appeared, then, as now, the above payments credited in the account current. For the status of the mortgaged property the firm referred them to the record of the foreclosure proceedings. We are unable to say that the District Court erred in declining to find these allegations of fraud sufficiently supported by proof.

[4] As to the allegations that the "succession" had no notice of the foreclosure proceedings, the record of said proceedings recites that on April 11, 1892, the mortgaged property was "attached," and Diaz himself appointed "trustee" thereof; an order made therein April 25, 1892, further recites that the mortgagors had interposed no opposition; and a petition therein, dated June 23, 1892, purporting to have been filed on behalf of Antonio Santiago's widow, his then living daughters, and Gonzalez, surviving husband of Saturnina, who had deceased, recites that they had no opposition to offer, and names an appraiser, whose appointment they requested. This petition purports to have been signed at Utuado by Andujar and Diaz, each "for myself and wife," and by Gonzalez. The name of Antonia Muniz is signed by one Echevarria, one Rodrigues signs "by request of Don Vicente Andujar, Jr., and Doña Carmen Santiago," one Quinonez signs "by request of my wife, Maria L. Santiago." The order for sale of the property on August 19, 1892, made July 22, 1892, directed publication of notice in Utuado, where the property was situated and the mortgagors lived.

[5] To overcome the presumption in favor of the regularity of the proceedings, after more than 20 years, in view of what appears from the record thereof, as above, it is obvious that clear and convincing proof was necessary. No one of the surviving mortgagors undertook to testify that they never had notice of the pendency of the proceedings. The only testimony having any tendency whatever to show such want of notice was in substance as follows: Diaz denied that he was appointed trustee in said proceedings in April, 1892, as recited in the record. He asserted that his signature to a certificate which recited his appointment, his acceptance, and that he had been sworn to perform the duties was in fact made for the purposes of a different proceeding. He did not undertake to deny, however, that he signed the petition of June

23, 1892, for the appointment of an appraiser on behalf of himself and wife. Andujar undertook to testify that he knew nothing of this petition and that neither he nor his wife had knowledge of the foreclosure proceedings. According to his testimony, he did not remember signing anything in 1892, and had only learned how to sign within the last three years. We are unable to hold that the District Court erred in declining to find this evidence sufficient to prove that the foreclosure proceedings were in fact carried on without notice to the mortgagors. To prove that they were intentionally so carried on by the firm, with the fraudulent purpose of obtaining a decree without notice, as the bill alleges, we find in the record absolutely no evidence worthy of consideration.

Following its petition of February 22, 1893, that the mortgaged property be adjudged to it, the firm filed another petition November 24, 1893, wherein it recited that, of the 333 cuerdas covered by the mortgage, 50 were claimed by third parties, and consented that they be excluded from the adjudication sought. Alleging that the amount due on the mortgage, with interest and costs, exceeded two-thirds of the appraised value of the property, the petition asks that the firm be put in possession of the remaining 283 cuerdas and that a writ issue for that purpose. The court so ordered November 25, 1893.

No further step in the proceedings was taken, however, until August 14, 1897. By a petition then filed, the firm, of its own accord, so far as appears, represented to the court that prior to the carrying out of the order of November 25, 1893, the "indebted estate had made payment of the greater part of the credit," leaving a balance of 894.95 pesos due, with interest and costs. It asked the court, in view of this, to adjudge to the firm and put it in possession of only "a sufficient number of cuerdas" out of the 283, to cover what so remained due. An order to that effect, made October 7, 1897, recited that the petition "was announced in open court to the defendant estate." On a subsequent petition for the appointment of a surveyor to "make the segregation of the property under the attachment, and fix its metes and bounds," the court made such an appointment, January 20, 1898, following an order for notice to the parties and a recital that the defendant failed to appear. By another order, made the same day, 132.04 cuerdas were adjudicated to the firm out of the 283 referred to in former orders. A subsequent "act of possession" certifies that on March 4, 1898, an officer of the court gave possession in pursuance of said order to a representative of the firm of a parcel of land bounded according to an accompanying report of the designated surveyor. This is the land involved in the present suit. A certificate of the proceedings, reciting that they had been upon due notice, was duly registered in July, 1898.

There is testimony in the record, from Ramos, that he was in occupation of the mortgaged property in March, 1898, would have known if possession had been taken as this "act of possession" recites, and that he never saw there the officer or the representative of the firm mentioned in said act. Except as already stated, there was no evidence before the District Court tending to contradict the recitals in

the foreclosure proceedings relating to the steps taken therein in 1897 and 1898. It was argued that 894.95 pesos, with interest and costs, was not in fact due the firm in August, 1897; but we cannot hold that the evidence before the District Court required such a conclusion, against the findings of the local court, as shown by the record of its proceedings at the time. That the firm voluntarily relinquished its claim to more than half the property covered by its mortgage obviously tends to negative the charge that it was acting oppressively, or carrying out a scheme to defraud the mortgagors. The arguments to that effect in the appellant's brief seem to us based mainly upon epithets and accusations unjustified by any proof to be found in the record.

All the above proceedings, resulting in possession taken by the firm under judicial order, were had while Porto Rico was Spanish territory and under the Spanish law then prevailing therein. After said possession was acquired in 1898, there was no attempt to dispute or disturb it until this suit was brought in May, 1913. Ramos occupied the property under lease from the firm during part of 1900 and 1901, but the evidence regarding the dealings between him and the firm in the matter of this lease has no tendency, so far as we can see, to assist the plaintiff's contentions above considered. The liquidation of the firm's affairs in 1909, whereby the property came into possession of the three defendants above named, took place meanwhile, four years before this suit was begun.

We find no error in the refusal of the District Court to hold the foreclosure proceedings void whether for want of notice or otherwise.

[6] 3. The defendants pleaded, in answer to the bill, that the plaintiffs' cause of action was barred by certain provisions of Porto Rican law; also that by their undisturbed possession since 1898 they had acquired a title by prescription, which it was too late to dispute in 1913. Since the plaintiffs' suit was not brought in any local court, nor according to the forms peculiar to the local laws, there is difficulty in directly applying to it the terms of any section cited from the Civil Code or the Mortgage Law. If the suit is, in substance, an "action for nullity" of a contract, such as is to "last four years," according to section 1268 of the Code, the time for bringing it, of course, expired long before 1913, as remarked in the opinion of the District Court. In Henna et al. v. Sauri et al., 237 Fed. 145, — C. C. A. —, before this court in 1916, a suit in the courts of Porto Rico, similar in nature to this, was held by those courts not "prescribed" until after fifteen years had expired—a ruling not appealed from, and according to which, if here applied, the plaintiffs' claims became barred by March, 1913, at the latest. By section 1858 of the Civil Code, the rights of the firm to the property in question would become established by prescription after their possession had continued for ten years, i. e., in 1908; the plaintiffs being during that entire period all "present" in Porto Rico, so far as appears. The District Court regarded the firm's rights as so established. The plaintiffs invoke section 1864 of the Code, according to which "real actions" do not prescribe until after thirty years; but, in view of section 1858, this rule is applicable only when want of good faith appears on the defendant's part, which, as above held, can-

not be said in this case. In view of the uncertainty as to the proper application of the local law relating to these questions, we have preferred to examine fully the evidence concerning the plaintiffs' allegations, rather than to dispose of them by any ruling that their right to make them had expired by limitation.

[7] 4. Certain grounds upon which one of the plaintiffs, Beatriz Gonzalez y Santiago, denies the validity of the mortgage as to her, remain to be considered.

Born February 28, 1891, she claims to be the only surviving child of Saturnina, the daughter of Antonio Santiago, whose death occurred, according to the bill, at Utuado, on April 7, 1891, four days before the date of the mortgage executed as above under his power of attorney by Delgado at Arecibo. Of any authority to represent her mother he had been, as she contends, necessarily deprived before the mortgage was executed.

Her objection to the validity of the mortgage, though available ever since its execution, is one never raised or suggested until the present bill was filed 22 years later, 21 years after the foreclosure proceedings began, and more than 15 years after their termination. She attained majority February 28, 1912, more than a year before the bill was filed. Her father, Atanacio Gonzalez, was one of the signers of the petition above mentioned, filed June 23, 1892, in the foreclosure proceedings—"in his capacity," it is therein recited, "as father of the sole and only heir of [her mother], named Beatriz, a minor, and therefore her legal representative." There has been no attempt to deny that he did so sign, or to show that he did not continue to be his daughter's legal representative, throughout her minority.

In view of all the above, we find no error in the conclusions of the District Court, referring to section 1640 of the present Civil Code, identical in terms with article 1738 of the Spanish Civil Code, in force at the time, that the mortgage cannot now be avoided by mere proof of the date of her mother's death, without evidence charging Delgado or the firm with knowledge on April 11, 1891, that said death had occurred.

All the assignments of error are in effect disposed of by what has been said above.

The decree of the District Court dismissing the bill, with costs, is affirmed, and the appellees recover their costs of appeal.

PRICE v. WALLACE.*

(Circuit Court of Appeals, Ninth Circuit. May 14, 1917.)

No. 2849.

1. TRUSTS ⟸44(3)—WILLS ⟸58(2)—AGREEMENTS TO DEVISE OR BEQUEATH—SUFFICIENCY OF EVIDENCE.

Agreements whereby a trust is created, or whereby one agrees to leave a child's share of his estate to another, though not legally adopted, or to leave all of his property to another, will not be enforced in equity, unless it is clearly and satisfactorily shown that the agreement relied on was made, that it was clear and specific in its terms, and that by enforcing it the true intent of the parties is being carried out.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 68; Wills, Cent. Dig. § 165.]

2. TRUSTS ⟸44(1)—WILLS ⟸58(2)—AGREEMENTS TO DEVISE OR BEQUEATH—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to establish an alleged agreement by plaintiff's stepfather that, if she would give up and procure a divorce from her husband, and live with him, he would leave her a specified share of his property, or an agreement by the stepfather's second wife, after his death, to hold such share of the estate in trust for plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Wills, Cent. Dig. § 165.]

3. TRIAL ⟸397(4)—DECISION—APPLICABILITY TO ISSUES.

Error cannot be predicated upon the refusal of the court to make a decision on an issue not tried.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 943.]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit by Elizabeth M. Price against Marie Dewey Wallace. From a decree dismissing the bill (224 Fed. 576), plaintiff appeals. Affirmed.

This is a suit to have Marie Dewey Wallace, the appellee, adjudged a trustee for the benefit of the complainant, appellant, Elizabeth N. Price, and her children, with respect to a two-thirds interest in the property of the estate of Peter B. Smith, deceased; and for an accounting and general relief. The substance of the complaint is: That complainant lived with Peter B. Smith, her stepfather, and her mother in Minneapolis, and adopted the name of Smith, and was regarded and treated by her stepfather as if she was his own daughter, and that she was told by him that he wished her to regard him as her own father, and that as his daughter she should be well provided for; that in February, 1899, with the knowledge and approval of her stepfather, she married Dr. MacLean, a surgeon in the Army, and thereafter had two children; that about 1900 her mother was ill, and that her stepfather urged Dr. MacLean to resign from the Army and to return to Minneapolis, so that complainant could be with her invalid mother; that Dr. MacLean resigned, and with his family returned to Minneapolis just before the death of Mrs. Smith in June, 1900; that complainant remained in Minneapolis and made her home with her stepfather, who told her that he wished her and her family to live with him during the remainder of his life; that about October, 1900, Dr. MacLean became involved in some trouble and left Minneapolis; that complainant wished to go with him, but that her stepfather advised against her continuing to live with Dr. MacLean and urged her to bring suit for divorce; that in 1901, yielding to the wishes of her stepfather, she was granted a divorce in Minnesota and was awarded the custody of her children; that in October, 1900, when Dr. MacLean had his trouble, and before and after his departure from Minne-

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

*Rehearing denied October 8, 1917.

sota, her stepfather entered into an agreement with her to the effect that, if she would remain at his home with her children, and treat and regard him as her own father, and care for him and take charge of his household as though she were has own daughter, he (Smith) would support the complainant as if she were his own daughter, and as if her children were his own grandchildren, and that he would will to the complainant, for herself and children, all the property that he might at the time of his death own; and that if she refused to do this and persisted in following Dr. MacLean, he (Smith) would leave no property to them and would have nothing to do with them.

Complainant says that, having great respect for her stepfather, and believing that Dr. MacLean had made it improper for her to live with him again, she agreed to the proposal of her stepfather; that after making the agreement in October, 1900, she performed all the obligations imposed upon her, and remained with Mr. Smith, and was maintained and supported by him; that in February, 1902, Mr. Smith told her he intended to marry Marie Wallace, defendant herein, and said that, inasmuch as his new wife would relieve the complainant of the care of his household and of the service to him under the agreement, and that inasmuch as he desired complainant to travel, he desired the agreement which had been made as hereinbefore described to be modified with respect to his promise to will all his property at his death to the complainant and her children, so as to leave to the complainant, for herself and her two children, two-thirds of the property which he might own at his death, one-third to the complainant for her own separate use, and one-third to the complainant for the use of her children, and one-third to the defendant whom he proposed to marry. Plaintiff alleges that the modification was assented to, and that in consideration of the performance of the contract up to that time, and of the plaintiff's promise to continue the performance of the contract, as modified, it was agreed that Smith would leave to the complainant, for herself and the children, two-thirds of the property which he might own, and that thereafter complainant continued living with her stepfather as his own daughter, and performed all her duties to him under the contract, as so modified, as long as he permitted her to do so. It is alleged that Mr. Smith married the defendant in May, 1902, and that complainant and her children lived with Mr. and Mrs. Smith for about 15 months after the marriage, except for a short time, when plaintiff joined a chorus in an operatic company; that in August or September, 1903, defendant being annoyed by the presence of complainant and her children in the household, she was sent by Mr. Smith to California and there supported by Mr. Smith; that in August, 1905, she married E. J. Price in California, and was deserted by him about 1907, and that Price died in 1914; that Mr. Smith died in August, 1907, and that thereafter complainant went to Minneapolis with her children and has earned her own living since; that in January, 1906, Mr. Smith made a will leaving all of his property to the defendant; that, within a few days after Mr. Smith died, complainant had a conference with the defendant, who told complainant of the agreement and modified agreement made between her husband and complainant, and told her that it had been understood and agreed between Mr. Smith and herself that, if he would leave his property to her, the defendant, as a protection against possible dissipation by the husband of this complainant, that the defendant should hold two-thirds in trust for complainant and her children, and account therefor, and in due time turn it over to the complainant in accordance with the agreement and modified agreement; that complainant urged the wisdom of employing counsel, but that defendant dissuaded her from doing so, and told her that she understood the agreement and modified agreement, and intended to carry out the same, and promised that if complainant would not consult a lawyer and take steps to enforce the agreement, or make appearance at the probate proceedings of the will, and make no claim by reason of the agreement, and would allow distribution of the estate to defendant as the sole legatee, defendant would respect and recognize complainant's rights, and would take the property in her own name, but would hold two-thirds in trust, and charged and impressed with a trust in favor of the complainant, and would account and live up to the alleged agreement. Complainant says that, relying upon the promises, she made no assertion of her rights

and permitted the defendant to receive all property in her own name, and that defendant refuses to account or to turn over.

The answer denies all the allegations with respect to the agreements as alleged. After trial the District Court dismissed the complaint, and plaintiff appeals.

William H. Hallam, of Portland, Or., for appellant.

Wood, Montague & Hunt and Erskine Wood, all of Portland, Or., and H. V. Mercer, of Minneapolis, Minn., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The District Court in a well-considered opinion has carefully stated the issues and with considerable detail quoted from and analyzed the material evidence introduced upon the trial. Price v. Wallace, 224 Fed. 576. There is, therefore, no necessity for us to restate the testimony at any length, and we shall not attempt to do so. The legal questions involved in the merits of the appeal are simple, and to the end that our review may go directly to the points affecting the merits, we will dispose of the questions of practice submitted by appellee by formally overruling the objections to the assignment of errors and denying the motion to dismiss the appeal.

In very general language appellant assigned error because the Court denied the relief plaintiff prayed for. But in the brief filed by her counsel she states her position to be that a trust was constructed upon foundations stated substantially as follows: (1) Smith's agreement with the complainant after he expelled the husband and father, which agreement was modified when Smith engaged to marry the defendant; (2) upon a "correlative stipulation between Smith and the defendant"; (3) upon the ground of "equitable adoption"; and (4) because of "Smith's total commitment," by reason of which equity will compel the enforcement of the stand he took.

[1] We need not discuss the rule, thoroughly well established as it is, that a trust may be created and enforced where a filial relationship is actually assumed, or that a man may make a contract whereby he agrees to leave to one, even though she has not been legally adopted, a child's share of his estate at his death, and that services and companionship will constitute valuable consideration for the promise of the man. Healey v. Simpson, 113 Mo. 340, 20 S. W. 881. Nor will we question the doctrine that a contract in parol may be made under which one may leave all his property to another, if she would leave her home and thereafter live with him and care for him. Owen v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369. But the authorities in support of the rule that equity will enforce such agreements are in accord in holding that the courts will not aid, unless it is clearly and satisfactorily shown that the agreement relied on was made, that it was clear and specific in its terms, and that by enforcing it the true intent of the parties is being carried out. Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728.

It was evidently upon this theory that the judge of the District Court proceeded, and after stating the facts and quoting verbatim important parts of the testimony of complainant and of her witnesses, said:

"Upon the whole, it is clear to my mind that the plaintiff has failed to establish, either the alleged first or the modified agreement by such clear and convincing proof as is required for the substantiation of parol agreements of the kind. And as to the alleged trust agreement with the defendant, the clear preponderance of the evidence is against the plaintiff's contention."

[2] It being, therefore, in respect to the existence of the agreements or arrangements, original and modified, relied upon, that appellant failed in the court below, we have given very careful attention to the evidence bearing upon that same fundamental ground, and in doing so have weighed the evidence of Mrs. Price and considered it by itself, as well as in connection with the other evidence offered by her, and with the acts and expressions by letters and otherwise of Mr. Smith, and with the evidence introduced by the defendant, including that of Mrs. Wallace herself, and of Mrs. Jessie Carey Smith. Extended quotations from the record would but serve to affirm the views of the District Court. The direct testimony of the plaintiff, to the effect that Mr. Smith told her that, if she would give up her husband, everything that he had would be hers, and that she finally assented and told her stepfather to "go ahead and get the divorce," is very much weakened by her further testimony that before the divorce was applied for she came to the conclusion that her husband could not support her. Nor can we sustain the conclusion that plaintiff was impelled to sue for divorce under any agreement, made in 1900 or 1901, that Mr. Smith would leave his property to her. The circumstances developed, when considered with the testimony of Jessie Carey Smith, show that the plaintiff's reason for suing for divorce was because her husband was in trouble again, and had been in prison after he left Minneapolis, and was regarded by plaintiff as unworthy.

We cannot disturb the conclusion of the District Court that no trust relationship between Mrs. Price and Mrs. Wallace was established. The positive denial by defendant of the statement of the plaintiff that there was a conversation between them at Minneapolis, after the death of Smith, wherein defendant said that she would carry out the so-called modified agreement, which Mrs. Price said was made with her stepfather, is supported by many significant circumstances. For instance, there is the evidence that, before plaintiff married Price, Smith consulted plaintiff's own father about what was best for the plaintiff and her children, and had an understanding with him that each would contribute $50 a month toward the support of the family in California, and that Smith did contribute to her support until she married Price, when he reduced his contribtuion to what he thought would help maintain plaintiff's children. The letter (quoted in the opinion of the District Court) of Smith to Wright, the uncle of appellant by marriage, in February, 1903, is also worthy of special mention. There is also the evidence of Mr. Lauderdale, a close friend of Smith, that Smith said he was displeased with plaintiff and intended to stop helping her, but would continue to do something for the children as long as they were in his home.

[3] As there was no issue tried of a legal adoption, or claim of right by inheritance as an adopted child, no error can be predicated upon the refusal of the court to make decision thereon.

In conclusion, our opinion is that plaintiff has failed to demonstrate that the District Court erred in its decision. Study of the record impresses upon us that there is a lack of strength in plaintiff's case upon the most essential issue. We must therefore hold that it would be unjust to decree that Mr. Smith did not have the power to do with his property what he wished when he made the will in favor of the defendant.

The decree is affirmed.

In re SEWARD DREDGING CO.

Appeal of SANDS.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 219.

1. BANKRUPTCY ⊜151—TITLE ACQUIRED BY TRUSTEE.
Under Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), providing that trustees in bankruptcy, as to 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, trustees are not purchasers for value, nor have they the rights of creditors holding liens other than creditors of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239.]

2. BANKRUPTCY ⊜151—TITLE ACQUIRED BY TRUSTEE.
Under Bankruptcy Act, § 47a (2), as amended by Act June 25, 1910, § 8, a trustee has the rights of the bankrupt, and the rights of a creditor holding a lien by legal or equitable proceedings, and, if these rights are antagonistic, he can take his choice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239.]

3. MINES AND MINERALS ⊜56—AGREEMENTS FOR WORKING—NATURE.
Under a contract between the owner of a placer mining claim and E., E. was to take possession of the mine, furnish machinery, and material to work it, and at the end of the first summer's work he was to have the option of continuing operations on a royalty basis; but, if he did not exercise this option, he was to be paid the difference between the cost of his plant and the cost of operation and the value of the gold obtained by him, whereupon all of his improvements on the property were to become and remain the property of the mine owners. *Held*, that this contract was not a conveyance, nor a lease, but a mere license.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166.]

4. SALES ⊜454—CONDITIONAL SALES—NATURE OF TRANSACTION.
So much of the contract as provided the manner in which the mine owner was to become the owner of E.'s plant constituted an agreement for conditional sale, a system of transferring property unobjectionable at common law, and explicitly recognized by Uniform Sales Act Alaska (Sess. Laws 1913, c. 66) §§ 1, 20, providing that a contract to sell or a sale may be absolute or conditional, and that the seller may reserve the right of possession or property until certain conditions have been fulfilled, notwithstanding delivery to the buyer, or to a carrier or other bailee for transmission to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334.]

5. SALES ⊂=473(2)—VENDOR AND PURCHASER ⊂=233—FAILURE TO RECORD INSTRUMENT.

Such contract, not being a conveyance, was not required to be recorded by Civ. Code Alaska, § 98, making conveyances of real property not filed for record void against subsequent purchasers in good faith, and, regarded as an agreement for conditional sale, it was not capable of being recorded; no statute requiring or permitting the recording thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1384; Vendor and Purchaser, Cent. Dig. §§ 563–566.]

6. COURTS ⊂=359—FOLLOWING LOCAL LAW—CONSTRUCTION OF STATUTES ADOPTED FROM OTHER STATES.

In construing the statutes of Alaska, transplanted from Oregon, the Oregon decisions, unless departed from by Alaska judgments, are to be considered as local law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949.]

7. COURTS ⊂=366(18)—FOLLOWING STATE DECISIONS—LIENS.

In matters of lien, the local law as shown by decisions, is controlling in federal courts, provided it can be ascertained with sufficient clearness from the decisions of the local courts of last resort; but otherwise the federal courts will form their own judgment.

8. FIXTURES ⊂=22—CHATTELS SOLD CONDITIONALLY.

A vendor by conditional sale, or other legal device for retaining title until payment is made, may, even under an agreement entirely lawful per se, permit his chattels to become so thoroughly a part of real property that they can no longer be severed therefrom, whereupon they become part of the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 57.]

9. FIXTURES ⊂=22—CHATTELS SOLD CONDITIONALLY.

Where a combustion engine, bolted to a concrete bed, and other fixtures, forming part of mining plant and placed upon a mining claim under a contract amounting to a conditional sale, were easily removable by, at most, loosening certain bolts, and such removal would neither injure nor destroy the realty, nor destroy or necessarily injure the chattels, they were not a part of the realty, under Oregon decisions.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 57.]

10. BANKRUPTCY ⊂=140(1)—PROPERTY VESTED IN TRUSTEE—PROPERTY CONDITIONALLY SOLD.

Chattels, forming part of a mining plant, placed on a mining claim under a contract amounting to a conditional sale, and not so attached to the realty as to become a part thereof, did not pass to the trustee in bankruptcy of the mine owner, under Bankruptcy Act, § 47a (2), as amended by Act June 25, 1910, § 8, and Comp. Laws Alaska 1913, § 973, providing that an attachment creditor shall be deemed a purchaser in good faith and for valuable consideration, as one attaching all the property of the mine owner could not have held such chattels.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199.]

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

In the matter of the Seward Dredging Company, bankrupt. On petition to revise an order granting a petition by one Estabrook for delivery of certain chattels to him. Order affirmed.

The bankrupt owned a placer mining property in Alaska. This will be assumed to be real estate, for purposes of decision, a holding not to be complained of by appellant, who takes the point for granted. A written contract was made by bankrupt with one Estabrook, to the effect (so far as material) that Estabrook should "take possession" of the mine, furnish machinery and

material to work it, and himself extract gold, keeping careful accounts of expenses and receipts. At the end of the first summer's work, Estabrook was to have the right or option of enlarging and continuing his operations on a royalty basis; but, if he did not find the enterprise to his liking, the contract was then to terminate, and accounts between the contracting parties were to be stated in the following manner: The actual cost of installation of mining plant, plus cost of operation for the summer or mining season, should be credited to Estabrook, and the gold recovered by Estabrook should be credited to the bankrupt. If the balance was against Estabrook, he was to pay the same to the bankrupt; but if the value of the gold was less than cost of plant and operation, the bankrupt was to pay Estabrook the difference, "and thereupon all of said improvements shall become and remain the property of" the Seward Dredging Company.

Estabrook did not exercise his option, the gold recovered during the first experimental season (1914) did not equal Estabrook's expenditure by over $25,000, and that difference the Seward Company never paid. It did, however, resume possession of its mine before bankruptcy, and Estabrook did not remove therefrom his machinery, etc., which passed into the physical possession of the trustee, and therefore into the "custody of the bankruptcy court." A large part of Estabrook's plant consisted of chattels, of which only one need be specified, an oil-burning combustion engine of considerable size, used for driving a generator, a machine which was shipped to the remote and difficult region of the mine in small parts, there assembled, and bolted to a concrete bed, contained within a house, of a very rough and cheap construction. The trustee in bankruptcy having refused to surrender any of Estabrook's apparatus, he filed petition to compel delivery to him of the chattels, which (or whose value) are the subject of this appeal. If he is entitled to the engine, it is too plain for argument that his right extends to all he has demanded.

The District Court granted Estabrook's petition. From an order to that effect the trustee appeals.

H. L. Brown, of New York City (John W. H. Crim, of New York City, of counsel), for trustee.

Nathan A. Smyth, of New York City, for claimant.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The position strenuously maintained by the trustee rests on a combination of sundry legal elements of no very apparent relation to each other, viz.: (1) The amendment of 1910 to section 47a (2) of the Bankruptcy Act; (2) an Alaska statute regulating attachments; (3) an assumption that the agreement with Estabrook was a conveyance of some interest in land, and therefore real estate; (4) the Alaska recording acts; and (5) dependence on decisions of the Supreme Court of Oregon, in respect of statutes adopted from that state by Alaska.

[1, 2] 1. Before the amendment of 1910 a bankruptcy trustee (so far as section 47a (2) was concerned) merely stood in the shoes of the bankrupt. He was not a purchaser for value (Zartman v. First National Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418), any more than an assignee for the benefit of creditors (In re Goodwin, etc., Co.'s Estate, 166 Pa. at 299, 31 Atl. 91). By the amendment in question his powers were enlarged (so far as here material) thus:

"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."

It appears to be thought that the amendment has made trustees "purchasers for value" as to some or all of the property peacefully coming into their possession. This is not true; the rights of a creditor with a lien have been superadded, but such rights are wholly different from those of a purchaser for value. Since 1910 a trustee has two rights as to property in his custody; i. e., that of the bankrupt and that of such a creditor as is described. They are different rights, sometimes antagonistic; the trustee can take his choice. Further, it is plain that, when speaking of a "creditor," Congress means a creditor of the bankrupt; it is impossible that any trustee could exercise the power or right of any creditor of any person, who (e. g.) might lawfully establish a lien upon property fortuitously coming into the court's custody. In this case the trustee, having surveyed the list of possible creditors of the bankrupt, capable of exercising legal or equitable proceedings, has chosen the position of an attaching creditor as being most favorable to his contentions. We assume that he has this right. Bailey v. Baker, etc., Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; Interstate Banking, etc., Co. v. Brown, 235 Fed. 32, 148 C. C. A. 526.

2. Compiled Laws Alaska (1912) § 973, provide that "from the date of the attachment" the plaintiff therein "shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached." See Cowden v. Wild Goose Trading Co., 199 Fed. 561, 118 C. C. A. 35. We assume that the trustee is (since the chattels here in question were situate in Alaska) entitled to all the rights that would have accrued to him, had he (as a creditor of Seward Dredging Company) laid an attachment upon said chattels, under the quoted Alaska statute, on the day the bankruptcy petition was filed. Bailey v. Baker, etc., Co., supra.

[3, 4] 3. It is not true that the contract between Estabrook and the bankrupt was a conveyance in the sense that it transferred anything that could be called realty or constituted a lease. An agreement exactly similar in legal effect was held not a lease, and no more than a contract for labor to be performed, merely fixing compensation for services rendered, in Hudepohl v. Mining, etc., Co., 80 Cal. 553, 22 Pac. 339, in which case the document considered was called a lease by the parties, a fact taken into consideration merely as evidence of ignorance. There, as here, the contractor was formally given possession of the mine, a fact which made him no more than a licensee.

In the present instance, however, the contract went further, and provided for the manner in which (in the situation that actually arose) the bankrupt was to become the owner of the chattels in question. We regard this portion of the contract as constituting a plain agreement for conditional sale—a system of transferring property unobjectionable at common law (Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828), and explicitly recognized by the Uniform Sales Act (sections 1 and 20), which became law in Alaska as chapter 66 of the Session Laws of 1913.

It results, from the matters thus far treated, that the trustee herein can only prevail, if a creditor of the bankrupt, under Alaska law,

would have prevailed, by virtue of an attachment levied on the day of petition filed upon personal property, situate on bankrupt's premises, but belonging to Estabrook.

[5] 4. The recording acts of Alaska provide that:

"Every conveyance of real property * * * not * * * filed for record * * * shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." Section 98, Civ. Code.

It is urged (a) that the "conveyance" (i. e., the contract with Estabrook) should have been recorded, if the rights therein established as between bankrupt and Estabrook are to be good as against the trustee; and (b) that the recording act, since it uses the same phraseology, is to be read in connection with the attachment statute. The first proposition is unsound, because (as above stated) the contract was not a conveyance; while regarded as an agreement for conditional sale, it was not capable of record, in that the territorial statutes did not require or permit the same. As to the second suggestion, we are quite unable to perceive any connection between the recording acts and the attachment statute, unless an attachment affects real estate; and the attached chattels are to be regarded as part of the realty,—a point considered hereafter.[1]

[6, 7] 5. It is urged that the local acts above referred to must be construed in the light of the jurisprudence of Oregon, the state from which they were transplanted. As a general principle this is true. Capitol Traction Co. v. Hof, 174 U. S. at 37, 19 Sup. Ct. 580, 43 L. Ed. 873; Love v. Pavlovich, 222 Fed. 843, 138 C. C. A. 268. This means that Oregon decisions, unless departed from by Alaska judgments, are to be considered as local law, and such law (in matters of lien) is determinative of the case, provided that it "can be ascertained with sufficient clearness from the decisions of (local) courts of last resort, otherwise, we shall form our own judgment." Triumph, etc., Co. v. Patterson, 211 Fed. 249, 127 C. C. A. 617.

The Oregon rulings to which we are referred, of which Muir v. Jones, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441, Landigan v. Mayer, 32 Or. 245, 51 Pac. 649, 67 Am. St. Rep. 521, Herschberger v. Johnson, 37 Or. 109, 60 Pac. 838, and Washburn v. Intermountain, etc., Co., 56 Or. 578, 109 Pac. 382, Ann. Cas. 1912C, 357, are examples, all deal with the conflicting claims of grantees and mortgagees of real estate or mechanics lienors as against those claiming as personalty "affixed" or "annexed" chattels; i. e., chattels whose character had "changed to realty by being affixed to the soil."

The argument, then, comes to this—that these chattels (e. g., the combustion engine) were so affixed to the realty or annexed thereto as to become part thereof, a familiar subject of discussion with which (un-

[1] The Compiled Laws of Alaska define "real and personal property" (section 607): Real property "includes all lands, tenements and hereditaments and rights thereto and all interest therein whether in fee simple or for the life of another." Personal property "includes all goods and chattels, money, credits and effects of whatever nature not included in the term 'real property.'"

der the facts of this case) we think neither the recording act nor the attachment statute has any legitimate connection.

[8] In every jurisdiction it is possible that the vendor by conditional sale or other legal device for retaining title until payment made may, even under an agreement per se entirely lawful, permit his chattels to become so thoroughly a part of real property that they can no longer be severed therefrom, wherefore in common parlance they "become realty." Under exactly what circumstances this phrase is applicable the courts of different states are not agreed; and the trustee's only arguable position is that he acquired the chattels because he certainly received title to the bankrupt's realty, of which the chattels had become a part.

[9] We hold as a fact that the combustion engine, and a fortiori the other articles, were easily removable by (at the most) loosening certain bolts, and that such removal would neither have injured nor destroyed the realty nor destroyed nor necessarily injured the chattels. This being the case, the Oregon decisions do not impose upon them the character of realty. Herschberger v. Johnson, 37 Or. at 111, 60 Pac. 838. This holding is consistent with the only local decision on the subject—Mineral, etc., Co. v. Ramsey, 4 Alaska, 734. It is perhaps true that the trend of opinion in the Oregon decisions is more strongly against the removal or severability of chattels than is warranted by Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and Detroit, etc., Co. v. Sistersville, 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166; but they go far enough for this case.

[10] Whether the law of fixtures (apart from any statute) is a matter as to which the federal courts are bound to follow local decisions is something on which no opinion is now given; it is at present sufficient that, if this trustee had been a creditor of the Seward Dredging Company, who had attached everything that said company had in Alaska, he could not have held Estabrook's property, because that property did not belong to the defendant in the attachment, and was not (within the decisions either of Oregon or Alaska) affixed to the real property of the defendant so as to become a part thereof.

The order appealed from is affirmed, with costs.

STAVE & TIMBER CORP. IN NORFOLK, VA., v. A. H. ANDREWS CO.

(Circuit Court of Appeals, Second Circuit. April 17, 1917.)

No. 232.

1. APPEAL AND ERROR ⊜1078(3)—REVIEW—POINTS NOT ARGUED.

Where the point was not argued, it would be assumed that denials upon information and belief of the material allegations of the complaint, even in respect of matters plainly within the knowledge of the pleader, were good.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258.]

2. SALES ⊜287(2)—BREACH OF WARRANTY—RIGHT TO RETURN GOODS.

Under a contract for the sale of kilns, containing a guaranty of quality, capacity, and performance, and providing that, in the event of any fail-

ure on the part of the apparatus furnished to do its work properly, the purchaser would notify the seller, and permit it or its agents to have access to the apparatus to remedy any errors in installation or defects of any kind, and that in the event of it not being as agreed, after such opportunity was afforded for correction of errors or defects, the purchaser might, at his option, either pay therefor or ship the apparatus back to the seller, the option on the part of the buyer to either pay for the kilns or return them arose after opportunity was afforded the seller to correct errors or defects, though the purchaser did not attempt to remedy the defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 812.]

3. SALES ⊂=429—BREACH OF WARRANTY—ACTIONS—CONDITIONS PRECEDENT.

Assuming that the warranty survived acceptance, no action or counterclaim for breach of warranty could be maintained, without first paying for the kilns or returning them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1224–1229.]

Ward, Circuit Judge, dissenting.

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

Action by the A. H. Andrews Company against the Stave & Timber Corporation in Norfolk, Va. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error (hereinafter called Andrews Co.) contracted in writing with plaintiff in error (hereinafter called Stave Co.) to furnish and erect certain kilns for the artificial drying of lumber. The kilns, after completion, were operated by Stave Co., and a portion of the contract price was paid. This action is for the balance of said price.

In the written contract Andrews Co. guaranteed the quality of materials and the capacity and performance of the kilns when erected. The document concluded with the following: "The purchaser agrees that in the event of any failure on the part of the apparatus furnished to do its work properly he will notify the said the A. H. Andrews Company immediately and permit them or their agents to have access to such apparatus and furnish all reasonable assistance required by the said the A. H. Andrews Company to remedy any errors in installation of apparatus or defects of any kind or character found therein. In the event of said apparatus not being as herein agreed after such opportunity is afforded said the A. H. Andrews Company for correction of any existing errors or defects as above, the purchaser may at his option either pay for the same according to the terms hereof, or ship all the apparatus back to the A. H. Andrews Company, and in case apparatus is returned the said the A. H. Andrews Company will pay the freight both ways upon delivery of the apparatus and refund all money received by them, in payment therefor."

The complaint alleged: "That after the said installation and operation of the said kilns [Stave Co.] notified [Andrews Co.] of certain alleged defects or failures on the part of the apparatus, * * * [Andrews Co.] requested an opportunity, and offered and was at all times able, ready, and willing, to remedy any errors in installation or defects of any kind or character found therein, and duly tendered further performance of said contract, but * * * [Stave Co.] would not perform said contract on its part to be performed, and prevented [Andrews Co.] from any further performance, and [Andrews Co.] duly notified [Stave Co.] that if it did not desire the apparatus to ship it back to [Andrews Co.] as provided in said contract, but [Stave Co.] failed and neglected to perform its contract in said respect and failed to ship back the said apparatus."

The answer admitted: "That after the installation of said kilns [Stave Co.] notified [Andrews Co.] of certain alleged defects therein and of the failure of the said kilns to do the work for which they were purchased; also that [An-

drews Co.] notified [Stave Co.] that if it did not approve said apparatus to ship it back."

The allegations quoted from the complaint and not specifically admitted (as above) were denied "upon information and belief." To the answer was added a counterclaim for breach of warranty, in that the kilns aforesaid were defective in material and performance, to the damage of defendant below in a sum larger than the demand of the complaint. In this counterclaim Stave Co. asserted: "Upon the discovery of the defects and breach of warranty aforesaid, defendant duly notified the plaintiff thereof, and required it to comply at its own expense with the terms of its contract and guaranty, which plaintiff has neglected and failed to do."

Plaintiff below having made a motion for judgment on the pleadings, the same was granted for balance of purchase price, and the counterclaim dismissed, but not on the merits. This writ is to that judgment.

Cullen & Dykman, of Brooklyn, N. Y., for plaintiff in error.
Heyn & Covington, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). We assume with the parties in this case that Andrews Co.'s express warranty of the kilns survived, and was intended to survive, acceptance, and that under ordinary circumstances defendant's procedure in counterclaiming for breach of warranty in a suit for the contract price would not be open to objection. This is the ordinary course of law. The question here is whether the agreement of the parties amounts to a binding contract to pursue another and special procedure, which they are presumed to have preferred and chosen.

[1] As the point has not been argued, we assume that denials upon information and belief of the material allegations of the complaint, and even in respect of matters plainly and certainly within the knowledge of the pleader, are good. Bennett v. Leeds Mfg. Co., 110 N. Y. 150, 17 N. E. 669; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771; Kirschbaum v. Eschmann, 205 N. Y. 127, 98 N. E. 328. Upon this assumption it is plain from the pleadings and by the conjoint oath of both parties that the kilns were defective, and did not comply with warranty; that Andrews Co. did not succeed in making them comply, or did not attempt so to do, and did request Stave Co. to return them without expense and receive repayment of so much of the purchase price as had not already been paid.

[2] The contract did not in terms oblige Andrews Co. to remedy defects. It was always possible for the vendors to recognize their own failure without sending good money after bad, in an endeavor (perhaps) to do the impossible. This is plain from the language of the agreement, which provides that, "after such opportunity is afforded" Andrews Co. for "correction of any existing errors or defects," the purchaser could do one of two things; i. e., pay for the kilns, or ship them back without cost, procure return of the price paid, and thus satisfy the contract of sale. It is not provided that the purchaser should have this option only if Andrews Co. attempted to remedy defects; the option arose after an opportunity had been given to remedy defects, and on Stave Co.'s own pleading such an opportunity was afforded and either neglected or resulted in failure.

Argument for plaintiff in error consists in asserting that what we have called the option given the purchaser is stated in words which "are in fact meaningless." This is very far from being true. Warranties of performance (especially) are difficult of fulfillment, depending oftentimes quite as much upon skill in operation by purchaser as in excellence of materials furnished by vendor. Efforts hase not been infrequent to avoid by contract exactly such a situation as is here presented, viz. the purchaser of a warranted article pays some amount in advance, declares or finds his purchase to be defective, keeps and uses it with at least partial satisfaction, and leaves the vendor to sue for the cost of the thing sold, against a counterclaim put forward by the man who is using that which he has not paid for. On which side of a contest such as this justice lies is hard to discover upon the fullest evidence, and it is anything but meaningless or idle or unreasonable to avoid such a situation before it can arise.

[3] It is not doubted that, where the language of the parties' contract is clear, that it must be enforced unless illegal; and in this case we find no difficulty in holding, as we do, that it was the intent of the parties to this suit that if the kilns were not up to standard, and Andrews Co. either did not or could not or would not make them conform to the warranty, the purchaser covenanted to tender the kilns back as a condition precedent to any suit for breach of warranty. By the pleadings it is admitted, not only that no such tender was made, but such action was requested by Andrews Co. and refused by Stave Co.

We are not concerned with (and given no opinion regarding) the validity or infirmity of the counterclaim, and no judgment on the merits has been given thereupon. It asserts an independent cause of action, but under the circumstances here revealed by sworn pleadings, payment of the purchase price is a condition precedent to bringing such a suit.

The construction of contract above given closely resembles that in Birch v. Kavanaugh, etc., Co., 34 App. Div. 614, 54 N. Y. Supp. 449, affirmed 165 N. Y. 617, 59 N. E. 1119; nor does White, etc., Co. v. Miller, etc., Co., 131 App. Div. 559, 115 N. Y. Supp. 625, contain anything inconsistent herewith, as it was there specifically found that there had been a modification of the written agreement under consideration, which modification quite changed its original effect. See, also, J. A. Fay, etc., Co. v. Dudley, 129 Ga. 314, 58 S. E. 826; J. I. C. Threshing Co. v. Puls, 158 Ill. App. 1; Pennsylvania, etc., Co. v. Hygeian Cold Storage, 185 Mass. 366, 70 N. E. 427.

The crucial question always is: What did the parties mean—or can a plain meaning be extracted from the words they used? We think both these inquiries can be satisfactorily answered in this case; the parties meant and said that if the kilns were not up to contract they should be returned and the price refunded.

As the defendant below admittedly refused to pay the price or return the kilns, the judgment is affirmed, with costs.

WARD, Circuit Judge (dissenting). The contract in this case contained a guaranty by the seller to the buyer of the broadest kind as to

the quality and performance of the apparatus sold. The trial court and this court, I think, rightly, held that this guaranty survived acceptance. Then followed a clause regulating the procedure to be pursued in a particular case, viz. if the buyer notified the seller of defects, it was to give the seller an opportunity to examine and correct them. If after this was done it was found, not merely in the opinion of the buyer, but evidently by both parties, that the apparatus was not as agreed, then the buyer had the option either to pay the price and keep the apparatus, or to return it and the seller would refund all money received by it in payment. This shows clearly that the seller admits the defects, or otherwise it would not return the price.

The parties in their pleadings agree that the buyer did notify the seller of defects, and that the seller asked that the apparatus be returned by the buyer, if not satisfactory to it. This could be regarded as an admission by the seller that the apparatus was not as agreed, and so the procedure clause might be held to apply. If the seller had relied on these facts in his complaint, the judgment of the court below would in my opinion have been right. But the parties did not, as this court assumes, agree that the apparatus was not up to standard. On the contrary, they joined issue on this proposition. The issues raised in the pleadings were:

First, in its complaint the seller alleged that the buyer wrongfully deprived it of any opportunity to remedy the alleged defects, which the buyer denied in its answer.

Second, the seller alleged in its complaint that it had fully performed its contract, which the buyer denied in its answer.

Third, the buyer in its counterclaim alleged various defects of the apparatus in quality and performance, all of which the seller denied in its reply.

The issues, therefore, being whether the apparatus did or did not conform to the contract, the clause as to procedure did not apply, and the rights of the parties were to be determined under the guaranty clause. If the issues which the parties have made were on trial to be decided by the jury in favor of the buyer, the seller's complaint would have to be dismissed, and the buyer would be entitled to judgment on its counterclaim. These issues, I think, could not be disposed of by the court on the pleadings.

The judgment should be reversed.

In re ORDER OF SPARTA.

VADAKIN v. CASS et al.

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

No. 2218.

1. BANKRUPTCY ⟸70—PERSONS WHO MAY BE ADJUDGED BANKRUPTS—UNINCORPORATED "COMPANY."

An unincorporated fraternal beneficial association, having no capital stock and practically no assets, except those derived from assessments paid by members, but issuing to its members benefit certificates payable from the contributions of members, requiring members to pass a medical examination, and whose principal object was beneficial, rather than social, was subject to be adjudged a bankrupt under Bankruptcy Act, July 1, 1898, c. 541, § 4, subd. "b," 30 Stat. 547, as amended by Act June 25, 1910, c. 412, §§ 3, 4, 36 Stat. 839 (Comp. St. 1916, § 9588), providing that any unincorporated company may be adjudged a bankrupt, since the word "company" includes at least any unincorporated association or group of individuals, whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed, business, or commercial corporation, which may be adjudged a bankrupt under subdivision "b."

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

2. BANKRUPTCY ⟸88(1)—INVOLUNTARY PROCEEDINGS—UNINCORPORATED COMPANIES.

Congress having permitted a suit in bankruptcy to be brought against an unincorporated company, the proceeding may be brought against such company under its own name, with notice to the proper officials, though it is not a legal entity, and cannot be sued as an association.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 109.]

3. BANKRUPTCY ⟸70—INVOLUNTARY PROCEEDINGS—UNINCORPORATED COMPANIES.

The difficulty of getting at the value of certificates issued by an unincorporated fraternal association, so as to determine at what amount they shall be reckoned in voting for a trustee, is not a valid objection to a bankruptcy proceeding against such association, as the same difficulty would exist in any court that was winding up the order, and a court of bankruptcy has all the machinery of a court of equity, and will not find such difficulty insurmountable.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy; Oliver B. Dickinson, Judge.

In the matter of the Order of Sparta, alleged bankrupt. On petition by Louis A. Vadakin to revise an order (238 Fed. 437) refusing to vacate an adjudication on his application, opposed by Lucy E. Cass and others. Affirmed.

Emanuel Furth, David Bortin, and Jacob Singer, all of Philadelphia, Pa., for appellant.

Francis Chapman, Chas. Hunsicker, William S. Wallace, and Chapman & Chapman, all of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This is a petition to revise, and brings up the refusal of the District Court to vacate an adjudication and to dismiss the petition in bankruptcy. The facts are as follows:

The Order of Sparta is an unincorporated fraternal beneficial association, organized more than 35 years ago in Philadelphia, and having its principal place of business in that city. We are informed, also, that most of its membership is in the state of Pennsylvania. On November 22, 1916, it made and filed of record an assignment for the benefit of creditors, and on the next day a petition in bankruptcy was filed by the beneficiaries named in three unpaid certificates, each certificate having been issued to a deceased member. On December 4, it answered the petition, admitting insolvency and the making of the assignment, and stating its willingness to be adjudged bankrupt. The Order is governed by a supreme legislative and executive body, called the Great Senate, and the answer stated that this body had declared by formal resolution that the assets could not pay the pending death claims, that the assessments necessary to keep up the beneficiary fund were insufficient to continue the business of the Order successfully, and that no further assessments would be levied, but that business would be abandoned and an assignment made for the benefit of creditors. On the same day the adjudication was entered, and on December 6 Louis Vadakin, another holder of an unpaid certificate, obtained a rule to show cause why the adjudication should not be vacated and the proceedings dismissed, setting forth as the ground that the Bankruptcy Act did not cover the case of such an association. On January 11 the court entered the refusal now complained of.

The question for decision is whether the phrase "any unincorporated company," in clause b of section 4, embraces such an association as the Order of Sparta. Undoubtedly, the Order is unincorporated; is it also such a "company" as the act intends to include? From the record and from several decisions of the Pennsylvania courts concerning this very Order—Algeo v. Fries, 27 Pa. Super. Ct. 157; Schoales v. Sparta, 206 Pa. 11, 55 Atl. 766; and Taylor v. Sparta, 254 Pa. 556, 99 Atl. 157—to which we may properly turn for information and guidance, we collect and condense the following facts concerning the association and the character of its activities:

The Order of Sparta is a fraternal beneficial association whose objects are (1) to unite fraternally men between 21 and 45 years of age, of good moral character, and of sound health in body and mind; and (2) to establish a fund from which, after the death of a member in good standing, certain sums shall be paid to his designated beneficiary. The Order has no capital stock, and the members are not individually liable to pay either the benefit certificates or its other debts, these being payable only out of the treasury. By virtue of the Pennsylvania act of 1893 (P. L. 7), it was not to be affected by any subsequent act of the Legislature, unless fraternal beneficial societies should be expressly named therein. By section 1 of the same act, such associations are described as societies not for profit, but for the sole benefit of the members and their beneficiaries. They are authorized to have subordi-

nate bodies, a ritualistic form of work, a representative form of government, and to provide a fund to pay death and other benefits; the fund and the societies' expenses to be derived from assessments or dues collected from the members, and the benefits to be payable to families, heirs, or relatives, of the members, or to other dependent persons. The purpose of such societies is well known to be twofold—fraternal or social, and beneficial. The Order of Sparta consists of a Great Senate and subordinate senates. The Great Senate is the supreme legislative and governing body; it is authorized to enact and expound all rules regulating the affairs of the Order, to institute subordinate senates, and to have sole control of the beneficiary and other funds. The Order is not an insurance company, and does not do an insurance business; the essential difference between its beneficiary (or so-called insurance) contracts and the policies of regular insurance companies being that its pecuniary benefits are met by assessments paid by the members, these assessments being the chief and practically the only asset of the Order. Except that beneficial societies must file reports, it is not subject to the supervision of the state insurance department. Section 4 of the act of 1893 (P. L. 9). Its certificates are not contracts of indemnity against loss, but are payable only from the contributions of members. It does not and cannot issue a paid-up policy; and it is not obliged to maintain an insurance reserve. Its assessment rates are not swollen by an item for expenses, these being paid out of a general fund, which is made up of initiation fees, interest upon deposits, fines, certain dues of $1 per year, and money paid by subordinate senates for supplies. Only a small proportion, about 2 per cent., of the monthly beneficiary assessments, may be, and no doubt is, used for the same purpose. The annual dues of each member are $5, from which $1 is paid to the Great Senate; the remainder, with some initiation fees, being used to pay the expenses of the subordinate senates. Members enter the Order through the subordinate senates; the applicant submitting to a medical examination and signing a preliminary writing wherein he agrees that, if a beneficiary certificate be issued, he will pay promptly all assessments lawfully made upon him by the Great Senate, and in default of payment that the certificate shall be null and void, and no claim thereon shall be made by any person. If he pass the medical examination, and be elected and initiated, the applicant receives a beneficiary certificate which follows the terms of the preliminary writing, and binds the Order to pay a specified sum upon receiving proof of death—the money to be paid to the person designated in the certificate, and to be payable as soon as the money is in the treasury of the fund. The applicant accepts in writing the terms and conditions of the certificate and agrees to perform his own covenants and to pay all assessments, agreeing further that if he fail so to do no claim or demand shall be made on the certificate.

[1] If each word of the phrase in question—"any unincorporated company"—be taken singly, and be given what may be called its ordinary and popular meaning, there would be little hope of successful attack on the adjudication. But no doubt the argument may fairly be

made that the phrase should be considered as a whole, and also in the light of the subject-matter of the act, and that, when thus considered, the word "company" may have been intended to carry a more restricted meaning. Accordingly we have taken the argument into account, but we still see no sufficient reason for believing that the Order of Sparta is outside even the narrower meaning of the word. As amended in 1910, section 4 provides that the following three classes or groups may be adjudged bankrupt in adverse proceedings: (1) Any natural person, with certain exceptions; (2) any unincorporated company; (3) any moneyed, business, or commercial corporation, with certain exceptions—partnerships being separately dealt with in section 5 (Comp. St. 1916, § 9589). It seems clear, therefore, that an unincorporated group of individuals, not a partnership, is (speaking broadly) referred to as a "company," and is to be found somewhere between a natural person and a corporation; but, as these groups are of many kinds, the question remains whether every kind is a "company" in the precise statutory sense, even if, e. g., its object should be wholly or chiefly charitable or educational or social. We shall not attempt to answer this question without qualification; the case before us does not call for such an answer, and we think it sufficient to consider one situation at a time. But in our opinion this much may be safely and reasonably said: Whatever may be the full scope of the word "company," it does include at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business, or commercial corporation. A corporation is also a group of individuals, and the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the act. We do not say that Congress might not in plain language exempt one group, and not the other; but it seems sound to conclude that, if the meaning of the act be in doubt, we may properly resolve the doubt in favor of the meaning that the unincorporated group is at least as inclusive as the group of corporations. In a word, if "any unincorporated company" includes at least a group of individuals doing "business" in the same sense as business when carried on by a corporation, then such a company is certainly subject to the act. We repeat that we do not attempt to decide how wide the meaning of "company" may be; we simply hold that in any event it is wide enough to include a "business" company without a charter.

Is the Order of Sparta a business company? About this we have little doubt. Unquestionably it has social features also; our information about them is scanty, but so far as this record discloses they are subordinate and incidental. The chief object of the order is beneficial. The members desire first of all to make pecuniary provision for the future, and the social side of the Order takes a secondary, although no doubt, a useful, place. During its life the Order collected and paid out large sums of money—in 1915 its outstanding certificates amounted to nearly $5,000,000, and its assets to $167,000 (Taylor v. Sparta, 254 Pa. 557, 99 Atl. 157)—and, as we have seen an application

for membership is so nearly like an application for a regular policy of insurance as to justify the conclusion that the pecuniary feature of the transaction was by far the most important. We have not found any decision directly in point, but the following cases have some illustrative bearing: In re Fulton Club (D. C.) 113 Fed. 997; In re Hercules Atkin Co. (D. C.) 133 Fed. 813; Burkhart v. Bank (D. C.) 137 Fed. 958; In re Seaboard Underwriters (D. C.) 137 Fed. 987; Cleage v. Laidley (C. C. A. 8) 149 Fed. 346, 79 C. C. A. 284; In re Grand Lodge (D. C.) 232 Fed. 199; In re Associated Trust (D. C.) 222 Fed. 1012, 34 Am. Bankr. R. 851.

[2, 3] Two minor objections may be briefly noticed. The first is that the order is not a legal entity, and cannot be sued qua order. To this it is enough to answer that, as Congress has permitted a suit in bankruptcy to be brought against such a company, no reason is apparent why the proceeding should not bring the company into court under its own name—of course with notice to the proper officials. The other objection is the difficulty of getting at the value of the certificates, so as to determine at what amount they shall be reckoned in voting for a trustee. But the same difficulty would exist in any court that was winding up the order, and a court of bankruptcy has all the machinery of a court of equity, and is not likely to find the difficulty insurmountable.

The appeal is dismissed, at the cost of the appellant, and, on the petition to revise, the order is affirmed.

COLEMAN v. AIKEN.

(Circuit Court of Appeals, Fifth Circuit. May 7, 1917.)

No. 3037.

1. TOWAGE ⟸11(10)—LOSS OF TOW—LIABILITY OF TUG.

Libelant chartered respondent's tug to tow barges between Texas and Mexican ports. The charter provided that the entire tows should be under the orders of libelant; that respondent should use every means for the safety and safe delivery of each tow, but should not be responsible for the same; that in case of loss the tug should stand by and make every reasonable effort to recover any barge lost or broken away. The tug had the right to place as much coal as deemed necessary for its use on the barges. On one of the trips with three barges the tug ran short of coal, and, being unable to coal from the barges at sea, abandoned them and proceeded to Galveston, where it reported them lost in a storm. It made no effort to recover them. The weather in fact was no worse than was to be expected. *Held*, that respondent was liable for the loss, because (1) the tug negligently failed to take on board sufficient coal for the trip, even in the best of weather; (2) when it was found that it could not complete the voyage, which was the day before it abandoned them, it should have taken them to the nearest port, or at least proceeded to such port and recoaled, and then tried to recover them; and (3) because it made no effort to recover them after recoaling at Galveston.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 23.]

2. TOWAGE ⟸15(2)—SUIT AGAINST TUG FOR LOSS OF TOW—BURDEN OF PROOF. In such case it is not necessary to recovery that libelant show that, if the tug had performed its duties, the barges would have been saved or recovered.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36.]

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Suit in admiralty by Eugene J. F. Coleman, as assignee of the Clooney Construction & Towing Company, against I. H. Aiken, doing business as the I. H. Aiken Towboat Company. Decree for respondent, and libelant appeals. Reversed.

Harry T. Smith, of Mobile, Ala., for appellant.

W. A. Blount, A. C. Blount, Jr., F. B. Carter, W. A. Blount, Jr., and J. E. D. Yonge, all of Pensacola, Fla. (Blount & Blount & Carter and W. A. Blount, Jr., all of Pensacola, Fla., on the brief), for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. A charter from respondent Aiken to Clooney Construction & Towing Company provided for the services of the tug Monarch in towing barges from Calcasieu Pass to Frontera, Mexico, via Tampico. Paragraph 11 provided that:

"The owners should have the right to place upon the barges on each trip as much coal for the tug's use as they may deem necessary for such trip."

Paragraph 7 was to this effect:

"It is understood that the entire tow is under the orders and supervision of the Clooney Company, and in performing this work the Aiken Company shall use every means for the safety and safe delivery of each tow specified, but are in no way to be held responsible for same."

Added provision 12 was as follows:

"The Towboat Company agree in case of loss that the tug Monarch will stand by and make every reasonable effort to make recovery of the barge or barges lost or broken away."

By correspondence the charter was modified, in so far as the trip now under consideration was concerned, to "go direct from Port Arthur to Frontera with the tow."

With two barges in tow, the Monarch left Port Arthur May 23, 1912, at 5:30 p. m. On the 28th the barges were abandoned—the master of the tug claiming that on the 27th a storm from the southeast arose; that on the morning of the 28th it increased to great severity; that the barges had become water-logged; that coal was being washed overboard from them; and that the wind was so strong and the seas so high that it was impossible for the tug to take from the barges any of the coal remaining. He stated that he consulted the engineer and first officer, and, having ascertained that there was not enough coal aboard the tug to enable him to take the tug and the barges to any port, the barges were abandoned, and the tug taken to Galveston. After reaching Galveston, the master of the tug wired to the Aiken Company that the barges had been lost, but that the men aboard had been saved.

This wire was communicated to the Clooney Company, but no immediate effort was made by either party to find the barges. Libel was instituted against the Aiken Company. This appeal is from a judgment of dismissal.

Appellants claim that the libel should not have been dismissed, because of faults for which respondent was liable: (1) In going to sea without the proper supply of coal; (2) in deviating from the course expressly provided for by the contract; (3) in the master's not keeping himself properly informed as to the coal supply as the voyage proceeded; (4) after it appeared that the tug could not recoal at sea, in the master's not laying his course towards Aransas Pass, and in not putting in at that port; (5) in cutting the barges adrift, and in not having stood by after they were cut adrift; (6) after cutting the barges adrift, in not going to Aransas Pass, recoaling, and returning; (7) after going to Galveston, in not having recoaled and made a proper effort to find the barges; (8) in making, after arrival at Galveston, a misleading report, which prevented efforts to recover the barges.

The results indicate that no adequate provisions were made for coal. The charter, as modified, contemplated direct voyage to Frontera without stopping at any port. The coal on the tug was probably insufficient for the voyage under the most favorable weather conditions and with the barges properly loaded. Although the weather was fine on the 23d, 24th, 25th, and to noon of the 26th, the engineer states that it would have been impossible, at any time after crossing the bar, to have taken coal from the barges. Coaling from the barges was, according to the master, impossible when there was "any sea at all." The weather encountered was not unusual, and was to have been expected. If stopping at a port had been contemplated, an effect other than increasing what the master said was an overload might have been expected from placing coal on the barges. But the voyage was to be direct, and the impossibility of loading, except in very smooth sea, made the coal on the barges of doubtful value. A sea that would create a special need for this coal would render its utilization impossible.

The weather was good on the 24th and 25th. In the afternoon of May 26th the sea began "making up." On the 27th there was a "big sea," according to the master. The master claims that the coal consumption was greatly increased by the bad weather. The engineers discussed the shortage of coal on the 27th. The testimony is that bad weather would increase coal consumption from a half a ton to a ton a day. Early on the morning of the 28th the engineer reported to him that there was only from 30 to 36 hours' of coal left on board. The coal consumption could not have been increased more than two or three tons on account of the rough sea. The coal aboard the tug was insufficient in bad weather. The coal on the barges was not available in bad weather. Bad weather was to have been expected. It is apparent that very little care was exercised in providing an adequate coal supply.

[1] The question of responsibility for this condition remains. It was the duty of the shipowner to supply the coal. The owners especially contracted for the right "to place upon the barges on each trip as much coal for the tug's use as they may deem necessary for such trip."

While the "entire tow" was "under the orders and supervision" of the Clooney Company, the owners were under legal and contract obligations to "use every means for safety and safe delivery." The practical matters of navigation were left to the owners of the tug. They should be held chargeable with the results of a negligent failure to furnish an adequate available coal supply.

The charter, as modified, required a direct voyage to Frontera. The course taken was a deviation from that fixed by the contract. It is to be inferred from his testimony that the master intended to first make Tampico. Complaint of this deviation would be entitled to more consideration, if appellant had not assigned as error the failure of the trial court to decree "that the master was at fault in not laying his course via Tampico, so that the tug could coal at that point." The master could not be at fault both for not laying his course via Tampico and for not laying his course direct to Frontera.

On the 27th, the day prior to the abandonment of the barges, the engineers discussed the coal shortage, and mentioned the matter to the master. The sea was at this time rough; coal could not be taken from the barges. Less than one-half the voyage to Frontera had been completed. Assuming that no negligence is involved in not keeping informed as to the condition of the coal supply, it became the duty of the master to investigate when the fact of a probable deficiency was brought to his attention. It should have been apparent on the 27th that it would not be possible to make Frontera without coaling from the barges. Coal could not then be taken from the barges. There was nothing to indicate when that would be possible. The master could doubtless at that time have made Galveston with the barges, and it is almost certain that he could have gotten to Aransas Pass.

In his protest the master of the Monarch says that he cast adrift the barges "on account of severe weather and not having fuel enough to reach destination." No claim was then made that the barges were overloaded, water-logged, or otherwise in bad condition. The captain testifies that when the barges were abandoned "the sea was very high and the wind was increasing." The master of one of the barges testified that "the weather was not very bad; just a little rough." He said that the barges could have been towed in safety. He proposed to the captain of the tug, after being told that the Monarch would go to Galveston: "I will stay on the barge, if you will come back and pick it up." No particular difficulty was experienced in taking off the men on the barges, or in returning for their belongings. The statement of the master of the tug that the barges were water-logged and unseaworthy is denied. A careful examination of the record leads us to doubt if there was necessity for casting the barges adrift. At all events, the officers of the Monarch displayed a degree of prudence to be commended only when disregard of important duties is not involved.

If casting the barges adrift was necessary, the necessity arose from a deficient available coal supply. Let it be assumed that the conditions justified casting the barges adrift. They did not justify complete failure to try thereafter to recover them. The charter expressly provided that the tug, "in case of loss, will stand by and make every rea-

sonable effort to make recovery of the barge or barges lost." The contract did little more than express a legal obligation that would have existed if the contract had not so provided. The tug could have stood by, until the sea subsided, with small use of coal. It could have gone to Aransas Pass, recoaled, and returned. If this latter course had been pursued, there is every probability that the barges would have been recovered, as they would, under the conditions of wind and sea, have drifted towards that port.

If an absence of knowledge of conditions at Aransas Pass excused a failure to recoal at that port, nothing has been suggested which excuses the failure to return to the locality in which the barges were abandoned, after recoaling at Galveston. On arrival there on the day after abandonment, the master reported: "Lost barges in southeast blow. Men saved." A proper inference from this report was that the barges had gone down, and explains the failure of the owners to at once take steps for their recovery. If cutting the barges adrift was necessary or excusable, and if going to Galveston was necessary or excusable, complete abandonment of the barges was unnecessary and inexcusable. It was the duty of the master to undertake to recover the barges. Neither the obligations imposed by the general principles of law nor the duties distinctly declared in the charter were observed.

[2] It is not necessary to recovery that libelant be compelled to show that the efforts of the tug owners to perform their duties would have resulted in the recovery of the barges. That would be substantially impossible, and nonperformance of duty should not be encouraged, when a remedy is sought, by putting insurmountable obstacles in the way of those to whom the duty is owed. The rule should rather be to require one, on whom is the obligation to do, to show that his efforts would have been without avail.

The judgment is reversed, and the cause is remanded for a disposition not inconsistent with this opinion.

CONTINENTAL COAL CORP. et al. v. ROSZELLE BROS. et al.

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

No. 3047.

1. BANKRUPTCY ⊜16—JURISDICTION OF PROCEEDINGS—PRINCIPAL PLACE OF BUSINESS OF CORPORATION.

A corporation was engaged in extensive mining operations in B. county in the Eastern District of Kentucky, where it maintained four commissaries, selling to employés and the general public, and employed about 1,000 men, renting and living in its houses, numbering more than 500. The maps and original deeds of its property were kept in a vault there prepared for the purpose, its superintendent and manager resided there, and the mining and shipment of coal and sales of merchandise, timber, and lands, and the purchase of equipment and supplies had all been had there exclusively. It maintained its principal office in Chattanooga, where most of its officers resided and where its books were kept, the general guidance of its business effected, and the selling of coal, including

some bought by it from other producers done. *Held*, that its principal place of business was in the Eastern District of Kentucky, and the District Court for that district had jurisdiction of a bankruptcy proceeding against it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20.]

2. BANKRUPTCY ⟸467—REVIEW—QUESTIONS OF FACT.

The concurrent findings of a special master and the district judge on the question of the location of a bankrupt's principal place of business will not be disturbed upon anything less than a demonstration of plain mistake.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Petition by Roszelle Bros. and others to have the Continental Coal Corporation adjudicated a bankrupt. From an order adjudicating bankruptcy, the bankrupt and others appeal. Affirmed.

C. C. Moore and D. L. Grayson, both of Chattanooga, Tenn., for appellants.

C. L. Williamson, of Lexington, Ky., for appellees.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from an order adjudicating bankruptcy. It presents a conflict of jurisdiction over the administration of the bankrupt's estate, due to the pendency of proceedings in both the Eastern District of Kentucky and the Eastern District of Tennessee; the pivotal question (and the only one presented here) being in which of the two districts did the bankrupt have its principal place of business for the six months preceding May 5, 1916? Upon review of an order of the District Court for the Eastern District of Kentucky we held that that court, having first asserted jurisdiction, took constructive possession of the bankrupt's estate and should retain the case for the purpose of determining its own jurisdiction. In re Continental Coal Corporation, 238 Fed. 113, —— C. C. A. ——. Upon a reconsideration of the case the court below, adhering to its former opinion (235 Fed. 354), held that the bankrupt's principal place of business was in the Eastern District of Kentucky. Adjudication of bankruptcy followed.

[1] The bankrupt corporation was organized under the laws of the state of Wyoming, and it seems to be conceded that the purpose of its organization, as stated in its charter, was the owning and holding of coal lands and the mining, selling, and shipping of coal. Its legal residence was thus in Wyoming, but its principal place of business was not in that state, if indeed it has ever done any business there. It owns 2,000 acres of coal lands in Tennessee, none of which has ever been developed. All of its developed properties are in the Eastern District of Kentucky, including 15,000 acres or more in Bell county (on which it has operated during the six months period and before), and 10 coal mines from which it has mined and sold an average of more than 100,000 tons annually. In the vicinity of the mines it has maintained four commissaries, the annual sales from which to employés and the gen-

eral public have averaged at least $250,000. Its average annual sales of timber from its lands have amounted to between $25,000 and $40,000. It has employed in these activities at least an average of 1,000 men (mostly miners), nearly all of whom lived in and paid rent for the company's houses (more than 500 in number) on its lands. The mining and shipment of coal, as well as the sales of merchandise, timber, and lands, and the purchase of equipment and supplies for the mines and merchandise for the commissaries have all been had exclusively in Bell county. Except where the amounts of purchases were large, they were not required to be submitted to the Chattanooga office, although it was customary to consult it and sometimes take matters up with the board of directors. Detailed accounts of transactions have been kept in the office in Bell county. The maps and original deeds of the debtor's property are kept in a vault in Bell county, prepared for that purpose. For the three years ending June 5, 1915, all its activities were under the immediate supervision and direction of the company's vice-president and general manager, who resided and had his office in Bell county. Under him was a staff of officials, including an assistant general manager, who had charge of the bookkeepers and shipping clerks, a superintendent in charge of mining operations, and a manager in charge of the commissaries. The company also maintained there a timber department, a secret service department, and a legal department. In July, 1915, an executive committee was appointed, under authority of the board of directors; and its chairman, who has since resided in Bell county, has, until the bankruptcy, taken the place of and performed the duties previously discharged by the vice president and general manager. The corporation's principal office has all the time been in Chattanooga, which is in the Eastern District of Tennessee, and its principal stockholders and all its directors and officers—except the vice-president and general manager, the chairman and another member of the executive committee—have lived there. In this Chattanooga office the president, secretary and treasurer, and sales manager gave their entire time to the company's business, exercising a general direction and supervision over the business, and communicating daily, by mail and telephone, with those in charge at the mines and of the various operations connected therewith; and from whom, as well as from those in charge of the timber, secret service, and legal departments, reports were regularly received. The financial management was exercised at the Chattanooga office, including the borrowing of money, the remittance of funds to meet the pay rolls (made out at the mines), the payments for purchases (by checks drawn at the mines and countersigned at the Chattanooga office), and the sales of coal (some of which was bought by the company from other producers) on orders (partially at least through traveling salesmen) received and passed on at the Chattanooga office, copies of the orders being sent to the office at the mines for filling. Remittances for coal sold were also received at the Chattanooga office, and deposited in the company's account at the bank in that city where its principal banking business was done. The only bookkeeping done at the Chattanooga office seems to have related to the "general accounts." The company had no property in Chatta-

nooga aside from its office furniture and equipments, books, files, and records. It did no business anywhere except in the Eastern District of Kentucky (and in Chattanooga, as stated) aside from maintaining a retail coalyard at Louisville, Ky., which is in the Western District of Kentucky.

The corporation complied with the laws of Kentucky relating to the doing of business by foreign corporations in that state, including the appointment of a resident agent for service of process. It did not comply with the laws of Tennessee in these respects. After the filing of involuntary proceedings in the Eastern District of Kentucky, the corporation caused voluntary petition to be filed in the Eastern District of Tennessee.

In this state of facts the question is narrowed to this: In which of the two localities—the City of Chattanooga, Tenn., or Bell county, Ky. —was the corporation's "principal place of business"? Appellants contend that, as applied to the facts of this case, the corporation's principal place of business—

"is that place from which supreme direction and control of its affairs is exercised, where its executive offices are located, its stockholders and directors meet, its books and records are kept, its banking and financial transactions handled, and all component parts of its business regulated and directed, as a whole."

Cases are cited in which, as applied to the facts there presented, the features mentioned have been regarded as dominating.[1]

But we think the place where the principal office is located is not necessarily the place where the principal business is carried on. Such may or may not be the case. Nor as between the place where a mining corporation's actual operations are carried on and the place where the selling is done and the principal office maintained can the latter be declared in all cases, as matter of law, the principal place of business. All the authorities recognize, as do counsel, that the question as to the place where the bankrupt carried on its principal business is purely one of fact. Each case depends upon its own special circumstances. Neither of the cases cited by appellants is on all fours with the instant case. Where a corporation has more than one mine, quarry, or manufacturing plant, situated in different districts, its office from which supreme direction and control of the business generally is had, including the operations of the several plants, may, and perhaps must, be deemed the principal place of business. Such was the case in the Slate Company Case. But that consideration does not apply to the case here. The same may be said of the case, suggested by way of illustration, of a railroad running through several jurisdictions. Nor need we be concerned with the test sometimes applied, by way of comparing the volume of business done at different places. The test of volume of business in terms either of output or of dollars and cents is not pertinent to the situation before us.

[1] In re Matthews Consolidated Slate Co. (D. C.) 144 Fed. 724, affirmed in Burdick v. Dillon (C. C. A. 1) 144 Fed. 737, 75 C. C. A. 603; In re Pennsylvania Consolidated Coal Co. (D. C.) 163 Fed. 579.

In a well-considered opinion Judge Cochran has discussed the pertinent features of the case, and has stated reasons for his conclusion that the Eastern District of Kentucky was the bankrupt's principal place of business. We agree with the conclusion and with the reasoning on which it is based. There are several cases tending more or less strongly to sustain the conclusion reached by the district judge (In re Elmira Steel Co. [D. C.] 109 Fed. 456; In re Tygarts River Coal Co. [D. C.] 203 Fed. 178; Home Powder Co. v. Geis [C. C. A. 8] 204 Fed. 568, 123 C. C. A. 94), although, as in the case of those cited by appellants, not involving situations entirely parallel with that before us. The case with which we are dealing is sui generis. We are impressed that the dominating feature of the bankrupt's business—that which gave it distinctive character—was the mining of coal. As was well said by Judge Cochran:

"It is the production end of his [the mine operator's] business that is the prominent feature and is expressed in his name. No one ever speaks of a manufacturer or mine operator as a merchant or seller of goods, but always as a manufacturer or mine operator."

Taking into account the entire situation, we are better content with the view that the debtor's principal place of business was the place where these extensive mining operations, as well as the other business mentioned, were carried on, where the maps and original deeds of the company's property were kept in a vault prepared for that purpose, where this large number of company houses and the important commissary stores were maintained (a village of themselves), where the bulk of the bankrupt's property was situated, and where suits and liens against it would naturally be enforced (in fact, several personal injury suits were pending when the testimony below was taken), and where its superintendent and manager actually resided, rather than the office in Chattanooga, in which the books were kept, the general guidance of its business effected, and from which the selling was conducted. The retail coal business and the selling of coal bought, as well as that produced by the bankrupt, were incident to its dominant coal-mining business. We also think that the fact that the bankrupt complied with the Kentucky statute and not with that of Tennessee has a tendency, although not conclusive, "to show what was in effect its principal place of business," and that this effect is not destroyed by the reason assigned that compliance with the Tennessee statute would require a considerable payment of fees, nor by the fact that, following the involuntary bankruptcy proceedings in the Eastern District of Kentucky, the debtor, pursuant to a previously formed intention, filed a voluntary petition in the Eastern District of Tennessee. The contention that a corporation is presumed, as matter of law, to know the location of its principal place of business loses its force here from the fact that it required about two weeks' investigation of facts and of law to reach a conclusion that the bankrupt's principal place of business was in Chattanooga.

[2] But assuming that the correctness of the conclusion reached below is not free from doubt, it is enough to say that mere doubts are

not enough to cause its rejection. The testimony, with a comparatively unimportant exception, was all taken in the presence of the special master; that which is the subject of the exception just stated, viz. that taken after our former review, having apparently been taken in the presence of the judge. The master and the judge reached the same conclusions, and by similar processes of reasoning. These concurrent findings on questions of fact we would not be justified in overturning upon anything less than a demonstration of plain mistake,[2] and there is no demonstration of mistake.

The order of the district court appealed from is affirmed.

UNION ELECTRIC CO. et al. v. HUBBARD et al.

In re MOUND CITY COAL CO.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1917.)

No. 1494.

1. BANKRUPTCY ⊂=211—LIENS—CONFLICTING JURISDICTION.

Where, after the appointment of a receiver for a corporation by a state court, it was adjudicated a bankrupt, and it appeared that its assets exceeded its admitted lien debts by $64,000, and whether a further claim of $80,000 was entitled to rank as a lien debt was a very serious question, the bankruptcy court erred in granting the application of lien creditors that the property be returned to the receiver for administration in the state court, since, when it is manifest that there can be no fund to be administered for unsecured creditors, lien creditors should be permitted to realize on their securities in their own way, but this should not be done when there is any surplus, or any reasonable ground for inferring that there may be a surplus or equity, that will inure to the benefit of general creditors, or where there is any division of agreement among the lien creditors as to the method or tribunal of administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323.]

2. BANKRUPTCY ⊂=211—LIENS—CONFLICTING JURISDICTION.

In directing the trustee to turn over the property to the receiver, it was also error to direct the trustee to seek to intervene in the state court and have the validity of liens determined, and to provide that he be afforded full opportunity to contest such liens, and to reserve the right to take exclusive jurisdiction and administer the estate, if the state court should deny the trustee the right to intervene, or the relief which he was directed to seek, as the action of judicial tribunals of competent jurisdiction cannot be so indicated or required in advance, and, if the property should properly be turned over to the state court, it should be turned over without reservation or condition as to the after judicial action of that court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323.]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Northern District of West Virginia, at Wheeling, in Bankruptcy; Alston G. Dayton, Judge.

[2] Ohio Valley Bank Co. v. Mack (C. C. A. 6) 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; Wabash Ry. Co. v. Compton (C. C. A. 6) 172 Fed. 17, and cases cited at page 21, 96 C. C. A. 603; Deupree v. Watson (C. C. A. 6) 216 Fed. 483, 485, 132 C. C. A. 543.

In the matter of the Mound City Coal Company, bankrupt. On petition by the Union Electric Company and others to superintend and revise an order granting a petition of Nelson C. Hubbard and others. Reversed and remanded.

Joseph R. Curl, of Wheeling, W. Va. (William Erskine and John C. Palmer, Jr., both of Wheeling, W. Va., on the brief), for petitioners.

George A. Blackford, of Wheeling, W. Va., for certain respondents.

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

SMITH, District Judge. The Mound Coal Company, J. C. McKinley, and Nelson C. Hubbard filed a bill of complaint in the circuit court for Marshall county, in the state of West Virginia, against the Mound City Coal Company and others, under which, on the 12th of October, 1915, the Dollar Savings & Trust Company, one of the defendants to the bill, was appointed by the state court receiver of all the property of the Mound City Coal Company. On the 10th of February, 1916, a petition for involuntary bankruptcy was filed against the Mound City Coal Company in the District Court of the United States for the Northern District of West Virginia, and on the 2d of March, 1916, that company was adjudicated bankrupt, and thereafter the Security Trust Company, a West Virginia corporation, was appointed trustee in bankruptcy. Thereupon the Dollar Savings & Trust Company, the receiver in the proceedings in the state court, voluntarily turned over all the real and personal property of the bankrupt to the trustee in bankruptcy and the trustee took possession of the same. All the creditors of the bankrupt proved their claims before the referee in bankruptcy. The appraisers appointed by the referee appraised the assets of the bankrupt estate at about $204,000. The claims secured by lien were found to amount to about $140,000, and the unsecured claims to about $75,000.

Thereafter the receiver in the state court, the Dollar Savings & Trust Company, and the complainants in the state court proceedings, viz., Mound Coal Company, Nelson C. Hubbard, and J. C. McKinley, filed a petition before the referee in bankruptcy, praying that all the property of the bankrupt be returned by the bankrupt court to the receiver in the state court, to be dealt with by the state court, viz., the circuit court of Marshall county. This petition was refused by the referee in bankruptcy, and the petitioners thereupon filed a petition praying the District Court to review and reverse the order of the referee.

On the 11th of December, 1916, the District Judge filed his order reversing the order of the referee, and remanded the proceeding to the referee, with instructions to enter an order directing the trustee in bankruptcy to surrender up and deliver to the receiver in the state court all the property of the bankrupt, and further directing the trustee to seek by petition to intervene in the state court and ask that court to modify its decree, so as to provide that, before any sale of the property or any distribution of the proceeds of such sale be made, the validity of the liens thereon and the order of priority, may be determined, and to provide that the trustee in bankruptcy be afforded full opportunity to

contest the validity or extent of any and all such liens, and to direct that any surplus funds arising from the sale or operation of the property, after payment of all proper costs, charges, and expenses of the suit and the receivership, should be paid over to the trustee in bankruptcy. The decree of the District Judge further provided that the District Court of the United States reserved and retained the right to take exclusive jurisdiction of the bankrupt estate and administer it, and to stay the proceedings in the state court, if that court should deny to the trustee the right to intervene, or deny to the trustee the relief which the trustee was by the decree directed to seek in the state court.

[1] The present petition before this court is to review and revise the action of the District Court, and to reverse its order of the 11th of December, 1916. From the facts set out in the record it appears that the assets of the bankrupt estate exceeded its admitted lien debts by some $64,000. There is a claim of some $80,000 (additional to the sum of $140,000 allowed by the referee) to have a lien on the assets, but this claim was disallowed by the referee. In any event, it appears a very serious question whether this $80,000 be entitled to rank as a lien debt or a debt at all. If its lien be finally disallowed, then there should be a fund of some $60,000 to be administered for the benefit of the unsecured creditors. Such being the case, it would seem that the bankrupt estate should be administered by the bankrupt court. Where the admitted and uncontested liens on any part or portion of the bankrupt estate clearly exceed the value of that property, so as that it is manifest that under no circumstances there can be any fund therefrom to be administered for the unsecured creditors, the courts of bankruptcy have exercised the discretion of permitting the lien creditors to realize on their securities in their own way, either by permitting proceedings already commenced in state courts for that purpose to proceed or by permitting the lien creditors to exercise any powers of sale they may have, or to initiate proceedings in any court of competent jurisdiction they prefer, to realize on their security. This has been done upon the theory that, inasmuch as in such cases the property really belongs to the lien creditors, the bankrupt court is not required to burden it with the expense of an administration in bankruptcy, if the lien creditors prefer another method or tribunal for the administration.

There is no reason why the property of a lien creditor should be unduly burdened with the cost of an administration solely for the benefit of the general creditors, nor will the bankrupt court ordinarily impose that burden on a lien creditor at the instance of a general creditor, where it is manifest that the particular property is worth less than the liens thereon, or that there are no assets in excess of the liens. Where, however, there is any surplus, or any reasonable ground for inferring there may be a surplus or equity in the property, that would inure to the benefit of the general creditors, or there is any division of agreement among the lien creditors entitled as to the method or tribunal of administration, it is usually the course of the bankrupt court, in pursuance of its exclusive jurisdiction, to take charge of the liquidation and administration of the assets, because it is impossible under such circumstances for the estate to be properly administered in more than one

tribunal. If the bankrupt court were to await the action of the state tribunals in ascertaining surplus assets and determining questions concerning the existence and rank of liens, the administration of the estate in the bankrupt court might lie in abeyance for an indefinite period—perhaps for years—before the trustee in bankruptcy would receive from those courts the assets he should administer.

This would be to subvert the spirit and purpose of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 544), which contemplates and requires a speedy and uniform liquidation and administration. It is thus the duty of the bankrupt court, charged with the administration of the estate, to take charge of all the assets under such circumstances, and determine all questions relating to them, and it is likewise the duty of all other tribunals of otherwise concurrent jurisdiction to surrender possession to the proper court for that purpose.

[7] The learned judge who made the order in the court below was therefore in error under the circumstances of this case in directing the trustee in bankruptcy to turn over the bankrupt estate to the receiver in the state court. He was also in error in directing the trustee to turn it over loaded with the conditions that, if that tribunal denied the relief the trustee was directed to ask, then the United States court of bankruptcy reserved the right to take back the possession of the property. The action of judicial tribunals of competent jurisdiction cannot be indicated or required in advance. If the property in question should properly be turned over to the state court, it should be turned over without reservation or condition as to the after judicial action of that court.

The decree of the District Court of the 11th of December, 1917, is accordingly reversed, and the cause is remanded to that court, to retain the possession of all the assets directed in that decree to be surrendered, and to proceed with the administration of the bankrupt estate in due course of law.

Reversed.

In re SHELLY.

MacEVOY v. E. & Z. VAN RAALTE, Inc.

(Circuit Court of Appeals, Third Circuit. May 24, 1917.)

No. 2179.

1. BANKRUPTCY ⊂=446—REVIEW—PETITION TO REVISE—QUESTIONS OF FACT.
On petition to revise an order affirming a decision of the referee, a fact found by the referee must be accepted.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

2. BANKRUPTCY ⊂=140(1)—PROPERTY VESTING IN TRUSTEE—RIGHTS OF THIRD PERSONS.
A building contract provided that, if the contractor refused or neglected to supply a sufficiency of materials or workmen the owner might provide them and deduct the expense from the amount of the contract, and that all work and materials delivered on the premises to form part of the works would be considered the property of the owner and not be

moved without its consent, but that the contractor should have the right to remove all surplus materials after the completion of the work. When a petition in bankruptcy was filed against the contractor, materials not yet incorporated in the building were on the ground. *Held*, that the owner's right thereto under the contract was superior to the right of the trustee under the amendment of 1910 giving the trustee the status of a lien creditor as of the time the petition is filed, as the lien of a creditor would have been subordinate to the owner's rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199.]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of Oswin W. Shelly, bankrupt. On petition by Clifford F. MacEvoy, trustee, to revise an order (235 Fed. 311) affirming a decision of the referee in favor of E. & Z. Van Raalte, Incorporated. Order affirmed.

Olcott, Gruber, Bonynge & McManus, of New York City (Harold Riegelman, of New York City, of counsel), for appellant.

William S. Bennett, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This dispute arises upon the following facts:

Shelly was a building contractor, and on November 3, 1913, undertook to erect a mill for $76,000 at Paterson, N. J., for E. & Z. Van Raalte, a corporation. Sections 4 and 9 of the contract are as follows:

"Sec. 4. Should the contractor at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three (3) days' notice, in writing, being given, to finish the said work, and the expense shall be deducted from the amount of the contract."

"Sec. 9. All work and materials delivered on the premises to form part of the works are to be considered the property of the owner and are not to be removed without its consent; but the contractor shall have the right to remove all surplus materials after the completion of the work."

The contract was duly recorded in the clerk's office of the proper county. On November 29 Shelly applied for a payment on account, and on December 2 received the architect's certificate for $3,000; this sum being paid him on December 5. Ten days later the petition in bankruptcy was filed, and at that time materials appraised at $1,787.52 were on the ground, but not yet incorporated in the building. The receiver (who is now the trustee) claimed the property as the bankrupt's, and a claim was also made by the Van Raalte Company on two grounds: (1) That the materials had already been paid for by the $3,000; and (2) that sections 4 and 9 gave them a right superior to the receiver's or the trustee's. By agreement the company used the property in completing the building, undertaking to pay its value to the trustee if the dispute should be decided in his favor. The total cost of the building to the company was more than $79,000. The referee and the District Court decided in favor of the company, the court's opinion being reported in 235 Fed. 311, and in this proceeding

the trustee raises two questions: First, whether the company had paid for the materials in full; and, second, whether his own title is better than the title of the company.

[1] 1. The referee considered the question of payment to be immaterial, and the District Court did not discuss it at all. If the matter were important, we may note that the referee found as a fact (and in this proceeding the fact must be accepted) that of the property found at the date of bankruptcy only certain items valued at $666.60 had been on the ground when Shelly received the architect's certificate; the rest having been delivered since that time. But we agree that the decisive question is the second, viz. the effect of the contract, and to that we turn for a brief consideration.

[2] 2. Only a few words are necessary, for Judge Rellstab has come to a satisfactory conclusion, and we shall add little to what he has said. In our opinion the decision of this court in Duplan Co. v. Spencer (C. C. A. 3) 115 Fed. 689, 53 C. C. A. 321 (writ of error dismissed for want of jurisdiction, 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287), is controlling, and we shall confine ourselves to explaining why we think the amendment of 1910 has not impaired the force of that ruling as applied to the facts now before us. A fresh examination of the Duplan opinion shows that the reasoning of Judge Gray took the following course: The relevant article there was more elaborate than the provisions in the present contract; but the object in both cases is the same, namely, to give the owner of the premises security for such advances as he may make, and the right to use the materials on the ground to finish the building. Under article 5 of the Duplan agreement, the materials thus brought upon the premises by the contractor and appropriated to the building were considered to be so far delivered to the owner as to make them a security for his advances. A quasi or qualified right of property therein, and a possession not inconsistent with the contractor's right and duty to incorporate them in the building, resulted from their delivery and their appropriation to the building. This being so, the security would have been of little avail if the materials themselves could have been taken away, either by an execution or by a trustee in bankruptcy. The effect of the contract was held to be that the materials thus brought upon the ground and appropriated to the building were impressed with a charge or interest in favor of the Duplan Company consistent with the contractor's qualified ownership, but commensurate with the requirement that they should furnish security to the owner for the performance of the contract and for advances made.

In this view of the mutual rights of the parties, it was held that no unlawful preference had been created by the advances that were made. There was no new and independent contract, but merely a recognition of the old contract and a furtherance and consummation of its intent. The court turned then to the contention of counsel for Spencer, the trustee, to the effect that, even although this contract might be good between the parties and their immediate representatives, it could not bind bona fide judgment creditors, and that, as these could have levied upon the materials without regard to the contract, the trustee had ac-

quired an unqualified title therein. This contention was rejected as based on an erroneous assumption, and the court held that the property could not have been levied upon and sold under judicial process against the contractor, whether issued on general grounds or on the particular ground that the possession of the Duplan Company was not sufficient to support its claim against the contractor's creditors. On the contrary, the court declared that the goods thus delivered upon the premises were sufficiently in the owner's possession to protect the interest that resulted from the agreement; they were in the owner's possession as fully as they could be consistently with the contractor's right to use them in the building. Materials thus delivered were notoriously in the qualified possession and ownership of an owner of the freehold, and the formal creation of a charge or interest in his favor, or the making of a conveyance to him, would not require, or indeed permit, any further delivery or change of possession for the purpose of taking the case out of the mischiefs aimed at by the statutes against fraudulent transfers. The contract between the parties was such that the contractor could not have disposed of the property in violation of his obligation under the building agreement, and he could have been prevented in equity from so doing; and it was also true that a creditor could not have seized the property in opposition to the right of the owner.

If this course of reasoning be sound—and it is the law of this court, from which we have no present intention to depart—the Duplan Case rules the controversy in hand, and the amendment of 1910 has not given the trustee a right superior to the right of the Van Raalte Company. Under this amendment, the trustee takes the status of a lien creditor as of the time the petition in bankruptcy was filed (Border Nat. Bk. v. Coupland [C. C. A. 5] 240 Fed. 355, — C. C. A. —), and such a lien would have been subordinate to the owner's right. The essential features of sections 4 and 9 are the same as the features in the earlier decision, and the other facts do not materially differ. We need not discuss situations that are not before us; our decision is restricted to the facts presented on this record.

The order is affirmed.

JONES v. BAILEY et al.

(Circuit Court of Appeals, Third Circuit. May 16, 1917.)

No. 2212.

1. FRAUDULENT CONVEYANCES ⟸57(4)—VALIDITY OF TRANSACTIONS—SOLVENCY OF GRANTOR.

J., intending to give his grandson a lot in a tract of unimproved land and to build a house thereon for him, let a contract, on which $500 had been paid before J.'s death. He devised such tract, including the lot, to T., his son, the father of such grandson. His wife and children arranged to have the house finished at the expense of the estate, and after its completion, at an additional cost of over $2,400, T. conveyed the lot to his son. The lot was worth only $300 or less, and the transaction was in good faith and with no intent to hinder, delay, or defraud creditors. T. then owed no personal debts and believed himself to be solvent, and there was no affirmative proof that he was not solvent; but subsequently, owing to the failure of enterprises in which he owned stock, he became unable to pay obligations on which he was security for others. *Held*, that the transaction would not be set aside, especially as the house, constituting the principal value of the property was not equitably T.'s property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 150–152, 154.]

2. FRAUDULENT CONVEYANCES ⟸272—SUITS TO SET ASIDE—BURDEN OF PROOF—INSOLVENCY.

In a suit to set aside an alleged fraudulent conveyance, the grantor's insolvency was a question of fact, and the burden of establishing it was on plaintiff; the conveyance being prima facie valid.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 804.]

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

Suit by Samuel Bailey, Jr., and another, receivers of the Federal National Bank, against Samuel E. Jones. From a decree in favor of plaintiffs, defendant appeals. Reversed, and suit dismissed.

Stephen Stone, of Pittsburgh, Pa., for appellant.

John S. Wendt, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In the court below, Messrs. Bailey and Loos, receivers of the Federal National Bank, filed a bill to set aside a conveyance of certain real estate made by Thomas P. Jones, one of the defendants, to Samuel E. Jones, the other defendant. On final hearing that court entered a decree granting the relief prayed for; whereupon the defendants took this appeal. The proofs in the case tended to show that James Jones was in his lifetime the owner of the ground in question, which was part of a considerable piece of unimproved land. He was a man of substance, and had announced his pur-

pose to give his grandson, Samuel E. Jones, who was a son of Thomas P. Jones, a lot out of said tract and to thereon build a house for the occupancy of his said grandson and his family. With that purpose in view, plans for the house were prepared, and a contract let by James Jones for the building. This building had so progressed under that contract that, when James Jones suddenly died, March 17, 1912, he had paid on account thereof some $500 before the contractor defaulted. By his will, made the year before, James Jones devised to Thomas P. Jones, the father of Samuel, the tract which included the lot on which the house was being built. After the death of the grandfather, his wife and children, knowing of the decedent's purposes, informally and as a family arrangement, agreed that the house should be finished at the expense of the estate, which, of course, meant at their expense, with the understanding that Thomas P. should convey the lot to Samuel, on which they would construct the building.

The original contractor having, as we said, defaulted on his contract, the executors of James Jones, in pursuance of the family arrangement, hired another contractor and made a new contract. The house was finished at an additional cost to the estate of over $2,400. There was proof tending to show that the lot on which the house stood was worth from $250 to $300. Carrying out the family arrangement, Thomas P., on January 15, 1913, conveyed the lot to Samuel, and the deed was promptly placed on record. It is admitted that the above actions were taken in good faith, and the trial court stated that it "cannot find that he [Thomas P. Jones] was actuated by desire to hinder, delay, or defraud his creditors by making the conveyance to his son." It, however, held that Thomas P. Jones was insolvent at the time the conveyance was made, and that therefore the conveyance, without reference to its admitted honesty of purpose, was invalid against creditors. Such being the holding of the court below, it is apparent that its decree is based on the fact of the insolvency of Thomas P. Jones when he made the conveyance.

[2] This is a question of fact, and the burden of establishing it is on the bank for prima facie the conveyance is valid. We turn, then, to the proofs, to ascertain from them, and from them alone, whether the weight of them warrants the court's finding. In that regard we cannot but feel that there is a dearth of proof on that vital subject, and that possibly the court below, having had in charge the administration of the numerous bankrupt and insolvent estates in which Thomas P. Jones, his business associates, and related companies were subsequently involved, may have quite unconsciously been led to the conclusion that he was insolvent when this conveyance was made. The question of his insolvency is not discussed in the court's opinion, or the proof cited in support of the court's finding. Beyond the mere statement that he was insolvent the only statement is that:

"There is no doubt that, at the time of making the conveyance, the said Thomas P. Jones believed that his financial condition was better than it actually was."

We have carefully examined the entire record, and we are unable to find proofs of such facts as warranted a finding of insolvency.

Thomas P. Jones was a large owner of stocks in coal enterprises that were doing a large business, and his subsequent personal insolvency was due to the failure of such enterprises to refund accruing mortgage indebtedness. It is quite evident that depression in the coal business about that time, rather than worth of the properties, led to the failure of the companies, and to the elimination of the supposedly large means Thomas P. Jones possessed. Clearly he was carried down, not by his inability to meet his personal obligations, for he had no personal debts of his own, and his obligations were wholly as security for others. Nor were any of these secondary obligations created on the basis of his ownership of this property, for it will be observed his ownership of the property came to him by his father's will after these obligations were created. That he regarded himself as solvent the finding of the court virtually conceded, and that those who were closely allied to his affairs regarded him as solvent is shown by the fact that those interested in his father's estate jointly contributed to the building of this house, thereby giving it the substantial value which alone makes it worth while to prosecute this suit, which in effect takes, not the property of these defendants, but the property which the widow and other heirs of James Jones contributed to the grandson in order to carry out the wishes of James Jones. As we have seen, the proofs were that the bare lot was worth from $250 to $300. The $500 on an unfinished house added little to the value of the lot, and it formed such a small fractional part of Thomas P. Jones' property that in the nature of things its acquisition did not make him more, and its conveyance less, solvent.

In view of these facts, of the lack of affirmative proof, and of the equitable consideration that the thing of real value here, to wit, the house, which was built under a new contract, with funds furnished in the main by the widow and heirs of James Jones, out of respect to the wishes of a deceased husband and father, and that such house was not built on the lot by Thomas P. Jones, and in that sense was not equitably his property, we feel that both legal and equitable justice is done by dismissing this bill.

FILLIPON v. ALBION VEIN SLATE CO.

(Circuit Court of Appeals, Third Circuit. May 17, 1917.)

No. 2223.

APPEAL AND ERROR ⊂=1069(3)—HARMLESS ERROR—COMMUNICATIONS WITH JURY.

That, in a civil case, a written question from the jury, as to a point of law, was presented to the judge, and answered by him in writing after he had retired to his chamber, and not in open court, or in the presence of the parties or their counsel, was not ground for reversal, where no harm resulted, the question and answer were preserved of record, and counsel were promptly informed of what had taken place, and given an opportunity to except to the substance of the instruction and the manner of giving it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4139.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Charles B. Witmer, Judge.

Action by Donato Fillipon against the Albion Vein Slate Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Calvin F. Smith and Smith, Paff & Laub, all of Easton, 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. The plaintiff, an adult subject of the king of Italy, suffered injury while at work in the slate quarry of the defendant, a Pennsylvania corporation. He was a rubbish hand, or ordinary laborer, and this had been his occupation for more than a year. The defendant's quarry was operated by gangs, each gang comprising four block men and (at the time of the accident) one rubbish hand. The quarry is an open hole, from which the rough blocks of slate are hoisted to the top of the ground by ropes or chains. After a block has been blasted out, it is tilted up by crowbars, and by wedges of iron or wood, so that the hoisting tackle may be fastened around it. Under small blocks the wedges are placed by the hand, which need not go farther in than the edge of the block; under large blocks, the wedges are pushed part of the way by the hand, and then a stick of some kind is used to push the wedge farther in, the workman being thus protected from injury in case the stone should slip or make some other unexpected movement. A rubbish hand is a general utility man, and is expected to do whatever the foreman of the gang may direct. The plaintiff's experience had made him familiar with the work just described. His account of the accident was as follows: On July 31, 1914, a large block, several feet both in length

and in breadth, had been blasted out, and chains were about to be put around it. He was helping, and had inserted a wedge as far as possible without putting his hand under the stone. But the wedge had to go farther, and he was afraid to use his hand for that purpose, telling the foreman that he wanted to get something to push the wedge. Instead of consenting, the foreman ordered him to "Go ahead! Go ahead!" and he thereupon put his right arm under; the result being that the arm was so badly crushed by the sudden movement of the block that amputation was necessary. The court asked the jury to decide whether the company had been negligent, and whether, in view of the plaintiff's testimony that he was merely obeying the foreman, his obedience was excusable—in other words, whether he fully understood the danger and acted with reasonable care.

The plaintiff took no exception to the charge, the jury retired, and the court adjourned for the noon recess. After the recess the courtroom in which the trial had been held was occupied by another judge and another case, and Judge Witmer retired to his chamber. While the other case was proceeding, the jury sent a written question to Judge Witmer concerning the applicable rule of contributory negligence, and the judge returned a written answer. The question and answer were both preserved on the record, and the plaintiff was afterwards allowed an exception to the instruction thus given, and also to the manner of giving it. The manner was objected to, on the ground that the question was asked and answered in the method described, not in open court, in the absence of the parties and their counsel, and without their knowledge or consent. The verdict was for the defendant.

We need not discuss the question and answer themselves; they contain nothing of which the plaintiff can properly complain, the answer being slightly more in his favor than the charge itself. The point chiefly insisted on now is the alleged error in failing to give the instruction in open court. Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts, and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota v. Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them. The decisions that follow the earliest report—Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185—lay down the unbending rule that no communication should take place between a judge and the jury, except in open court and (if practicable) in the presence of counsel; and some of them hold that communications of only slight importance will furnish ground for reversal, if they have been made in a different place and a different way. The other line of authorities accepts the rule as highly desirable, but not as unbending, holding that the circumstances of each case should be carefully scrutinized, in order to be sure that no harm has actually been done, and that no harm is likely to be done, by the kind of com-

munication that may be under examination in a given case. In our opinion this is the better view, and we give it our approval, confining the decision to the situation now before us, namely, an ordinary civil (not criminal) case, where the jury has asked a plain question in writing concerning a matter of law, not a matter of fact, and where the judge has answered it in writing plainly and accurately, and nothing else has occurred—the question and answer, moreover, having been preserved of record, and counsel having been promptly informed of what has taken place, and having been given the opportunity of excepting to the substance of the instruction and to the manner of giving it. In the case in hand we think it plain that no harm was actually done, and it is not easy to see how harm is likely to happen under precisely similar circumstances, where a question of law only is propounded and is accurately answered. We do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different that surrounds it; but, so far as we can see, harm is not probable. We agree fully that modifications of established practice should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also. But, after all this has been said, we are still brought to the question: Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside, where such an irregularity has crept in, although it has done no actual harm, and is unlikely to do harm?

We do not see our way to answer this question in the affirmative, and must therefore affirm the judgment.

FIRST NAT. BANK OF PITTSTON v. HOGGSON BROS.

(Circuit Court of Appeals, Third Circuit. June 7, 1917.)

No. 2229.

1. EVIDENCE ⟸382—DOCUMENTARY EVIDENCE—AUTHENTICATION—DISCRETION OF COURT.
In an action for architectural services, under a contract which provided for payment based on the schedule of charges indorsed by the American Institute of Architects, it was within the trial court's discretion, and not an abuse of its discretion, to admit a printed circular over the name of the secretary of such Institute, identified as its schedule of charges, as against the objection that the schedule should be proved by the minutes of the society, as this objection simply went to its authentication, and the question was one of incidental procedure and sufficiency of proof.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1658, 1659.]

2. EVIDENCE ⟸242(5)—ADMISSIONS—DECLARATIONS OF EMPLOYÉS.
In an action for architectural services, under a contract which was canceled pursuant to a provision therein, evidence that a person in plaintiff's employ, who visited defendants for the purpose of negotiating a new contract, but not shown to have had anything to do with the settlement of the old contract, said plaintiff's charge would be only $600, was properly excluded.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 898.]

3. APPEAL AND ERROR ⟸690(5)—RECORD—QUESTIONS PRESENTED FOR REVIEW.
In an action for architectural services, under a contract which designated its subject-matter as the additional items in connection with the alterations and additions to a bank building, where the plans and specifications were not reproduced in the record, or produced before the appellate court, it could not hold that error was committed in excluding evidence that the plans and specifications furnished were for a new structure, and not for alterations.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2902.]

4. APPEAL AND ERROR ⟸690(5)—RECORD—QUESTIONS PRESENTED FOR REVIEW.
The alleged error in overruling an objection to a question as not being cross-examination cannot be reviewed, where the witness' testimony in chief is not in the record.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2902.]

In Error to the District Court of the United States for the Middle District of Pennsylvania.

Action by Hoggson Bros., a corporation, against the First National Banks of Pittston. Judgment for plaintiff, and defendant brings error. Affirmed.

B. R. Jones and Andrew Hourigan, both of Wilkes-Barre, Pa., for plaintiff in error.

Morgan, Lewis & Bockius, of Philadelphia, Pa., James L. Morris, of Wilkes-Barre, Pa., and Selden Bacon, of New York City, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Hoggson Bros., a corporate citizen of New York, brought suit against the First National Bank of Pittston, a corporate citizen of Pennsylvania, to recover for architectural services rendered under a written contract. The defendant admitted liability under the contract for services rendered to the extent of some $600. The plaintiff claimed for services rendered to the extent of $3,900. The case was tried by a jury, which found in favor of the plaintiff for the full amount of the $3,900 claimed. On entry of judgment thereon, the bank sued out this writ of error.

The proofs in the case tended to show the parties made a contract whereby the plaintiff agreed to furnish plans, specifications, and architectural services, to remodel defendant's bank building, and do the work for $30,000. By a later writing the plaintiff agreed "to execute the additional items in connection with the alterations and additions to your bank building in Pittston, for the sum of $33,000, in addition to our previously accepted estimate, No. 9821, all conditions of which are to apply." The contract further provided:

"We agree to allow you the privilege of canceling the order at any time before the work is begun, and, in the event of our not going on with the work, to accept as our remuneration a sum based on the schedule of charges endorsed by the American Institute of Architects."

[1] In pursuance of such power, the defendant canceled the order and erected a new building on another site. The plaintiff was an unsuccessful bidder for such work, and thereafter sued for its fees as architect, as above stated. The defendant conceded it owed some $600 for such fees, and alleged that this sum had been agreed upon between the parties when the order for the building was canceled. The question whether the $600 had been agreed on was submitted to the jury in a charge which is not complained of; but the jury found for the plaintiff for the $3,900 claimed by it. The errors assigned involve rulings of the court in the rejection or admission of evidence. We find no error in these rulings. To prove the schedule of charges indorsed by the American Institute of Architects, plaintiff called the secretary of the New York chapter of that body, who was also a member of the national body and who produced a printed circular over the name of the secretary of the American Institute, and testified it was the schedule of the Institute's charges. It was objected that such schedule should be proved by the minutes of the society. The method of proof in such case is largely in the discretion of a trial judge, and we are of opinion the fair bounds of such discretion were not overreached in this case. There is no pretense that the schedule of prices stated in this circular are not in point of fact what the Institute had established. The objection simply went to its authentication. The question was therefore one of incidental procedure and sufficiency of proof, and did not involve the real issue in the case, which was whether the plaintiff had waived the rates and agreed to accept $600.

[2] It is assigned for error that the court refused to admit the

declaration of one Gwyer that the plaintiff's charge for its architectural service would be only $600. While Gwyer was in the plaintiff's employ, we find no evidence whatever showing any express authority, or any employment which implied a right, to make such statements or bind the plaintiff thereby. He visited the defendants for the purpose of negotiating a new contract for another building on a different site, and there is no proof that he had anything whatever to do with the settlement of the old contract.

[3] It is contended that the court erred in rejecting the testimony of a witness who, it is alleged, would have testified that the plans and specifications furnished by the plaintiff for the second contract were not for alterations, but for a new structure entirely. It will be noted, as quoted above, that the subject-matter of this second contract was by the agreement of the parties, designated as "the additional items in connection with the alterations and additions to your bank building at Pittston." Presumably the plans and specifications complied with this description—indeed, we are warranted in so regarding them, for the plaintiff in error has not reproduced the plans and specifications in the record, or produced them before us. We have, therefore, no ground for holding that error was committed by the court below in excluding this testimony of the witness that this second contract was for a new building, and not for alterations and additions, as the contract specified.

[4] In the absence from the very abbreviated record before us of the testimony in chief of the witness Morgan, we are unable to say whether the court erred in overruling, as not being cross-examination, the question asked; and for a similar reason of the plans and specifications not being before us we are unable to determine whether the plaintiff's proofs failed to make out a case for the jury. It scarcely need be said that this is a court of errors, and in the absence of an affirmative showing of error the judgment of the court below should be affirmed.

Finding no error in this record, we therefore affirm the judgment below.

DELAWARE, L. & W. R. CO. v. CONSALVO et al.

(Circuit Court of Appeals, Third Circuit. April 16, 1917.)

No. 2221.

APPEAL AND ERROR ⊜930(1)—VERDICT—ASSUMPTIONS.

Where, in a passenger's action for injuries, the position of each party as to the manner in which the accident occurred was supported by direct and positive testimony, and this question was settled by the verdict in favor of plaintiffs, it would be assumed that the accident happened as claimed by plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755, 3756, 3758.]

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Action by Marianna Consalvo and others against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Frederic B. Scott, of New York City, for plaintiff in error.

Wilbur A. Heisley, of Newark, N. J., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. About half past 9 o'clock on the evening of Sunday, August 9, 1914, the plaintiffs—Marianna Consalvo and her husband in her right—with several friends were approaching their destination at Morristown, N. J., on a passenger train of the defendant company. They were in the second coach, and retained their seats until the station was announced. The events from this point of time are in dispute. The railroad's account is that while the train was at the station a number of persons, including the friends of the plaintiffs, alighted safely and without hurry, and other persons entered the car. A reasonable and sufficient time having been given for arriving and departing passengers, the train started; but the plaintiffs had unduly delayed, and did not reach the front door of the coach until after the train had begun to move. Nevertheless they went out upon the platform, and the wife descended its steps, while her husband went down the steps leading from the rear platform of the first coach. Becoming alarmed, however, the husband and one of her friends warned Marianna not to get off, but to go on to the next station, whereupon she turned to ascend the steps, lost her balance, was dragged some distance, and finally fell from the train and was severely injured. The railroad's contention is that she was not directed or invited by any one to get off at the time she made the attempt, and was not called upon to decide quickly between impending dangers, but was merely in the situation of a passenger who has voluntarily gone upon the platform of a moving train and is trying to alight, in order to avoid the inconvenience of being carried a few miles further. This

being so, she was guilty of contributory negligence, both at common law and especially under section 39 of the New Jersey Act of 1903 (P. L. p. 666).

The plaintiffs' evidence tended to prove that, when the train stopped at Morristown, they and their friends walked down the aisle while the train was at rest, their friends being in front; that the plaintiffs went upon the platform, the husband going across to the first car and descending its steps, while the wife started down the steps of the car in which they had been riding. While in these positions, the signal was given and the train began to move; the wife was warned not to get off, and turned to go back, but fell from the steps and was drawn under the train. The plaintiffs therefore contend that the train was at rest when they left their seats and went down the steps, and that the start was negligent, because they had not had a reasonable time to alight.

An attentive examination of the record has satisfied us that each of these positions is supported by direct and positive testimony, and that the case presents a simple question of fact, which has been settled by the verdict in favor of the plaintiffs. We must assume, therefore, that the plaintiffs were in the act of alighting and were rightfully on the platform of a train at rest, and from this point of view the questions sought to be raised by the company do not arise.

The judge's instructions were clear and adequate, and we find no error to correct.

THE HISPANIA.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1917.)

No. 2888.

SHIPPING ⊂=121(2)—CHARTERS—LIABILITY OF VESSEL FOR DAMAGE TO CARGO —UNSEAWORTHINESS.

The temporary jamming of the steering gear of a steamship, not due to any defect or negligence of the officers or crew, causing a collision with another vessel, *held* not to constitute unseaworthiness, which under the charter party rendered the ship liable to the charterer for resulting damage to the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 450, 451.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by the Planters' Steamship Company against the steamship Hispania; the Rolf Seeberg Ship Chandlery Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

The opinion filed in the District Court is as follows:

This is a libel for damages to a cargo of bananas. Libelants had chartered the steamship Hispania for one or more trips between New Orleans and

Honduras. On January 2, 1906, while proceeding up the Mississippi river in charge of a pilot in a fog, she collided with the steamship Dalton, lying at anchor. The Hispania cleared herself and was run aground on the river bank. The cargo, consisting entirely of bananas, was transferred to barges and transported to New Orleans. The libel claims damages for a total loss of cargo, because of injury by water and delay, and for expenses in connection with reshipment.

The libel alleges as a basis of the ship's liability that she was unseaworthy, in that she had no binnacle or binnacle light; that her two compasses varied more than 5 points; that she had no telltale to indicate the position of her helm; that her steering gear was defective; and that her ground tackle was insufficient and defective. The answer denies any unseaworthiness as alleged, and pleads staleness.

Considering the friendly relations of the parties after the accident, the death of a material witness, and the great delay in taking testimony and bringing the case to trial, the plea of staleness is not without merit, but I do not consider it necessary to pass on it in the view I take of the merits.

It is conclusively shown by the evidence of the captain, first officer, and the pilot of the Hispania that the accident was caused solely by the temporary jamming of the steering gear. This was unavoidable, was speedily corrected, and was not caused by any defect, nor by any negligence of the officers or crew of the vessel. This did not constitute unseaworthiness, and under the terms of the charter the ship is not liable for the resulting damage.

The other allegations of unseaworthiness are not proved; but, had they existed, they would have had no bearing on the accident. The ship had two compasses—one correct and in good order and properly lighted; the other not adjusted, not in use and not lighted. Just prior to the accident the pilot was in the rigging, where he could not see either compass, and his orders were being properly executed by the officers of the ship. Whether there was a telltale or not made no difference, as there was no doubt as to the position of the helm. When the anchor was let go, it was too late to bring the ship up in time to avoid the collision.

The libel will be dismissed.

John D. Grace, of New Orleans, La., for appellant.

William Grant and William B. Grant, both of New Orleans, La., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. We have well considered the evidence in this case, in the light of the briefs and additional briefs and supplemental briefs, and we find that the trial judge properly rendered a decree for the defendant.

For the reasons given by him, the decree appealed from is affirmed.

JUNG v SOCIÉTÉ ANONYME DE LA DISTILLERIE DE LA LIQUEUR BENEDICTINE DE L'ABBAYE DE FECAMP et al.

(Circuit Court of Appeals, Fifth Circuit. April 30, 1917.)

No. 2941.

TRADE-MARKS AND TRADE-NAMES ⇐95(3)—UNFAIR COMPETITION—IMITATION OF LABELS—INJUNCTION.

A preliminary injunction, restraining infringement of complainant's liquor label, should not be so broad as to prevent defendant from truthfully stating on this label the ingredients of his liquor; the statement being so made as not to constitute an imitation of complainant's label.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by the Société Anonyme de la Distillerie de la Liqueur Benedictine de L'Abbaye de Fecamp and others against Louis Emanuel Jung. From an order granting a preliminary injunction, defendant appeals. Modified and affirmed.

William C. Dufour, H. Generes Dufour, Charles J. Théard, and Delvaille H. Théard, all of New Orleans, La., for appellant.

Irving R. Saal, of New Orleans, for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. From our examination of the case we conclude that the preliminary injunction was properly issued, but as its language may be construed to restrain all use by the appellant of the words "Carduus Benedictus Herb," and as he has a right to make a truthful statement of the herbs from which his liquor is distilled, if the statement is not so made as to constitute an imitation of a label of appellees, the injunction will be amended by adding:

"This injunction, however, is not to be construed as preventing defendant from truthfully stating on a label that his liquor is made from Carduus Benedictus herbs; the statement being so made as not to constitute an imitation of a label of appellees."

The injunction issued in the case will be modified in this respect, and, as so modified, the decree is affirmed.

GARLAND et al. v. QUINN.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 2991.

1. PATENTS ⇐328—INFRINGEMENT—LIGHT CONTROLLER FOR AUTOMOBILES.

The Myers patent, No. 1,099,715, for a light controller for automobiles, consisting of a light bulb having one-half its surface silvered to reflect

the light against the main reflector, thus increasing the intensity of the rays, with means for rotating the bulb from the driver's seat, so as to turn the rays so reflected in any desired direction, *held* not infringed by a device in which the bulb can only be manually turned or adjusted

2. PATENTS ⟸168(2)—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE.
A patentee, who has acquiesced in the ruling of the patent office limiting his claims by the inclusion of certain elements, is estopped to claim the broader construction, which he has abandoned.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244.]

3. COURTS ⟸356—RECORD ON APPEAL—APPROVAL BY TRIAL JUDGE.
The failure of an appellant to present his statement of the evidence to the trial judge for approval, as required by equity rule 75 (198 Fed. xi, 115 C. C. A. xi), will be disregarded (except as to costs), where it otherwise appears that the transcript is complete and accurate, and the decision on the merits would be the same, whether or not the testimony is considered.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937.]

4. COURTS ⟸356—RECORD.
The failure of an appellant to state the evidence in the record on appeal in narrative form, as required by equity rule 75 (198 Fed. xi, 115 C. C. A. xi), does not affect the appeal, but subjects him to the imposition of costs.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937.]

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by Nelson J. Quinn against Edward Garland and the Federal Sign System Electric Company. Decree for complainant, and defendants appeal. Reversed.

O. C. Billman, of Cleveland, Ohio, for appellants.

Geo. E. Kirk, of Toledo, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 1,099,715 to Myers, June 19, 1914, on light controllers. The device of the patent is specially adapted to automobiles; its objects are to increase light intensity and decrease objectionable light dispersion. These objects are accomplished by silvering the lower portion (about one-half) of the ordinary electric light bulb seated in the usual spherical or parabolic reflector, whereby the light is projected from one side of the silvered part of the bulb, acting as a reflector, toward the opposite side of the main reflector, thus increasing the intensity of the rays which normally proceed from the light itself in the same direction. When the silvered portion of the bulb is in the usual lower position, the light is reflected therefrom upward to the main reflector and thence downward upon the road, and approaching drivers and pedestrians relieved from confusion due to blinding rays otherwise projected upward from the lower side of the main reflector. The patent also discloses a method whereby the lamp, having a rotatable stem mounted in the main reflector, may be rotated by the driver from the seat, and the

silvered and reflecting portion of the bulb adjusted "for such finding position as desired, as in turning corners." The patent contains five claims. The District Court held the first, second, third, and fourth claims valid, and the second and third infringed, and as to the last-mentioned claims entered the usual interlocutory decree for injunction and accounting. Defendant alone appeals. The claims here in issue are printed in the margin.[1]

[1] The alleged infringing device consists of a white semispherical light-reflecting adjustable shell, adapted to use by being manually pressed into place upon the bulb, in such position as to shield its lower half. Claims 1 and 4 were held not infringed, because in the opinion of the District Judge each of those claims is limited to "the use of the silvered and immovable coating, as a nonreflecting surface on the incandescent bulbs." The second and third claims were thought to be infringed, because in the court's opinion broad enough to include the detachable shells, and because the shells were capable of adjustment on the bulbs, and when used in connection with parabolic reflectors were capable of downward reflection and forward projection, or lateral deflection, at the will of the operator.

The alleged infringing device differs, however, from the disclosure of the patent in these respects: The electric light bulb is incapable of rotation in the socket of the main reflector except manually and after releasing a set screw which normally prevents rotation; and it has no means for adjusting, from the driver's seat, the bulb reflector and the main reflector relatively to each other, and thus for varying the direction of ray projection. As used in the bullet headlight, which is the alleged infringing use, this result can be accomplished only by manually opening the glass front of the headlight, manually releasing the set screw mentioned, and then manually turning the bulb in its socket; or, after releasing another series of set screws securing the main reflector to the rim of the glass front, manually detaching the adjustable shell from, or turning it upon, the glass bulb, and readjusting it manually in the desired position. Manifestly the method first stated would be the natural one. This adjustment thus cannot be effected from the driver's seat or while the automobile is in motion. The pivotal question is whether this capacity for manual adjustment responds to the call in the claims for "deflectable light-projecting means," "means for adjusting the reflectors relatively to each other," and "adjustment means for the light in varying the direction of ray projection."

[1] "2. *Deflectable light projecting means embodying the* combination with a first projecting reflector of a light therein having *fixed therewith* a second reflector directed toward the first reflector, and means for adjusting the reflectors relatively to each other whereby a portion of the light field of the first reflector may be intensified at the sacrifice of other portions of the light field of the first reflector."

"3. *Deflectable light projecting means embodying the* combination with a first projecting reflector, of a light centrally disposed therein having *fixed therewith* a reflector directed to reflect rays from the light toward one side of the first reflector, and adjusting means for the light for varying the direction of ray projection whereby a portion of the light field of the first reflector may be intensified at the sacrifice of other portions of the light field of the first reflector."

[2] We are convinced that it does not, after careful consideration of the specifications, in connection with the Patent Office history of the application. The application encountered many difficulties in the course of its allowance. As originally presented it contained nine claims. The first five entirely omitted the elements of deflectability, means for adjusting the reflectors relatively to each other, and for varying the direction of ray projection. All five were rejected on reference to the prior art. Claim 1 was subsequently allowed, and became present claim 1, but only after the inclusion of the element "and means for adjustably mounting the bulb for determining the lateral direction of the light field projection." Original claims 6 to 9 contained reference to adjusting means. They were allowed, and became, respectively, claims 2 to 5, inclusive, but only after amendment, which in case of present claims 2 and 3 consisted in the insertion of the words we have italicized in the claims as printed in the margin. Present claims 1 and 4, as allowed, contained amendments of a somewhat similar nature. It seems clear that the examiner regarded the inclusion of the elements of adjustability, deflectability, and dirigibility as essential to the allowance of the claims; that he would not have allowed them, except as they contained such elements; that the applicant so understood, and consciously acquiesced in the express inclusion of such elements. This being so, he is estopped to claim the broader construction which he thus abandoned. Campbell v. American Shipbuilding Co. (C. C. A. 6) 179 Fed. 498, 103 C. C. A. 122; 20 Century Heating, etc., Co. v. Taplin, etc., Co. (C. C. A. 6) 181 Fed. 96, 104 C. C. A. 156. The claims plainly do not cover the mere use of a partially silvered or partially screened lamp (regardless of adjustability), whether such silvering or screening is integral or nonintegral with the bulb, or whether nondetachable or detachable.

We cannot think that a capacity for adjustment by manually removing the shell from the bulb and manually replacing it in another position is the equivalent of the means for adjusting and deflecting within the proper interpretation of the claims in question. Such capacity for manual adjustment would be of little practical value. In our opinion the means called for by the claims are operative means; manual means are mechanical only. This conclusion is fortified by the decision of Judge Learned Hand in a case brought by this plaintiff for infringement of the patent here in suit (Quinn v. Faw [D. C.] 235 Fed. 166), which has been affirmed by the Circuit Court of Appeals for the Second Circuit.

[3] A question of practice remains to be considered: The record does not show that the trial judge ever settled or approved the statement of the evidence (which was taken in open court), as required by general equity rule 75 (198 Fed. xi, 115 C. C. A. xi) and the statement seems not to have been presented to the judge for approval. Furthermore, the record shows a "lodging" but not affirmatively the actual filing, of the testimony with the clerk of the District Court, as provided by the same rule, and on the argument in this court appellee urged that the case was not properly before us.

So far as appellee's rights are concerned, this suggestion is without

merit; there seems no reason to doubt that the transcript is complete and accurate; it seems to have been treated as filed; the ninth item in appellant's præcipe for transcript is "the complete transcript of proceedings at hearing on October 11, 1914"; counsel stipulated that the transcript of record on appeal should include only the documents, orders, and proceedings referred to in the præcipe for transcript mentioned, and that the complainant's two physical exhibits representing the "bullet headlight" and defendant's device should be sent up to this court; the clerk's certificate states that the transcript contains "full and complete copies of the papers enumerated" in the præcipe.

[4] The rule relating to the putting of the testimony in narrative form does not seem to have been abused, for the testimony (one witness for each party) consists of less than 26 pages, and it is not clear that reduction to narrative form would have been desirable; but, if so, that consideration could readily be taken care of in the award of costs (see our opinion In re General Equity Rule 75 and In re Our Rule 15, 222 Fed. 884, 138 C. C. A. 574; Chesbrough v. Woodworth [C. C. A. 6] 195 Fed. 875, 877, 887, 116 C. C. A. 465), and the objection was not suggested until the final hearing in this court. However, our conclusions on the merits would be the same, whether or not the testimony taken below is considered, for the admission of the Patent Office history is covered by the stipulation of the parties; the complete transcript of the same, as well as an abstract thereof, having been actually filed in the court below; their presence here is thus in no way dependent upon the settlement by the trial judge of the testimony taken orally before him. In these circumstances, we think a denial to appellants of recovery for the costs of preparing and printing the transcript of testimony so taken in open court (pages 19 to 44, inclusive, of the record) will satisfy the requirement of the rules, without injustice to appellee.

The decree of the District Court, finding infringement of claims 2 and 3, and awarding injunction and accounting with reference thereto, is reversed, and the record remanded to that court for further proceedings not inconsistent with this opinion. Appellants will recover their costs of this court, except the item above mentioned.

SEA GULL SPECIALTY CO. v. HUMPHREY.

HUMPHREY v. SEA GULL SPECIALTY CO.

(Circuit Court of Appeals, Fifth Circuit. April 28, 1917.)

No. 3030.

PATENTS ⟸219(2)—LICENSES—SUIT FOR ROYALTIES—DEFENSES.

Where a contract giving a license under a patent contained no guaranty against competition by infringers, the fact of such competition, through which the licensee lost sales, is no defense to a suit by the licensor to recover the agreed royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 340.]

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by William P. Healy and the Healy Box Corporation against the Sea Gull Specialty Company. Decree for complainants, and defendant appeals, with cross-appeal by T. F. Humphrey, trustee in bankruptcy of the Healy Box Corporation. Decree modified on cross-appeal.

The following opinion was filed in the court below:

In this case defendant was using certain patented box-making machines under a license from plaintiff and owed royalties. Another concern, using an infringing machine, invaded its territory and succeeded in taking away defendant's largest customer by underbidding its prices. Defendant retained the machines, but declined to pay royalties, on the ground plaintiff was obligated to prevent competition, and the loss on sales amounted to more than the royalties due. I sustained a demurrer to the jurisdiction of the court, and while the matter was pending in the Supreme Court on appeal the parties compromised and settled all of their differences, except the question of the amount of royalties due. The judgment dismissing the bill was reversed.

The bill prayed for an injunction, for cancellation of the license and the return of the machines, and for an accounting. Those questions are now out of the case, but the question as to the royalties is before me. Had the defendants' territory been invaded by a licensee of plaintiff, or by one allowed to infringe by connivance of, or agreement with, plaintiff, a different question might be presented. The license did not guarantee defendant against loss by the competition of infringers. The subsequent correspondence did not amend the contract, or create an estoppel to claim royalties already earned. The greatest right defendant could have exercised under the circumstances was to abandon the contract after notice to plaintiff and its failure to vigorously prosecute the infringers, but that course was not adopted.

There will be a decree in favor of plaintiff for $3,786.18 and for costs.

James E. Zunts, of New Orleans, La., for appellant.

Chas. Rosen, of New Orleans, La., and Henry B. Gayley, of New York City, for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. None of the assignments of error in the appeal are well taken. Cross-appellants should have their award for damages for infringement increased by the addition of an amount equal to interest at 5 per cent. from judicial demand to judgment.

The decree will be so amended, and, so amended, will be affirmed.

MEURER STEEL BARREL CO., Inc., v. NATIONAL ENAMELING & STAMPING CO.

(District Court, E. D. New York. April 12, 1917.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STEEL BARREL.
The Young patent, No. 891,895, for a metal or steel barrel with the body and head united by a fluid-tight solderless point, was not anticipated and discloses patentable invention. Claims 1 and 3 also *held* infringed, and claim 2 not infringed.

2. PATENTS ⟸239—INFRINGEMENT—ADDING UNNECESSARY PARTS.
The addition of a well-known or unnecessary step will not avoid infringement, even though the addition is claimed as an improvement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 377, 378.]

In Equity. Suit by the Meurer Steel Barrel Company, Incorporated, against the National Enameling & Stamping Company. On final hearing. Decree for complainant.

Emery, Booth, Janney & Varney, of New York City (Robert S. Blair, Frederick L. Emery, and Melvin G. Palliser, all of New York City, of counsel), for plaintiff.

Guggenheimer, Untermyer & Marshall, of New York City (Louis Marshall and A. V. Cushman, both of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff charges infringement of patent No. 891,895, granted July 30, 1908, to Frank E. Young, on an application dated April 27, 1907. Young assigned the patent to the Brooklyn Range Boiler Company, a New York corporation. In 1913 the plaintiff company was incorporated for the purpose of manufacturing under this patent, in connection with other work, and received an assignment from the Brooklyn Range Boiler Company, which was dated and delivered on the 31st day of December, 1913, but was not recorded until August 11, 1915.

The defendant is a corporation with a large plant in the Eastern district of New York, which performed, under contract, for the plaintiff, part of the work upon the material for the barrels constructed and sold by the plaintiff during the years preceding 1914. The defendant thus had in its factory some machinery which was built or had been adapted to the needs of barrel making, and, when the plaintiff transferred its work to its own factory, the defendant installed other machinery and proceeded to place upon the market barrels, which it now seeks to justify as properly competitive, in a commercial sense, with those of the plaintiff, and which it denies are an infringement of the Young patent.

[1] The patent in suit is stated in the specifications to relate—

"to metal or steel barrels or similar receptacles in which the heads, formed separately from the body, are secured to the latter in such manner that a fluid-tight receptacle is provided; this being accomplished in an improved manner by means of a malleable iron clamping ring."

There are several fundamental or obvious propositions, based upon the prior art, which must be stated in order to consider the disclosure of the earlier patents and the scope of the claims of invention by Young:

These steel barrels are cylindrical and of uniform diameter. The joint between the head and side of the barrel (like that in a wooden barrel) is completed by the clamping pressure of a hoop or ring, which is forced upon and around the chime of the sides of the barrel. The metal barrel seam must be air and liquid tight, and this object is to be attained without the use of solder in the art with which we are concerned. The hoop or metallic ring must be held on by some clamping force, to replace the nails in the ordinary wooden barrel hoop, and must subject the joint to some wedging action to take the place of that provided by the increase in diameter in the ordinary barrel as the hoop passes on toward the center of the barrel. The prior art shows that the joint itself, from the standpoint of being liquid or air tight, and from the standpoint of strength, whether it be stiffened by its form and shape or actually reinforced (that is, armored) by additional metal, was a feature old in analogous arts and old in the making of metallic barrels, so far as the general propositions of these constructions are concerned.

The language of the plaintiff's patent is simple, and, aside from one literal error in claim 2, is not open to much dispute as interpreted by the experts in the case. The patentee states that his construction—

"does not require the formation of a recess in the side wall of the clamping ring, for the purpose of forming a shoulder, which cannot ordinarily be of very great depth without materially increasing the thickness of the ring, which is undesirable, and which, moreover, does not permit of the folding of one member around the folded metal of the other member, so as to effectively interlock these two members, independently of the clamping ring."

The recess, into which the metal of both the side and the head of the barrel is forced, creates the shoulder of the prior art, referred to by Young, by the change in diameter. The bent-over portion must be pulled out straight in order to effect the release of the metal from the recess. It is evident that, if the clamping ring is to be made with any considerable strength or armoring power, it must present sufficient metal to contain the recess. It is also evident that tightness (both for liquids and air or gas) and the durability of the seam will depend upon the amount of compression and of compressed surface which is furnished in the seam, if no solder or adhesive material be used to accomplish that result. So, as Young says, he seeks to save material in the clamping ring, and to avoid the difficulties presented in rolling up or folding over each other the head and side into a seam and then forcing the seam over the shoulder of the groove or recess, by using the seam as the shoulder about which the clamping ring is rolled down.

It is evident from the prior art that the exact shape of this shoulder, or form in which this seam is rolled up, or the number of folds made, or the precise order of the various thicknesses which comprise the fold, would not limit the patentability of this idea of so clamping the seam as to roll the malleable metal into a gas and water tight joint, while furnishing the protecting armor and the locking or clamping fea-

ture of the hoop of metal. By folding over the side of the barrel, Young presented a shoulder with two thicknesses of metal at the lower edge of the seam. One thickness from the head was added to this by bending the flange of the head of the barrel over the folded side. He carried the flange far enough around so that it not only entered into the formation of the shoulder, but was bent under the folded parts of the side of the barrel to tighten the seam. He then carried the ring of his chime hoop or clamping ring entirely around the seam with which he had thus formed the shoulder on the outside of the barrel, and bent this flange of the metallic clamping ring sharply under this so-called shoulder in the manner indicated in the drawing.

The claims of the patent are as follows:

"1. A barrel or receptacle comprising a body and a head united by a fluid-tight, solderless joint, said body and head being bent one upon the other to form at least four thicknesses of metal, thereby to form a shoulder made up of at least two thicknesses of metal, and an annular malleable clamping ring having a bendable locking flange overlapping said bent portions, with its free end bent at an abrupt angle to such flange, so as to overlap said shoulder, thereby positively to lock said bent portions within the walls of said ring.

"2. A barrel or receptacle comprising a body and a flanged head united by a fluid-tight, solderless joint, said flange and head being bent, one upon itself a plurality of times, and the other upon such bent portions to form five thicknesses of metal, and thereby forming a shoulder made up of three thicknesses of metal, and an annular malleable metal clamping ring having a bendable locking flange, with its free end bent at an abrupt angle to such flange, so as to overlap such shoulder, thereby positively to lock said bent portions within the walls of said ring.

"3. A barrel or receptacle comprising a body and a flanged head united by a fluid-tight, solderless joint, said body having a part bent upon itself, and said flange being bent around such bent portion of the body and forming therewith a shoulder located exteriorly of the barrel, and a malleable metal clamping ring having a part thereof located interiorly of and in parallelism with the flanged head, and a bendable locking flange located exteriorly of and in parallelism with the bent portions of such head and body, with its free end bent inwardly at an abrupt angle to such flange, so as to overlap such shoulder, thereby positively to lock said bent portions and body within the walls of said clamping ring."

Claim 2 differs from claim 1 only in the additional thickness of metal in the shoulder, and in stating that the side is bent upon itself; while claim 3 says that the body is bent upon itself, and that the hoop or ring is to have parts "in parallelism" with the flange of the head and with the rolled-up seam, while reaching around the seam far enough to be bent under and to clamp or lock the seam with a closing up or tightening force.

From 1908 to 1913 the Brooklyn Range Boiler Company manufactured its sheet metal into cylinders, stamped or cut out the sheet metal disks for the heads of the barrels, and formed the hoops or clamping rings from channel iron bars. All of the parts were then galvanized, and the heads embossed with the name and device of the customer ordering barrels, by the defendant in its factory. The evidence shows that the defendant company and its workmen were familiar with the general style and construction of the so-called Young or Meurer barrel, and some of the witnesses testify that the chime ring of the general type used by the plaintiff, and of the type first placed on the market by

the defendant, were referred to in the factory as the Young or Meurer chime. The latter statement is denied by the defendant, but it is apparent from the record that before the time of the formation of the Meurer Steel Barrel Company, and soon after the Brooklyn Range Boiler Company ceased to have part of the work done in the defendant's factory, the defendant placed upon the market a steel barrel, of which a sample has been sufficiently identified as purchased in May, 1913, and marked in court as "Defendant's Exhibit 8," or "Barrel A."

Some of the witnesses for the defendant testify that this particular form of barrel was unintentional, and the result of the use of blanks for the barrel heads on which the flange was too narrow; that is, the material did not extend far enough to bend around the folds of the barrel side and to be tucked up under or within that fold. The defendant claims that this particular exhibit was the result of some unnoticed failure to turn out a perfect barrel. The record, however, shows that a great number of such barrels were placed upon the market, and it would appear that, during the years from 1912 to 1914, the defendant made and sold barrels of this general type, and with a chime ring substantially like that of the patent in suit, as applied in the commercial form of barrel in the plaintiff's output.

At some time during this period from 1912 to 1914, the attention of the defendant was called to the possible charge of infringement, and particularly by a letter dated June 16, 1913. The defendant then denied any actual infringement, or intent to infringe, and soon after described the form of barrel which it was then manufacturing, and which it has since sold, and about which the principal issue in this case turns. When Young applied for his patent, his application was rejected upon the patents to Booth, No. 516,073, of March 6, 1894; Scaife, No. 6,391, reissued April 20, 1875; Hardie, March 6, 1906, No. 814,375 (which is not shown in the present record); and a patent to Reynolds, No. 621,540, March 21, 1899.

The patent to Booth covered a hot water boiler for stoves or ranges. It showed a seam formed by bending over the side of the boiler, around the flange of the head or end of the boiler, and the clamping of a metal ring, which extended over and down on both sides of the seam or fold just described. It is evident that the pressure, as well as the tendency to leak, in a boiler of this sort, would come from the inside of the boiler. The ring was expressly stated to be U-shaped in section, and to be bent underneath the turned-over flange of the side of the boiler, so as to enable the thin metallic end or head to the boiler to resist the pressure occurring at the joint, without the use of heavier material in the sides and ends of the boiler itself. Booth, however, planned to use solder in making a tight joint, and was not concerned with the problem of furnishing great resistance to an external force exerted against the head of the boiler. It is evident that, if the boiler were filled with water under pressure, the strain would be in general in the opposite direction.

The Scaife patent, which was nearly 20 years older, described a sheet iron keg for coal oil, in which the chime (or chine as Scaife called it) was formed by overlapping and rolling up the sheet of metal

forming the sides with the sheet of metal forming the head. Scaife was not concerned with an absolutely water-tight joint under pressure, nor with the question of a joint furnishing great power of resistance, and his patent, so far as we are concerned, teaches only the general idea that a lapped seam, of the type used in many of the patents of the art prior to Young, could be formed from sheet metal, and would be sufficiently strong to serve as the edge or chime by which the keg could be easily handled.

When we consider the Reynolds patent, we have passed over much of the prior art, and must at once notice the statement by Reynolds that his improvement is applicable to—

"all kinds of receptacles or reservoirs and metallic packages, in which the drum or body is provided with one or more heads—such, for instance, as preserving cans, barrels, pails, range boilers, and many other articles too numerous to mention."

The plaintiff seeks to disregard the effect of much of the prior art by pointing out that the patents relate to pails, coal hods, range boilers, and other articles, which are not barrels. But in Reynolds we have the plain statement by that patentee, whom Young was using as the basis of his own improvement, that these objects are within the scope of the Reynolds patent. The plaintiff's contention is not of great importance in this case, for the patents referred to described ideas that were old and unpatentable as such at the time of the Young application. The validity of the Young patent does not depend upon its novelty in these respects, and their analogy and application to the issue must be admitted.

In a patent to Bruson, No. 132,895, November 12, 1872, we have, as was shown in Scaife, a flange or edge produced at the bottom of sheet metal ware, requiring no solder for dry substances, and formed by the folding over of the side, around the rolled-up flange of the bottom of the vessel. Bruson also shows a groove or notch at the point where the bottom comes in contact with the side, and into which the bottom is forced and held by the pressure of the folded over flanges. This idea was applied to barrels in the Caird patent, No. 473,495, April 26, 1892, and Caird shows a number of forms of rolled-up or folded seams, about which he shrinks a metallic hoop in order to make a water-tight barrel.

It might be noted that the Wilson patent, No. 24,772, of July 12, 1859, reissued January 6, 1863, as No. 1,383, shows the bent-over or folded metallic seam formed by the use of a mandrel, but not making, as in Scaife, a chime ring to the keg or barrel.

On January 29, 1889, patent No. 397,047 was issued to Barrath, for coal hods, in which the folded-up seam of the Wilson powder keg was used to form the bottom seam of the coal hod. A flange or standard for the coal hod was furnished by adding a circular sheet of metal, which lapped into the seam from the opposite direction to that of the sides of the hod, and which was folded up so as to make a stiff joint without the use of solder.

On January 8, 1896, a patent was granted to A. V. Trust, No. 532,117, for a wash boiler, in which he evidently intended to provide a

tight joint by the use of solder, but which, like the Barrath coal hod, was raised from the surface of the stove by the bead or rolled-up seam made with the flanges of the side and of the bottom. Trust placed about this rolled-up seam a sheet of thin metal, which he crimped in on each side above the projecting flange. This outside ring added some strength as well as protection, but did not render the joint impervious to water, nor greatly increase its resistance to pressure, and would not anticipate the use of a metallic chime ring upon a barrel. It must also be noted that the wash boiler is not circular, and the protecting ring is not shaped, nor of such weight as, to resist heavy blows, and can be distorted in a far different way than the chime ring of the circular barrel.

On July 10, 1900, one J. E. Byrnes obtained a patent, No. 653,439, for the insertion of a sheet of anti-rust material inside the bottom of a pail or other vessel, but with the flange projecting between the flange of the bottom and of the sides, so as to be rolled up into the seam, and thus to present the surface of the anti-rust material in the form of a thin sheet, which was fastened in place by embodying it in the beading or edge of the vessel. This teaches no more than the Trust patent, or any of those patents of the prior art, as to the possibility of folding up a piece of metal in a seam or beading, so as to hold it in place and form the beaded rim by the folding up of the sheets of metal.

The next patent was issued upon the 16th day of March, 1880, No. 225,499, to F. A. Walsh, and here a new idea entered in. Walsh used a thin sheet of metal, like the Byrnes anti-rust sheet, to act as a temporary or thin cover to a paint can or such receptacles, with the idea that this cover could be easily punctured or removed, and yet would render the vessels tight until their contents were desired. In order to secure this result, Walsh placed over the thin sheet of metal a ring for receiving the cover and with a projecting flange, which was bent around and tucked under the flange of the thin sheet, and also under the side of the can, thus fastening the side, the thin top, and the ring together in the bead or rim. Walsh thus made out of this tin beading a structure in which he had the side, the flange of the top, and the overlapping or projecting rim, which was bent around and tucked up into the seam in such a way as to bind the parts together sufficiently to meet the needs of a paint can, and to show the possibility of making a fluid-tight joint, under ordinary pressure, by the rolling up of thin metal into a beaded seam. He may have contemplated the use of solder, if necessary. But he does not show a chime ring in the sense in which we find that idea used when we come to the Reynolds patent. Walsh merely makes use of the old ideas of the tucked-in seam and of folding flexible metallic sheets about other folds, to form a shoulder. He tucks in his outside sheet, so that it is of itself made a part of the joint, instead of crimping it around, as was well known in the prior art. He thus makes his joint tight, and illustrates the possibilities of folding up the parts into a seam.

This idea is more plainly illustrated in the Patterson patent, No. 674,305, May 14, 1901. Patterson makes an improvement for metallic containing vessels, such as cans, by forming an air-tight joint between

the vessel and the cover. Patterson states that the idea of bending the edge of the cover underneath a shoulder formed by the beaded edge of the can was old, and he therefore does not bend or tuck the edge of the cover under the beading on the side of the can, but leaves it fitting down over this beading, and then at a number of points around the sides has flexible wings, which can be crimpled or bent under, so as to tighten the joint.

The next step was the application of these ideas to the needs of a metallic barrel, and resulted in the Reynolds patent, No. 621,540, March 21, 1899, which has been quoted above with respect to its dependence upon the prior art. Reynolds describes an improvement in the means for locking the head to the drum or body of the barrel, and also in the reinforcing means by which he secures the required strength at the joint or chime ring. The Reynolds barrel was cylindrical in form and had a malleable iron chime ring, with an outstanding flange. This ring was to be placed inside the flange turned up around the head of the barrel, which in turn was inside the flange of the barrel side. The malleable iron flange of the chime ring was forced down against the outside of the barrel, and thus the flanges of the head and side were pressed into a recess on the inside of the chime ring. As all of the material was malleable or ductile, the diameter of the barrel side and head, when forced into the recess, was thus reduced, and the flange of the chime ring came to rest against the shoulder formed where the side was pressed into this recess, in such a way that the outer surface of the chime ring presented a circumference equal to that of the outside of the barrel.

Reynolds thus, by mere compression and reduction of diameter, joined together the head and the side, and bent over the flange of the chime ring in the same way in which the hoop upon an ordinary wooden barrel presses the outside rim of the head into the groove or recess in the sides of the barrel, and thus forms the outside or protecting hoop which in the old Caird patent, as in wooden barrels, was provided by shrinking on an external hoop. But Reynolds obtained also the protecting rim presented in wooden barrels by the edge of the wooden hoop, or, as shown in the Booth range boiler patent, by the metal of the U-shaped ring. But, more than this, he fastened the hoop in place by the resistance of the hoop against the shoulder formed when the edges of the head and sides were reduced in circumference and brought into the recess of the chime ring. When the flange of the ring was pressed down into place, this shoulder could not be straightened out without breaking the chime ring, unless such great pressure was used as to forcibly draw out, over the larger diameter of the shoulder, and from the frictional contact of the parts, either the side or the head of the barrel. Such withdrawal could not be accomplished from the outside of the barrel by any ordinarily expectable accident or blow. But Reynolds, in addition to this, secured a fluid-tight joint by the pressing together of the malleable or ductile parts which were subjected to the strain presented when the flange of the chime ring was bent into place. This Reynolds patent proved to be commercially practical and apparently valuable.

In 1906 a patent was published in France, upon the 6th day of July (for which an application was made in the United States on the 18th of January, 1907, but upon which the patent was not issued under No. 1,017,427 until February 13, 1912, and which, therefore, is not an anticipation), by which one Le Febvre combined the shrunk-on hoop of Caird with the projecting rim of the prior art, in order to form a joint sufficiently protected for the purposes of a metallic barrel, with rolled up or folded over seam. The Le Febvre patent, however, involves other features in the formation of the barrel, and, even if it were early enough to be an anticipation of Young, shows no improvement over Reynolds in the direction in which we must travel in order to get to the Young patent.

Young states in his specifications that in order to form the shoulder (the necessity for which was well known) he desired to avoid the extra thickness required for the recess in the ring. He also wished to avoid the necessity of clamping the chime ring by an extra bend in the lower part of the chime ring and next to the head of the barrel. In Reynolds the chime ring does not project, so as to form the surface upon which the barrel rolls. The outer surface of the Reynolds barrel side is flush with the chime ring. In Young the outer surface of the chime ring forms a hoop, and the inner surface of the chime ring may be straight (i. e., flat) or bent. It is in all cases parallel to the inner side of the flange of the barrel head in the part between the head itself and the rolled up seam.

There would be no patentable novelty in thickening the material of the Reynolds chime ring, so that the surface on the inside or toward the center of the barrel would be flat. Such a ring would merely use extra metal, and would not give protection to the seam against blows from the outside. Young sought to obtain this protection and a tight seam, while making his chime ring of a flat piece, which would not require the extra rolling for the formation of the recess and would save metal.

The testimony in this case shows that in the defendant's factory in 1913, when a change was made from the earlier form of chime ring, the material on hand was prepared for use by rolling a recess into the malleable bars then on hand, until material of this shape could be supplied, with the recess constructed at the rolling mill. This material began to be used in November, 1914.

Young created the shoulder, which he recognized was necessary, by rolling up the side of the barrel and folding around this the flange of the head, so as to make the beaded rim and the interlocking seam shown in the tin receptacles of the prior art. He thus produced a seam which, when made of malleable sheet iron, would of itself be strong enough to resist ordinary strains and might be water-tight. In other words, he then had the seam of the Byrnes anti-rust vessel and that of the Scaife coal oil barrel, but with a slightly different form of fold in the beading. No novelty was presented by the mere form of the fold. But in his claims he describes different thicknesses of metal forming this fold, as different embodiments of his way of creating the shoulder which, as has been said, he recognized must be pres-

ent if the chime ring was either to be locked on or to furnish any clamping effect with respect to the seam itself. He secured this clamping effect, and locked the chime ring on, by carrying over the outstanding flange and forcing it around the beaded seam and then bending it sharply in against the side of the barrel. He then had the old idea of the beaded rim, which was capable of being compressed, when made out of malleable metal, into a water-tight joint. He used the old idea of a shoulder, which, by the interposition of a ring of larger circumference, would prevent the straightening out of the metal flange or seam, after it had been drawn into the smaller diameter. He reinforced the resistance to the stripping off of the metal which formed the smaller ring, and absolutely prevented the pulling out or opening of the folds (which constituted the seam as well as the shoulder), by locking them up inside the chime ring, which was the adaptation of another old idea, but which was applied to new uses.

Young thus secured, also, the protecting or armor feature of the Booth, Trust, Barrath, and Reynolds patents, as a part of the mechanical or physical conditions resulting from forming a water-tight seam under the application of that force which was used to bend around and into the clamping position the projecting flange of the chime ring. He pointed out in his specifications and in his discussion with the Patent Office the differences between his application and the Reynolds patent. In so doing he assumed the lack of patentability in the old ideas of the prior art. He distinguished his patent from Reynolds, in that the presence of a shoulder, upon which to clamp down his ring and the flanges of the side and head of the barrel, was not required within the chime ring itself. He pointed out the desirability of being able to roll up the beaded seam, and form the shoulder for the clamping purpose, outside of the chime ring. He shows the economic advantage of rolling up this beaded seam as the chime ring is folded around. Thus he produces a tighter joint than if the seam were not rolled up within the flange; and he also pointed out the freedom from distortion or dangerous strain which would be presented if a previously rolled-up beaded rim were bent back and compressed into a recess, as would be the result if one sought to use the Reynolds chime ring upon a beaded seam like those of the prior art.

The defendant manufactures its barrels by forcing a rolled-up or interlocked beaded seam into a recess like that of Reynolds, which it forms either in a chime ring of uneconomical thickness, as Young says, or into a chime ring which is so rolled as to be bent in order to create the recess required. But the defendant does not then, as in Reynolds, use a flange short enough to also go into the recess, while pinching the folded seam against the upper side of the shoulder. On the contrary, it carries the flange beyond the shoulder in the chime ring, and under the shoulder of the seam, just as is done in Young.

The defendant, after the plaintiff called its attention to the charge of infringement, continued to make the seam tight and unrollable by compressing the outstanding flange over the seam. It provided resistance to the removal of the chime ring, or the pulling out of the parts of the seam, by rolling the flange of the chime ring around and under

the seam, so as to bend the flange at an "abrupt angle" below the shoulder of the seam itself. It adds from the prior art an additional fold to the edge of the barrel head, by which this edge is tucked up inside of the bent-over flange of the side, and thus seeks to avoid the language of claims 2 and 3, which state that the body is bent over upon itself.

But in practice this tucking in of the edge of the head does not prevent the actual bending of the body upon itself, nor does a variation in the form of the seam, which was obviously old in the prior art, release the defendant from the charge of infringement, if the defendant's structure makes use of the different seam in the identical way described in the claims. The one is a mechanical equivalent of the other. An inspection of the drawings will show that the seam and chime ring of the defendant's barrel A are substantially like those of the plaintiff, in its commercial form, which corresponds with claim 1 of the patent.

The defendant's barrel B and the so-called defendant's Toch barrel, or the barrel made for the Toch Company, contain the folded seam to form the shoulder, the light weight chime ring, with a part in parallelism to the flanged head, and with the locking flange in parallelism to the bent parts forming the seam. They show the protecting features of the chime ring, which serves exactly the same purposes as those covered by the claims for the ring of the patent in suit, in forming a fluid-tight, solderless joint locked within the walls of the ring. They show the shoulder described by Young resisting any force which would tend to pull the seam out of the chime ring, and make use of the pressure of the outstanding flange as turned over around this seam, instead of as pinning it down against the upper side of the shoulder of the Reynolds ring.

It must be held, therefore, that the defendant's barrels infringe, unless they can escape infringement by the modification shown through distorting the seam, so as to force it around a corner; that is, into the recess which Reynolds used for a different purpose. It is obvious that the forcing of the beaded seam around this corner— that is, into the smaller circumference—will, through the pressure of the machinery needed to force the seam into this recess, serve some of the purposes of tightening the seam, of reducing the diameter, and of thus fastening on the chime ring in the manner presented by Reynolds. It is obvious that the addition of the ring of the Booth range boiler patent to the Reynolds patent, if applied in the way taught by Young, would present the defendant's structure.

It may be argued that the strain caused by pressing the seam into the recess is a detriment rather than an advantage. But this would be a matter for commercial competition, as the idea of patentable novelty would not be disposed of by the relative advantages presented by the different results. It may also be assumed that the defendant's barrel, if it involves the principles of the patent in suit, but with an added feature obtained through the use of the Reynolds recess, could be patentable even as an improvement over Young. But the

question whether the defendant's present form of barrel escapes infringement is much more difficult.

The defendant uses what are called one-time shippers; that is, barrels without a chime ring, and made, generally, like the old Scaife keg. The testimony shows that these barrels will meet the interstate commerce test, of sustaining an internal pressure amounting to 15 pounds to the square inch and of being dropped, when filled, from a height of 5 feet, so as to fall directly upon the edge of the barrel, without bursting or opening the seam. But these barrels without a chime ring do not enter into the issues in this case, and do not carry us, upon the question of infringement, beyond the point that a rolled-up seam may be made water and pressure tight, to a certain limited extent, is old in the art, and is the particular seam which the defendant uses in connection with the chime ring to make the barrel complained of.

There seems to be no reason for holding that the Young patent is not valid. Its claims are not anticipated by any of the patents of the prior art, nor are they so broad in their terms as to bring in an unpatentable application of the old ideas which have been discussed. The defendant, however, contends that if the plaintiff seeks to broaden its patent, so as to include the Reynolds recess, it is then abandoning the patentable ideas of the Young claims, and is seeking to cover an old form of device, open to the world since the expiration of the Reynolds patent.

With this the court cannot agree. The issue in the case is not whether the Young patent would be rendered invalid, if it covers the defendant's structure. The issue is rather whether the defendant can escape the charge of infringement by neutralizing or counteracting its use of the Young patent through the immediate application of the old idea of the Reynolds patent, so that the defendant is either improving on the Young patent, or rendering the parts of the device in which it seems to infringe the Young patent merely immaterial features in its structure. The Reynolds patent is open to the defendant, and the defendant could undoubtedly manufacture barrels by making a folded seam and then attaching a chime hoop or ring like Reynolds, which would force the seam around a shoulder, and then shut down upon the shoulder. But it does not do this. It merely presents a shoulder in the chime ring, about which it forms the seam and additional shoulder of the Young patent. If the defendant should fold up a seam, and then force it into the recess of the Reynolds ring, by the mere clamping down upon the shoulder of the flange, the effect would be to unroll or to strain open the seam.

The plaintiff contends that the defendant does in fact strain or distort the metal in making its barrels by this very tendency to lengthen the parts; that is, to unroll the seam, when using the additional shoulder in the main portion of the chime ring. But the defendant seeks to avoid this, and to obtain the rolling up or tightening effect of the Young patent, by merely bending over the flange of the chime ring, around the seam, so as to roll up this seam against the shoulder of the chime ring, and at the same time to form the shoulder of the seam, which shall be wrapped into the surrounding or protecting metal of the flange.

[2] The addition of a well-known or unnecessary step will not enable an infringer to escape the charge of infringement, even though that addition may be claimed as an improvement. The addition of immaterial steps, which may, or may not, be a detriment, but which do not change the mechanical equivalents of the elements in the claims of the patent in suit, and where no additional element is presented, will not enable the defendant to avoid the charge of infringement. If the defendant had desired to claim an improvement patent, he could have attempted to do so. If he desired to use the Reynolds ring, he should content himself with clamping the flange down upon the shoulder, instead of carrying it around the shoulder formed by the folded seam. The defendant is apparently obtaining all of the advantage presented by the use of the Young patent over Reynolds, and then is seeking to avoid the charge of infringement by inserting the additional step of the shoulder or recess in the chime ring which the plaintiff claims makes his barrels commercially less valuable, and which is evidently borrowed from the prior art, but which does not make the defendant's barrel either a Reynolds barrel or a prior art barrel, as distinguished from one made so as to embody the Young patent.

It is evident that the defendant does not infringe claim 2 of the Young patent, which specifies five thicknesses of metal, any more than this claim is used by the plaintiff in its own commercial form. A decree will therefore be entered, holding the Young patent the property of the plaintiff company, and holding its claims valid.

The decree will further provide that claim 2 is not infringed, but that claims 1 and 3 are infringed by the form of barrel placed upon the market by the defendant, and shown on this trial by the exhibits called "Defendant's Barrel A," "Defendant's Barrel B," and "Defendant's Toch Barrel."

In re HADDEN.

(District Court, S. D. Georgia, N. E. D. May 18, 1917.)

1. BANKRUPTCY ⊂⊃399(3)—EXEMPTIONS—FORFEITURE BY CONCEALMENT OF ASSETS.

Where a bankrupt's disclosure of his property and liabilities showed that his liabilities had been largely increased and his assets depleted since he gave a statement to a mercantile agency within one year, and showed a net worth of about $230 as against a net worth of $3,250 shown by such statement, the facts showed that he had not made a full and fair disclosure of all of his property, and such nondisclosure defeated his right to his homestead exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669.]

2. BANKRUPTCY ⊂⊃400(1)—EXEMPTIONS—RULING OF REFEREE—REVIEW.

The finding of the referee as to the bad faith of one claiming exemption will not be disturbed, unless clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673.]

In Bankruptcy. In the matter of G. R. Hadden. On petition for review of a finding of the referee that the bankrupt is not entitled to his homestead exemption. Affirmed.

Hardwick & Wright, of Sandersville, Ga., for bankrupt.
Alexander & Lee, of Augusta, Ga., for objecting creditors.

SPEER, District Judge. [1] In this case exception is made to the finding of the referee to the effect that the bankrupt is not entitled to his homestead exemption. This is based on the fact that on April 12, 1915, he gave a statement to a mercantile agency that his liabilities amounted to only $900. This left his net worth $3,250. In less than a year his petition in bankruptcy was filed. Now his assets have been depleted to the extent of $500, but his liabilities have been increased by the sum of $2,447.13. His accounts receivable were only $516.06. This left him with a net worth of $230.82. This, contrasted with his report of $3,500 less than a year before, in the opinion of the referee, demanded explanation. This the record does not disclose, and the court, like the referee, is constrained to conclude that the bankrupt did not make full and fair disclosure of all the property owned by him at the time of the filing of his petition in bankruptcy. This will defeat the exemption. In re Waxelbaum (D. C.) 101 Fed. 228, opinion by Judge Newman.

[2] The finding of the referee on the act of bad faith of one claiming exemption will not be disturbed, unless clearly erroneous. In Re West (D. C.) 116 Fed. 767. See, also, In re Stephens (D. C.) 114 Fed. 192; In re Boorstin (D. C.) 114 Fed. 696; McNally v. Mulherin, 79 Ga. 614, 4 S. E. 332; Torrance v. Boyd, 63 Ga. 23, and opinion of this court in Re Peacock (D. C.) 203 Fed. 191, affirmed by Circuit Court of Appeals, Fifth Circuit, 209 Fed. 1006, 126 C. C. A. 667.

In the opinion of the court, the finding of the referee denying the exemption should be affirmed; and it will be so ordered.

THE WILLEM VAN DRIEL, SR.

THE WELBECK HALL.

(District Court, D. Maryland. April 20, 1917.)

1. NEGLIGENCE ⇐21—OPERATION OF GRAIN ELEVATOR—NECESSARY PRECAUTIONS AGAINST FIRE.

Respondent operated on a pier, a large grain elevator, 240 feet long, about 100 feet wide, and 180 feet high. In it were 6 so-called receiving legs extending from the track floor to the top, in each of which ran a wide conveyor belt with buckets for carrying up grain passing over a large pulley at the top. While a steamship was loading on either side, the elevator took fire, and there was an explosion causing the death of a number of persons and serious damage to the vessels and cargoes before they could be removed. One of the conveyor belts had become choked and stopped, and some five minutes later dropped the pulley at the top, continuing in the meantime to revolve. The only place where the choking could be observed was on the track floor, while the only means for throwing the belt out of gear was a lever on the machinery floor 152 feet above. There was a considerable delay before this lever could be reached, and it was then found that it was out of repair and would not work. The machinery was stopped, but in the meantime the belt had fallen. There were

originally ropes extending down to the track floor by which the levers could be operated, but they had been for some years out of use and some had been removed. *Held*, that the damage to the ships and cargoes was the proximate result of the burning of the elevator, and on the evidence that the fire was caused by the friction between the belt and pulley, that it was due to the palpable negligence of the elevator company in failing to provide means to obviate a danger so obvious, and that it was liable therefor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28–30.]

2. NEGLIGENCE ⟸21—FIRES—"ACCIDENTAL" FIRE.

A fire caused by the negligence of a defendant or his servants is not "accidental" in such sense as to exonerate him from liability for injuries caused thereby to others.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28–30.

For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

3. NEGLIGENCE ⟸54—FIRES—PERSONS LIABLE—STOCK OWNERSHIP OR OTHER CORPORATIONS.

A railroad company which owned a grain elevator leased it for operation to an elevator company of which it owned all the stock. It afterward leased its road and all of its other property to the Pennsylvania Railroad Company for 999 years, reserving as net rental sufficient to pay dividends on its stock. The elevator company kept up its organization, operated the elevator under its own superintendent, and had a considerable surplus of assets, although it was governed in a general way by the Pennsylvania Company, which also selected and paid its officers. Through its negligence in operating the elevator, causing a fire which destroyed the elevator, libelants' vessels and cargoes were damaged. *Held*, that it was a separate entity, and its management of the elevator was independent to such extent that the Pennsylvania Company was not liable for its negligence causing the loss.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 66, 67.]

In Admiralty. Suits by Namlooze Vennoot Schap, master of the steamship Willem Van Driel, Sr., and by Edwin Dyason, master of the steamship Welbech Hall, against the Pennsylvania Railroad Company and the Central Elevator Company. Decree for libelants, against the Elevator Company only.

Kirlin, Woolsey & Hickox and Charles R. Hickox, all of New York City, and Ritchie & Janney, Stuart S. Janney, and Frank B. Ober, all of Baltimore, Md., for the Willem Van Driel, Sr.

Barry, Wainwright, Thacher & Symmers and James F. Symmers, all of New York City, and Harry N. Abercrombie, of Baltimore, Md., for the Welbeck Hall.

Bernard Carter & Sons and Shirley Carter, all of Baltimore, Md., for Pennsylvania R. Co. and Central Elevator Co.

ROSE, District Judge. [1] On the 13th of last June, two steamships were made fast to the pier upon which there then stood an elevator from which each of them was receiving grain. One of them, the Welbech Hall by name, was on the east side of the wharf; the other, the Willem Van Driel, Sr., on the west. The distance between the pier side of each of these ships and the elevator did not exceed some 8 or 10 feet. By 2 o'clock in the afternoon each had already a large part of its cargo aboard. About that time, with an explosion which

brought down the upper part of the elevator the whole building burst into flames. So far as the evidence discloses, no one on either one of the ships had any warning, prior to the catastrophe, that anything was wrong. Indeed, it was not until within a couple minutes of the explosion that any of the many men in the elevator itself knew that there was fire in it. The outbreak was so sudden and so fierce that a number of persons were killed. From the elevator and the ships every one who escaped fled for his life. It was not until the burning of much of the elevator made its neighborhood less dangerous that it became possible to do anything effectively to get the ships away from the furnace next to which they were lying. Then a number of tugs succeeded in towing to a place of safety the ships already greatly damaged in hull and cargo. The tugs came into this court of admiralty seeking salvage allowance. There is no question that the injury done to the ships and the grain upon them, as well as the danger of further damage from which the exertion of the salvors delivered them, was the direct and proximate result of the fire in the elevator, and that the ships were powerless to protect themselves from such damage and danger.

The elevator and the pier on which it stood belonged to the Northern Central Railway Company, hereinafter referred to as the "Northern Central." Many years before the fire, the latter had leased them to the respondent, the Central Elevator Company, of whose stock it was the owner. The Central Elevator Company for brevity will be styled the "Elevator Company." The Northern Central, some years before the fire, had leased for a term of 999 years all its property to the respondent the Pennsylvania Railroad Company, hereinafter called the "Pennsylvania."

The ships say that the fire was caused by the negligence of the Elevator Company and its employés, and that the Pennsylvania had exercised such control over the management of the elevator that it, as well as the Elevator Company, is liable for the damage done. The flexible methods of the admiralty made it possible to consolidate the salvage proceedings against the ships with the latter's claims against the Elevator Company and the Pennsylvania. By agreement, or by decree, the salvage awards have been made, and in this opinion the salvage operations need not be further referred to.

The elevator which was burned was the fourth which had stood on what was substantially the same site. Every one of them went up in smoke and flames. So far as the testimony discloses, the three predecessors of the one with which this case is concerned were destroyed by fire caused by sparks from locomotives or from donkey engines used on ship board. Nevertheless, their fate emphasizes the inflammable nature of such structures, and the difficulty of saving them from complete destruction when once a fire has gotten under way in them. It also serves, to a degree at least, to bring home to the respondents knowledge of how liable elevators are to destruction by fire. A description of the building burned last June shows why it is that fires in such structures are so disastrous. From north to south it was 240 feet long, and perhaps 100 feet broad from east to west. It had a height of 179 feet 6 inches. For 30 feet from the ground its walls were of

brick, for the remaining 149 feet 6 inches of wooden cribbing covered with corrugated iron. It was full of bins, legs, spouts, and other structures largely of wood. There ran from top to bottom six so-called receiving legs. Each of these legs was an enormously elongated wooden box or flume. For a few feet from the ground each of them was open, and throughout all the rest of its nearly 180 feet it was inclosed. The testimony does not show precisely what was the area of a cross-section of one of these legs or boxes, but it could scarcely have been less than 24 square feet and may have been twice or more than twice this. In each of these receiving legs there ran from the ground, and indeed from a few feet under the ground, nearly to the top of the building, an endless belt some 20 inches wide and from ½ to ⅝ of an inch thick. This belt moved over a pulley which had a width of 28 inches, a diameter of 84 inches, and weighed 1000 pounds. To the outer side of this belt at intervals of from 12 to 16 inches were fixed iron buckets in which the grain was carried up. As one of the witnesses for respondents said, each one of these legs would, on occasion, act as an enormous flue. There were in addition eight shipping legs, the construction of which has not been so minutely described, as well as a number of so-called cleaning legs. Such an elevator when in operation, or when it has recently been in operation, is bound to be very dusty. This particular elevator had for more than a year been running night and day for 20 hours out of every 24, Sundays and a very few holidays alone excepted. It shut down for meals for an hour between 6 and 7 morning and evening, and from 12 to 1 at noon and midnight. A few minutes before the disaster, the millwright had been at work getting ready a new fan to help the sweeping of the floors. It so happened, moreover, that on the day of the fire the press of work on the ground floor had called off the force usually employed in sweeping the upper floors. It may be safely assumed that at the time the fire began the elevator was at least as dusty as usual. The Elevator Company knew how inflammable the elevator was. It took certain precautions against fire. It carefully excluded all strangers from the building. Its employés were forbidden to smoke, or even to have matches on their persons, and, to make sure that the rule was obeyed, they were required, upon entering the building, to change their clothing. The elevator was well supplied with hydrants, hose pipes, water barrels, and buckets. So soon as any one sounded one of the fire alarms in the building, a powerful pump was automatically set to work to furnish a plentiful supply of water for the hose.

It is for lack of reasonable care in another respect that the ships seek to hold the respondents liable. Belts such as those which ran in the receiving legs are, from any one of a number of different causes, liable to become choked. That is to say, the belt in some way is caught and held fast while the pulley upon which it operates continues to revolve. The result is friction which, if continued for any length of time, must necessarily break the belt and may cause fire. The ships say that the particular conflagration which proved so serious originated in this very way, and was the natural and proximate result of a long-continued neglect of the respondents to provide means for promptly and certainly throwing a choked belt out of gear. It had been long recognized that,

in order to reduce the danger from fire to a minimum, there should be means for so doing. In some of the modern elevators, which are operated by electricity, a simple and apparently complete solution of the problem has been found. In them each belt is run by a separate electric motor, which stops whenever the pull upon it becomes unduly great. The respondents' elevator was built in 1903. They cannot be held negligent because they did not then install a system which, if not unknown, was not as yet in general use, nor for continuing to employ the method then adopted. The elevator was operated by steam power. In it all the pulleys were connected with a single line of shafting. It was, of course, often desirable and indeed necessary to throw one leg out of commission without shutting down the others. A friction clutch operated by a lever was provided for each belt, to throw it in and out of gear, as the case might be. This lever was on the machinery floor, which was 152 feet above the ground or track floor. Only from the latter could the choking of a belt be promptly discovered. Everywhere else it was shut up in its wooden box. When some one on the track floor saw that a belt was choked, how could he make sure that the lever nearly 150 feet above his head would be at once used to throw it out of gear? For many years before 1903, the approved practice in elevators equipped as this was to attach to each lever cables which ran down to the track floor. The choking of a belt would be first noticed by some one close to it. The rope or cable came down alongside the leg. No time would be lost in moving from one part of the spacious floor to another. If the friction clutch and its lever were kept in order, the belt could be thrown out of gear in a few seconds after any one knew it was choked. The elevator in question was originally equipped with such ropes, but for a decade or more before the fire they had not been used, at least for the purpose for which they were intended. Some, perhaps most, of them, were still in place; but in what order or condition apparently no one knew, and no one cared. Parts of them had been removed when rope was needed for some other purpose. Their use as means of operating the lever from the track floor had been abandoned, because not long after the elevator was built an oiler who happened to be near a lever when it was pulled from downstairs received a bad blow on the head. The suggestion that it was not well to rely upon the ropes, because the user of them could not see whether the friction clutch did its work, may be put aside. The puller of the rope on the track floor would be in full sight of the belt. He could tell whether it was still under strain from the pulley. If he saw that it was, he coud get word up to the machinery floor, summoning whoever happened to be there to go to the lever and operate it by hand. That was in fact practically the only way in which for years those on the track floor ever tried to get a belt thrown out of gear. Presumably, in the overwhelming majority of instances, a pull on the rope would have sufficed, the time consumed in giving it would not have been appreciable, and no harm would have been done, even in the small minority of cases in which it became necessary to put in use the cumbersome and time-consuming methods which in fact were exclusively employed in this elevator. What those methods were, how

slowly they worked at best, and how great were the chances that everything would not so work, and how many precious minutes were lost when they did not, can be understood from the story of what actually did happen in this elevator between the choking of the belt in leg 3 and the explosion.

The hopper boss on the track floor saw that grain was piling up on the floor over and around the hopper at the base of leg 3. He started to investigate. As he got closer, he thought it looked as if the belt was choked. Apparently appreciating the importance of speed, he broke into a run. When he reached it, he looked up and saw that it was choked. He then did what, under similar circumstances, everybody in that elevator had for many years always done. He went to the speaking tube, which fortunately was nearer to this leg than it was to the majority of them. He sounded the gong on the scale floor, 133 feet above the track floor. The scale floor was the next under the machinery floor, but was 19 feet below it. There were always a number of men somewhere on the scale floor, and it was the duty of the one of them who chanced to be closest to the tube to go to it as soon as the gong told him that somebody downstairs had something to say. On this occasion, one Smith, the boss or foreman of the scale floor, happened to be near the tube. He went to it. He was one of those who lost their lives within less than half an hour thereafter. He was told by the hopper boss that leg 3 was choked. He, in turn, did what it was the rule to do under such circumstances. He sounded the gong on the machinery floor. Now, if there happened to be anybody in this great room, 240 feet long, and he heard the gong, and furthermore supposed that there was nobody nearer than he, he went to it. Apparently, the only person who had any regular business on the machinery floor was the oiler. But he had duties, not only on that floor, but on the one above it and on the one below it as well, and at any particular time he might be on any one of the three, or indeed on none of them. He was, properly enough, forbidden to keep a stock of oil in the elevator. When he needed a fresh supply, he had to go down to the ground, out of the building, to get it. Now, it so happened, that was what he was doing when Smith sounded the gong to call him to the tube. Naturally, there was no answer. How long Smith waited for one does not clearly appear, although one witness estimates it at two minutes; it was probably not longer, as the distinct impression left by the evidence is that everybody understood the importance of haste, and that everybody did what he could to hurry things along, although the methods employed were such that without an unusually favorable combination of circumstances there was bound to be waste of effort and loss of time. After whatever interval of waiting for an answer there was, Smith told one of his assistants, a man named Lucas, to go upstairs and throw belt 3 out of gear. Lucas says he knew nothing of machinery. It is at least doubtful whether he had any clear idea of what he was to do when he got up to the top of the two flights of steps between the scale and the machinery floor. Whether he did or not did not turn out to be material; for, as his head rose above the level of the machinery floor, he saw the millwright, a man

named Aires, coming towards him. The latter was in charge of the machinery in the building and had spent more than 30 years in elevators, serving in five of them, every one of which, by the way, was destroyed by fire. He had been on the machinery floor arranging to install a new fan to assist in the sweeping of the floors. He had not heard the gong, or, if he had, he had not paid enough attention to it to be able to remember it. At the time Lucas hailed him, he was going towards the stairs on some errand having no relation to the belt in question. Lucas says he called out that No. 3 was choked. Aires understood him to say it was No. 2. Aires accordingly went past No. 3 to No. 2, in all a distance of some 56 feet. He listened for a moment and made up his mind that No. 2 was running properly. He went to some convenient hole in the floor and called down to Smith that No. 2 was all right. Smith replied it was No. 3 which was choked, not No. 2. Aires, accompanied by Lucas, then went to No. 3, which was some 18 feet from the stairway, and some 38 feet from No. 2. They moved the lever of the belt, but without effect. The belt was not thrown out of gear. They opened a trapdoor in the leg and smoke came out. In the meanwhile, Young, the hopper boss on the first floor, became worried at the delay and called up to Smith the second time to hurry up. It is possible to fix relatively to some of the other things that happened, the time of this second call, for Smith told Young that Aires was up on the machinery floor and had gone to No. 2 instead of to No. 3. Young does not say anything of having been told as to the mixup between 2 and 3; but from the testimony of Le Brun, who was a sort of assistant to Aires, we know that he was. At this time Le Brun was engaged in laying a floor in the engine room, and Young came and told him that No. 3 was choked and that No. 2 had been thrown out instead of No. 3. It is true that Young says his conversation with Le Brun took place later and after the belt had fallen; but Young was certainly mistaken in this, for Le Brun distinctly testifies that after he had the conversation with Young he went into the elevator, a distance of something like 140 feet from where he was, and looked at No. 3, which was still in place and choked. Indeed, I may say that, where Young's recollection differs from that of the other witnesses in the case, I am persuaded that their version, not his, should be accepted. After Smith had his second conversation with Young, he went up to the machinery floor and there joined Aires and Lucas. All three went up to the floor above the machinery floor, where Smith and Lucas, by Aires' direction, got a piece of scantling and tried to use it as a brake on the large wheel which drove the pulley in leg 3. While Smith and Lucas were so engaged, Aires made up his mind that the friction between belt 3 and the pulley must be stopped, and, as he had failed to throw that belt separately out of gear, the only thing left to be done was to shut down the machinery as a whole. He, accordingly, went down to the machinery floor and walked some 120 feet from the stairway to the north end of the building and to the place at which he could signal to the engineer to stop the engine. This he did. While he was so occupied, Smith seems to have left the upper floor and descended through the machinery floor to his ordinary station on the scale floor.

Just before he reached that point, a third call to hurry and throw out belt 3 came up through the tube from the first floor. The witness White received this message, and, as he did so, saw that Smith was at his side. Smith thereupon called down the tube to have the house shut down. Very shortly after the whistle sounded, showing that the engine room had received Aires' signal and was acting upon it. After the steam had been shut off, 2½ minutes elapsed before the machinery came to a complete stop. It was somewhere during this interval that the belt broke and fell. After Aires gave the signal, he came back to leg 3, and, when he reached it, the pulley seemed to him to be slowing down more rapidly than the rest of the machinery. He at first thought that the efforts of Smith and Lucas to stop the wheel with the scantling had been successful, but when he looked into the leg he saw that the belt had fallen. Smoke was coming out of the leg, but in diminishing quantities. It was quite dark, and he says if there had been any fire in it he could have seen it; but he saw none. With the falling of the belt, all occasion for keeping the house shut down ceased. Aires, accordingly, went again to the north end of the machinery floor and signaled to the engine room to start up. About 4½ minutes must have elapsed between the two signals. The order to turn on the steam was not at once obeyed, as the engineer thought it prudent first to make sure of conditions on the track floor. He, accordingly, went some 140 feet or thereabouts to the center of the elevator to see whether he could safely put the machinery in motion. He was told that he could, and returned to his engine room and did so. The time between the giving of the signal to shut down and the actual starting up again must have been about 6 minutes. Aires probably came down on the elevator as soon as the machinery began to work. He thinks that from the time he left the upper floor until the explosion was not more than 10 minutes. If so, it is probable that the fire was first noticed about 12 or 13 minutes after the belt broke. It is more important to fix the number of minutes from the discovery that the belt was choked to its breaking, but it is also much more difficult. A good deal happened in that interval. Young sounded the gong on the scale floor; Smith came to the tube and received the message; in his turn sounded the gong on the machinery floor, waited vainly for a response; sent Lucas upstairs; Lucas told Aires; Aires misunderstood and went to No. 2, listened, and perceived that there was a mistake somewhere; called down to Smith, who set him straight; went to 3, tried to throw it out of gear, failed, then opened the trapdoor, and looked in. While he was doing all this, Smith had another conversation through the tube with Young, and afterwards came to the machinery floor. Aires, Smith, and Lucas went to the top floor. The latter two with the scantling tried to stop the wheel. Aires went down to the machinery floor and walked 120 feet north on it, sounded the signal to shut down, and some time within the next 2½ minutes the belt broke. Probably everybody moved quickly, but the interval between Young's discovery of the choke and the breaking of the belt could not have been less than 5 minutes, and may have been considerably longer. Had the rope method of operating the lever been in use, and had the machinery been

in order, the belt would have been thrown out of gear in half a minute. Upon this assumption, the dangerous friction was allowed to continue unnecessarily for not less than 4½ minutes. It may be that some of the delay was due to the clutch being out of order; but, if so, the Elevator Company is no better off. It appears that the clutches were never inspected. If when there was some occasion to use them they did not work, the not very difficult conclusion that they were out of order was then drawn.

Was the fire the result of the delay? Respondents say that the evidence does not show that it was.

There are witnesses who, when they first saw or heard of the fire, were on the scale floor, others who were on the track floor, and still others who were outside the main building all together. Of all these, it appears that the first to see any fire was a colored man named Walker. He was on the track floor cleaning up when a live coal fell from leg 3. He stamped it out and reported the fact to Bardroff, the elevator foreman, who was right at hand. The latter made a hurried examination. He saw no fire in No. 3. He called up the tube to the machinery floor to look for fire around No. 3. Lucas was on the scale floor standing near Smith, who received the message. As he did so, somebody called, "Fire!" and Lucas, looking up over his head through the cracks of the floor, saw flames. Just then the fire alarm sounded. White at the time was coming out of the receiving weigher's office on the scale floor. Some one said, "There is a fire upstairs, and I am going to get out." White seized a fire extinguisher and started up to the machinery floor. Lucas on the sounding of the alarm ran to the front of the building. When he saw some one going up the stairs with a fire extinguisher, he turned back; but had made only two steps when the explosion came. By the time White reached the landing at the first of the two flights of steps which lead from the scale to the machinery floor, he saw a reflection of flames all along the main shaft. He realized that a fire extinguisher was useless, and he started down. He had just reached the machinery floor when the explosion took place.

In the meantime, Bardroff down on the track floor went towards leg 2. He smelt smoke, which he thought was stronger in No. 2 than No. 3. Another coal fell. He told Walker to go for a bucket of water. The latter did so, and was coming back to No. 3 to use it when he saw flames and smoke coming out of the grate of No. 1. He threw the water on the grain there, and at that minute the explosion happened. Bardroff in the meanwhile had gotten a bucket of water from another man and had lifted the trap door of No. 2. As he did, a puff of hot air blew out, and then the explosion.

Young was on the track floor at the time. He says he saw Walker going for water, but did not know it was for a fire, and that he heard nothing about the fire until Bardroff sang out, "There's a fire boys, go!" and the explosion instantly followed.

Welker, the engineer, was in the engine room when the fire alarm sounded. He went to the door to see what was the matter, and then

the explosion. He does not think half a minute elapsed between the giving of the alarm and the explosion.

[2] I do not think there can be any reasonable question that the fire was caused by the friction between belt 3 and its pulley. It spread from No. 3 along the shafting and through the legs before it was discovered, either because no one was at the time on the machinery floor or the top floor, or because, if the oiler who lost his life was there, he was in some part of one of those floors remote from the place at which the fire started, or was otherwise so engaged that he did not notice it until it had gained great headway. There is no other known cause for the fire. All the conditions are consistent with its having so originated. Respondents say that, even so, they are not liable. They rely upon the Statute of 6 Anne as amended by that of 14 George III. They did not seek to set fire to the ships. Neither they nor their servants wanted to start a fire at all. They cite the well-known passage in First Blackstone Commentaries, 431, to the effect that any fire is accidental within the meaning of the statute which was not a willful act of the person sought to be held for its consequences. They point to the approval of this construction by Lord Lyndhurst in his remarks upon Lord Canterbury's petition of right (First Phillips' Chancery Reports, 306), and to the fact that it was followed and applied in Lansing v. Stone, 37 Barb. (N. Y.) 15; but both the English and American courts have definitely rejected this interpretation, and upon full consideration have held that a fire caused by the negligence of the defendant or his servants is not accidental within the meaning of these statutes. Filliter v. Phippard, 11 Add. & Ell. N. S. 346; Webb v. Rome, Watertown & Ogdensburg R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Rogers v. Atlantic, Gulf & Pacific Co., 213 N. Y. 254, 107 N. E. 661, L. R. A. 1916A, 787, Ann. Cas. 1916C, 877; Hoffman v. King, 160 N. Y. 622, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553.

Many of the numberless cases in which railroads have been held to answer for the damage done by fire set by sparks negligently allowed to escape from their locomotives may perhaps be put on one side, because in many states special statutes recognize, define, or impose liability under such circumstances.

The respondents reply that if so much be admitted it does not follow that they are liable. They claim that, whatever may be the language of the opinions relied on by the libelants, the fires actually dealt with were in nearly every instance purposely started, although for a proper or at least for an innocent purpose, and the negligence for which the defendants have been held responsible consisted, either in recklessness in starting the fire under the physical conditions existing, or in a lack of reasonable care to prevent the fire getting beyond control. In other words, that the real reason why liability was imposed was that if defendants saw fit to make use of a dangerous element they were bound to be careful to keep it from harming other people. They argue that there is nothing which has been actually decided in-

consistent with a construction of the acts of Anne and George which will relieve every one from liability for the consequences of a fire which he did not intend to start, but which was started as the result of his negligence or that of his servants. In support of this contention, they point to the fact that, while lack of due care has caused countless fires, the cases are few in which so much as an attempt has been made to hold any one liable for their consequences. The fact as stated is undoubted, and has often been commented upon, as in the Notes to First Cooley's Blackstone, 431. It is doubtless true that both courts and juries realize how easily one may be guilty of some act of momentary carelessness which may cause a fire and involve a destruction of other people's property, which even the absolute financial ruin of the negligent one could not make good. They are reluctant to hold him liable unless his carelessness and the consequences are both clear. Even then they have sometimes sought to restrain the extent of his liability by laying down some rather artificial limitations as to the damages which they will consider the proximate consequences of his negligence. Ryan v. New York Central R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Pennsylvania R. R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431. But in so doing the Supreme Court and the weight of authority in other states hold that a mistake was made. Milwaukee Ry. Co. v. Kellogg, 94 U. S. 474, 24 L. Ed. 256. The courts have sometimes been asked to make the distinction contended for by the defendants, but they have always refused to do so. Vaughn v. Menrose, 3 Bingham, N. S. 468; Norris v. Holt-Morgan Mills, 154 N. C. 474, 70 S. E. 912.

There can be no question that the damage done to the ships and their cargoes was the proximate and indeed, under the circumstances, the necessary result of the fire in the elevator. The ships were at its side by the invitation of the Elevator Company, and for its profit as well as theirs. It knew that any fire which started in such a structure was likely to spread with a rapidity that injury to vessels made fast to the pier was the not improbable result, if a fire within the building once got headway.

The question remains as to whether the probability of a fire being caused by the friction between a choked belt and its pulley was great enough to make the Elevator Company, because of its failure to use the ordinary means of preventing such friction, liable to the libelants for the consequences of the fire. This question raises an issue of fact, in a common-law case for a jury, and in this for the admiralty judge. In passing upon it, all the facts and circumstances must be taken into consideration. Blackstone construed the statutes of Anne and George as he did because he thought the one on whose premises the fire started suffered enough by the damage done his own property, without requiring him to make good that which the fire caused his neighbors. It is difficult logically to reconcile this reasoning with accepted legal principles, but it has a good deal of human nature in it. Every one who is called upon to pass upon such an issue as that now presented is likely, consciously or unconsciously, to feel a strong sympathy with it, none the less that the claim will often be made, not for

the person whose property has been burned, but by the underwriters who have compensated him for it, and who, if anybody had thought of asking them to do so, would doubtless for a very small premium having insured against any possible consequences of defendants' lack of care. Nevertheless, I cannot help feeling that in this case the negligence of the Elevator Company in the respect discussed was palpable, and that the consequences to which it in fact led were those which might reasonably have been anticipated from it, and doubtless would have been had it so happened that the Elevator Company's officers had ever given thought to the subject. I doubt if they ever did; but, while it is easily understandable how it was that they did not, nevertheless legally they should, and, as they did not, their company must bear the loss.

[3] But is the Pennsylvania also liable? All the stock of the Elevator Company belongs to the Northern Central. It is true a few shares stand in the names of the gentlemen who are directors of the Elevator Company, but they have no beneficial interest in them. When dividends are declared, they are not paid on these shares, or, if paid, are turned over to the Northern Central by the nominal recipients. Some years before the fire, the Northern Central leased all its property and franchises to the Pennsylvania for the term of 999 years. The lease fixes the rent at a sum sufficient to pay on the stock of the Northern Central an 8 per cent. dividend, clear of all taxes and expenses. The latter retains its corporate organization, but does not manage or operate anything.

If any other than the Elevator Company is answerable for the consequences of this fire, it must be because that other actually took such part in the management and control of the elevator as to make itself liable for the negligence of the persons there employed. No rule of law forbade the Northern Central so leasing its property to another as to free itself from any liability for negligent operation by that other. On the other hand, the lessee will be liable if it does anything which would have made the lessor liable had there been no lease. It would be answerable, not because it was the lessee, but because it took such part in the conduct of the business as to make itself liable therefor. Liability does not depend on title. If it exists at all, it is because the person sought to be held actually does something in so negligent a manner that the plaintiff suffers. The fact that the legal title to the fee in the elevator and the land upon which it stood remained in the Northern Central has nothing to do with the case.

What part did the Pennsylvania take in the management of the elevator? It could have done whatever it wished. Any stockholder of a corporation who owns all, or even a majority, of its stock, can absolutely control its policy and management, so long as he acts in good faith towards the minority stockholders, if there are any. He can select its officers, and through them its employés. That the Pennsylvania did. Its general superintendent in Baltimore had been for years the president of the Elevator Company, and, when the individual who had filled those places surrendered one of them, he gave up both, and had the same successor in both. The treasurer of the Elevator

Company was a Pennsylvania employé. It had, however, its own superintendent, who held no office under the Pennsylvania. He had the right of "hiring and firing," as the current phrase puts it, all its subordinate employés. The superintendent and the secretary of the Elevator Company are the only executive officers it pays. Its by-laws provide for the appointment of an assistant secretary, comptroller, subcomptroller, and various accounting officers. The holders of these posts, except the assistant treasurer, hold similar positions in the Pennsylvania. They were not paid by the Elevator Company. For seven or eight years before the fire the jurisdiction of the comptroller's department of the Northern Central had extended over the accounts of the Elevator Company. A clerk in the comptroller's office of the Northern Central was authorized to sign vouchers of the Elevator Company as its auditor of disbursements. Entries in the minutes of the Elevator Company show that various officers of the Pennsylvania, without first consulting the directors of the Elevator Company, issued orders as to what the latter company should do, and that those orders were obeyed. As for example, in the year 1908, in order to augment its storage facilities, it, under the direction of Freight Traffic Manager Dixon of the Pennsylvania, hired barges at an expense of $16,000.

In February, 1910, the traffic department of the Baltimore & Ohio and the Northern Central decided to abolish the scaleage reduction feature in the elevators at Baltimore, whereupon the respective managements of the elevators were instructed to notify the Baltimore Chamber of Commerce that no such deductions would be thereafter made. In March, 1910, the president reported that he had received authority from the fourth vice president of the Pennsylvania to increase the salary of the Elevator Company's superintendent to $375 a month.

In June, 1912, the president of the Elevator Company reported that, with the approval of Vice President Dixon of the Pennsylvania, he had entered into an arrangement with the Chamber of Commerce, under which the Elevator Company would undertake to maintain in concrete tanks not less than 30 per cent. in monetary valuation of the grain stored at Canton.

In June, 1914, the president of the Elevator Company reported that the traffic department of the Pennsylvania had effected an arrangement by which the Elevator Company would insure the grain stored at the Canton elevators at the rate of 25 cents per $100 per annum, and suggested that the superintendent of the Elevator Company be sent to Philadelphia to consult with the superintendent of the Pennsylvania insurance department with a view to perfecting the details.

In October, 1914, it was reported that the operation of the Pennsylvania under the lease of the Northern Central had resulted in transferring all persons employed therein to the service of the Pennsylvania, whereupon the Elevator Company released the Northern Central from the previously existing pension agreement.

After the fire now in controversy, an inquiry was made as to whether the Pennsylvania would guarantee the insurance on the grain destroyed by fire, and the Pennsylvania notified the Chamber of Commerce it

would do so. The fire loss was adjusted by the insurance department of the Pennsylvania. The price list upon which claims were settled was sent to the Pennsylvania insurance department for their approval.

Sometimes, though not always, when the Elevator Company had surplus cash, it was turned over to the Northern Central, not as a dividend, but as a special deposit at 3 per cent., and then in January, 1908, when this deposit amounted to $100,000, the Elevator Company voted that the rent it had paid for two of its elevators for six years had been $14,000 per annum too low, and for three years $2,200 on the other, and that the Northern Central might take $90,600 of the money on deposit for this back rent. A year later the president of the Elevator Company reported that under a decision of the Northern Central it would have to pay $14,000 a year insurance.

Still, on the other hand, the organization of the Elevator Company was regularly kept up. Its stockholders' meetings were held, its directors met monthly. At the time of the fire, it had a considerable surplus of upwards of $200,000 in bank. It was in no sense a mere shell. At the same time, it was true that everybody connected with it knew that the Pennsylvania owned it and that anything the Pennsylvania chose to say was final. The officers and directors of the company could not always keep in memory the fact that, while the Pennsylvania could do what it would by its control over the stock, that control ought regularly to be exercised only through the board of directors of the Elevator Company. At times, the Pennsylvania was allowed to do things in a way which was not quite consistent with the assumption that the Elevator Company was an independent corporation; but there was no such wiping out of the corporate organization as is described in the case of Goralski et al. v. General Stevedoring Co. (D. C.) 213 Fed. 51.

In this case we are not dealing with an act in itself a wrong to some one else, done by the direction of the governing body of the Elevator Company. If we were, it might well be argued that the Pennsylvania, controlling all the stock of the Elevator Company and directing so many of its actions, ought not to be heard to say that it had not directed a particular one. That issue does not arise in this case and need not be here passed upon.

The libelants are justified in asserting that the elevator was operated as a facility to the business of the railroad company. They say that the owner of the stock of a subsidiary corporation, which is doing a part of its work, or which exists to facilitate the carrying on of its business, is answerable for its defaults in some cases in which one who owned its stock merely as an investment would not be. It does not seem necessary here to go into the merits of this contention. It would hardly seem that the stockholder thereby necessarily waives all its rights to rely upon the limitations of its liability in every case in which some servant of the subsidiary company does some careless thing to another's hurt. We are not here dealing with a subsidiary corporation without substantial resources, and which exists merely as a shield to enable the owner of its stock to carry on his business without exposing himself to liability for the negligence of the employés

who are required to run that business. The Elevator Company had considerable resources of its own. They were ordinarily adequate fully to protect any one likely to be injured by the negligence of its employés.

The libelants rely on Lehigh Valley R. Co. v. Dupont, 128 Fed. 840, 64 C. C. A. 478, and Lehigh Valley R. Co. v. Delachesa, 145 Fed. 617, 76 C. C. A. 307.

The Lehigh Valley Railroad Company owned all the stock of the Easton & Amboy Railroad Company. The same men held the same offices in each of the two corporations. The Lehigh Valley absolutely controlled everything that the Easton & Amboy did. Each of the companies had a separate account book. In every other respect they were carried on precisely as if the Lehigh Valley had owned and operated the railroad lines of both corporations. In the first case, the person injured was a passenger; in the second, a stevedore. The United States Circuit Court of Appeals for the Second Circuit held the Lehigh Valley Railroad Company liable, and said:

"Where the lines of several railroad corporations are conducted as a single system, for the purposes of the traffic between different points, originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency."

It does not seem to me that the facts here proved bring the case within the rule there laid down. The rule of respondeat superior is based on practical considerations, rather than on fundamental justice. It is not clear that it is always right to hold every one who gets a profit out of a particular business to unlimited liability for every negligent act of every one of the servants employed therein. As the law is, one not protected by a statute is liable for the acts of one who is technically his servant, when such acts are committed in the course of his business. The lawmaking power recognizes that this rule, useful as it is in most cases, may sometimes work great injustice, as is instanced in the limited liability statutes for the protection of shipowners. The negligence which resulted in damage to the libelants was negligence of people who were not legally the servants of the Pennsylvania. This case presents no facts which require that the legal form shall be ignored in order that justice may be done.

It follows that as against the Pennsylvania the libel will be dismissed, with costs. The Elevator Company will be held liable to the libelants for the damage suffered by them as a result of the fire. The amount can be ascertained by agreement or by a reference or by a hearing in open court.

EASTERN TEXAS R. CO. et al. v. RAILROAD COMMISSION OF TEXAS et al.

GULF, T. & W. RY. CO. et al. v. SAME.

(District Court, W. D. Texas, Austin Division. April 20, 1917.)

No. 295.

1. CARRIERS ⊜18(6)—REGULATION OF RATES—ENJOINING ENFORCEMENT.
Where the Interstate Commerce Commission prescribed maximum rates between Shreveport, La., and points in Texas, prohibited the charging of rates between such points higher than those applied for like distances between points in Texas, and ordered the railroad companies to cease applying the classification provisions then maintained to transportation between points in Texas, and a compliance therewith by the railroad companies would subject them to a multiplicity of suits by the State Railroad Commission and by shippers for failure to comply with the rates prescribed by the State Railroad Commission, while noncompliance therewith would also subject them to a multiplicity of suits with liability to large penalties, they were entitled to a temporary injunction restraining the State Railroad Commission and shippers who were threatening suit from instituting any suits, pending an action for a permanent injunction, based on the failure of the railroad companies to comply with the state rates so far as in conflict with the rates prescribed by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24.]

2. COMMERCE ⊜88—INTERSTATE COMMERCE COMMISSION—ORDERS—COLLATERAL ATTACK.
An order of the Interstate Commerce Commission prescribing interstate rates, and incidentally prohibiting intrastate rates thought to be discriminatory, cannot be attacked collaterally.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141.]

3. INJUNCTION ⊜151—APPLICATION FOR TEMPORARY INJUNCTION—SCOPE OF INQUIRY.
On an application to the District Court for a temporary injunction restraining a State Railroad Commission and others from bringing suits to enforce rates prescribed by such commission so far as in conflict with an order of the Interstate Commerce Commission, heard before three judges, it was not necessary for the court to decide upon the merits of the case, but only to determine if the bill presented a case for equitable relief, especially where proceedings were still pending before the Interstate Commerce Commission affecting certain of the rates.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336.]

Suits by the Eastern Texas Railroad Company and others against the Railroad Commission of Texas and others; and by the Gulf, Texas & Western Railway Company and others against the same defendants. On motion for a temporary injunction. Injunction granted.

J. W. Terry, of Galveston, Tex., H. M. Garwood, of Houston, Tex., Hiram Glass, of Austin, Tex., and A. H. McKnight, of Dallas, Tex. (T. J. Freeman, of New Orleans, La., S. B. Dabney, of Houston, Tex., C. C. Huff and E. B. Perkins, both of Dallas, Tex., E. B. Parker, of Houston, Tex., George Thompson, of Ft. Worth, Tex., and Frank Andrews, of Houston, Tex., of counsel), for plaintiffs.

Luther Nickels and C. M. Cureton, Asst. Attys. Gen., of Texas (B. F. Looney, Atty. Gen., of Texas, and S. C. Rowe, of Ft. Worth, Tex., of counsel), for defendants.

Blackburn Esterline, Sp. Asst. U. S. Atty. Gen., for the United States.

Joseph W. Folk, of Washington, D. C. (Charles W. Needham, of Washington, D. C., of counsel), for Interstate Commerce Commission.

Wylie M. Barrow, Asst. Atty. Gen., of Louisiana, for intervener Railroad Commission of Louisiana.

S. H. Cowan, of Ft. Worth, Tex., and N. A. Stedman, of Austin, Tex., for Dallas Freight Bureau and Ft. Worth Freight Bureau.

Paul Kayser, of Houston, Tex. (Huggins & Kayser, of Houston, Tex., of counsel), for interveners Houston Chamber of Commerce and others.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge. This suit grows out of an order of the Interstate Commerce Commission of July 7, 1916, made and entered in five consolidated cases, entitled: Railroad Commission of Louisiana v. Aransas Harbor Terminal Railway Company et al., docket No. 8418; Railway Commission of Louisiana v. St. Louis Southwestern Railway Company et al., docket No. 3918; Railroad Commission of Louisiana v. St. Louis, San Francisco & Texas Railway Company, docket No. 8290; Eastern Class Rates Investigation and Suspension, docket No. 710; and Class Rates to Shreveport, Louisiana, Investigation and Suspension, docket No. 729.

The order in question is very lengthy and not necessary to give in full. A large part of the order relates to the discrimination then practiced between Shreveport, La., and all points in Texas, and provides for discontinuance of this discrimination, and elaborately provides for maximum rates between Shreveport and all points in Texas, and orders defendants to establish on or before November 1, 1916, on notice to the Interstate Commerce Commission and the general public by not less than 30 days of filing, rates in accordance with the orders of the commission.

The tenth, eleventh, and twelfth paragraphs of the order are particularly pertinent on this hearing. They are as follows:

(10) It is further ordered, that said defendants be, and they are hereby, notified and required to establish, on or before November 1, 1916, upon like notice, and thereafter to maintain and apply to the transportation of property between Shreveport, La., and points in the state of Texas, class rates and rates on the above-named commodities not in excess of those contemporaneously applied by them for the transportation of like property for like distances between points in the state of Texas, except in those instances in which the rates between Texas points have been depressed by reason of water competition along the Gulf of Mexico or waters contiguous thereto.

(11) It is further ordered, that said defendants be, and they are hereby, notified and required to cease and desist, on or before November 1, 1916, and thereafter to abstain, from maintaining and applying to the transportation of property between points in Texas the classification provisions at present maintained and applied to such transportation.

(12) It is further ordered, that said defendants be, and they are hereby, notified and required to establish on or before November 1, 1916, upon like

notice, and thereafter to maintain and apply to the transportation of property between points in Texas, the provisions of the current western classification in effect at the time such traffic moves.

Preparatory to filing tariffs in compliance with the commission's order of July 7, 1916, the carriers representing 80 per cent. of the railroad mileage in the state of Texas and affected by the order of July 7, 1916, filed their bill in this court on September 4, 1916, for an injunction, joining as parties defendant the Railroad Commission of Texas, together with its individual members, the Attorney General of the State of Texas, and certain Texas shippers, reciting the proceedings before the Interstate Commerce Commission and the necessity they were under to comply, and their intention to comply, with the order of said commission; and then alleging, in substance, that the tariffs to be filed in accordance with the order of the Interstate Commerce Commission would necessarily conflict with the tariffs heretofore established by the Railroad Commission of Texas, which under the laws of Texas they were compelled to observe and comply with under heavy penalties, at the suit of the Attorney General of Texas or of individual shippers, that the defendants were claiming that the order of the Interstate Commerce Commission of July 7, 1916, was void, and were threatening to institute suits for damages and penalties under the Texas laws should the carriers comply with the said order of the Interstate Commerce Commission; and the complainants prayed for a temporary restraining order, an injunction pendente lite, and a perpetual injunction.

To this bill is attached the following order:

The foregoing application for a temporary injunction and temporary restraining order, to remain in force until the hearing of the said application for a temporary injunction can be heard and determined, was presented to me this 2d day of September, A. D. 1916, and it was shown that the Honorable T. S. Maxey, United States District Judge for the Western District of Texas, is absent from said district, and for that reason is unable to hear and act upon said application; and having read and considered the foregoing bill, it is ordered that the same be filed and that the application for a hearing for a temporary injunction is granted and such hearing is set down for September 28, 1916, at my chambers in the city of Atlanta, Georgia, at 10 o'clock a. m. That immediate notice of said hearing, of not less than five days shall be given to the Governor and the Attorney General of Texas and to the defendants. And I hereby call to my assistance at said hearing of said application the Honorable Richard W. Walker, Circuit Judge of this circuit, and the Honorable William T. Newman, District Judge of the Northern District of Georgia.

It being further shown, and it is my opinion, that irreparable loss and damage will result to complainants unless a temporary restraining order is granted, it is ordered that such temporary restraining order is granted, and the clerk of the District Court for the Western District of Texas is ordered and directed to issue a temporary restraining order as prayed for restraining the Railroad Commission of Texas, the Attorney General and others with notice, from filing and prosecuting suits against the plaintiffs or either of them for failure or refusal to put in effect circular No. 5060 of the Railroad Commission of Texas, dated August 28, 1916, until such time as the application for temporary injunction can be heard and determined, and the said temporary restraining order issued by said clerk shall restrain and prevent the Railroad Commission of Texas, the Attorney General of Texas and the other defendants hereto, and others with notice, from filing and prosecuting suits

against the plaintiffs or either of them for damages or penalties, for charging by them, on and after November 1, 1916, the rates prescribed and authorized by the Interstate Commerce Commission in its order of July 7, 1916, on shipments moving between points in the state of Texas, and such temporary restraining order as prayed for to remain in force until the hearing and determination of the application for an interlocutory or temporary injunction upon notice as aforesaid.

This September 2, A. D. 1916, at Atlanta, Georgia.

Don A. Pardee, U. S. Circuit Judge.

The hearing on the question of an injunction pending the suit was postponed by consent from time to time until April 4, 1917, in New Orleans, La., when the matter came on for hearing before Pardee, Circuit Judge, who issued the order to show cause, and Walker and Batts, Circuit Judges, called to assist under provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]).

Upon this hearing a large amount of evidence was introduced on both sides, consisting of subsequent pleadings in the case, affidavits, proceedings before the Interstate Commerce Commission, all as shown by the procès verbal hereto attached. The pleadings subsequent to the entry of the temporary restraining order herein are an amendment to the original bill, a supplemental bill by the complainant showing that tariffs and rates had been filed under the order of the Interstate Commerce Commission and were in force, a very lengthy and argumentative answer, by the Railroad Commission of Texas and the Attorney General of Texas, substantially denying all the allegations of the original bill and contending that the order of the Interstate Commerce Commission of July 7, 1916, was void, and, if not void, voidable in whole or in part; and further answering in the nature of a cross-action, contending and asserting that the order of July 7, 1916, was void, and that the United States and the Interstate Commerce Commission are necessary parties; and ended with the prayer that the plaintiffs be denied all relief herein and defendants have judgment and costs; and, further, on the final hearing, said order of the Interstate Commerce Commission be annulled and wholly set aside.

To this answer the complainants filed a general and special replication, and, said answer having been served upon the United States and the Interstate Commerce Commission, each made a limited appearance by attorneys contesting the jurisdiction as against them.

It further appeared that 28 other railroads, wholly situated in the state of Texas and not original parties to the suit, filed their petition of intervention, joining the complainants in the original bill and adopting the allegations and prayers therein, and further showing that they had filed tariffs under the order of July 7, 1916, and further alleging that on the 14th day of October, 1916, the state of Texas, acting through her Attorney General, filed a suit in the district court of Travis county, state of Texas, against these interveners and other railway companies, wherein the state of Texas sought to enjoin the defendants from charging on and after November 1, 1916, higher rates than those prescribed by the Railroad Commission of Texas and from using any classification other than those prescribed by the Railroad

Commission of the state of Texas; that they therein appeared and pleaded, setting up the proceedings before the Interstate Commerce Commission the order of July 7, 1916, that they had filed with the Interstate Commerce Commission tariffs in compliance with the order of said commission, the bill of complaint in this cause, and the restraining order issued thereon, and the filing of the answer of the Railroad Commission, etc.; that, on the hearing of the application for a temporary injunction in said cause, all of the facts alleged in said pleas to the jurisdiction were established by competent proof and were uncontradicted; and thereafter said court entered an order undertaking to restrain these interveners from charging higher rates than the rates prescribed by the Railroad Commission of Texas and from using or applying to shippers between points in the state of Texas any classification other than the classification prescribed by the Railroad Commission of the State of Texas; and also granting a writ of mandamus, etc.; and that an appeal was taken from the said orders which is now pending; and the interveners concluded with a prayer for a restraining order and injunction, etc.

It appears by the proof on this hearing that subsequent proceedings have been and are now pending before the Interstate Commerce Commission in the said consolidated causes, and that on the 26th of January, 1917, pursuant to a petition filed by the Attorney General of Texas and by various localities and commercial interests of Texas the commission entered a supplemental report and order in Railroad Commission of Louisiana v. Aransas Harbor Terminal & Railway Company et al., in which the proceedings in the five consolidated cases were reopened and leave was granted to the Attorney General of Texas and the Railroad Commission of Texas to intervene in a supplementary order as follows:

> Upon consideration of various petitions filed in the above-entitled proceedings asking that they be reopened for further hearing and argument and of the oral argument had therein, it is ordered that these proceedings be and they are hereby reopened for further hearing; and it is further ordered that pending such hearing or hearings and decisions thereon the order of July 7, 1916, herein shall remain in full force and effect.

[1] From the foregoing, it clearly appears that the complainant carriers both in the original bill and the intervention are in jeopardy. If they fully comply with the order of the Interstate Commerce Commission and put in force the tariffs authorized by that body, they will be subject to a multiplicity of suits by the Railroad Commission of Texas and by shippers involving heavy and even confiscatory penalties. If, on the other hand, they do not comply with the order of the Interstate Commerce Commission, but do comply with the orders made and tariffs prescribed by the Railroad Commission of Texas, they will be subject to a multiplicity of suits with liability to be mulct in very large penalties.

It seems clear that they are entitled to the protection of the court. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Wadley Southern Railroad v. Georgia, 235 U. S. 651, 35 Sup. Ct. 214, 59 L. Ed. 405.

[2] We assume that the order of July 7, 1916, involved herein is valid (Houston & Texas Cen. Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341), and the validity thereof can only be attacked directly; and, whether it is properly in issue in this case, and whether the court has jurisdiction (see 38 Stat. at L. 219), can only be decided upon the trial thereof. It certainly cannot be attacked collaterally in any case.

[3] The issues made herein in regard to certain specific rates published in tariff promulgated under order of July 7, 1916, and whether or not such rates are unreasonable or discriminatory or otherwise illegal, are now pending before the Interstate Commerce Commission, the only body competent to originally pass upon the same. Certainly, at this time, we are not called upon to decide upon the merits of the case. On the hearing before this special tribunal, it seems that we are not called upon to try or decide any of the questions presented upon the pleadings further than to determine if the bill itself as amended presents a case for equitable relief. On this issue enough has been stated to show that the complainants are entitled to such relief, and we find on the facts proved that the protection of the complainants requires the issuance of a temporary injunction substantially as prayed.

And it is so ordered.

BATTS, Circuit Judge (concurring). In a proceeding initiated in 1911 by the Railroad Commission of Louisiana against the Houston East & West Texas Railroad Company, the Houston & Shreveport Railroad Company, and the Texas & Pacific Railway Company, the Interstate Commerce Commission held that the named carriers maintained higher rates from Shreveport to points in Texas than were in force from cities in Texas to such points under substantially similar conditions and circumstances, and that thereby unlawful and undue preference and advantage was given to the Texas cities, and undue and unlawful discrimination against Shreveport, La., was effected. To correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged by the carriers for such commodities from Dallas and Houston toward Shreveport, for equal distances. This order was attacked in a suit instituted by the carriers in the Commerce Court. The order was sustained by that court, and an appeal was taken to the Supreme Court.

The Supreme Court held (234 U. S. p. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341) that: (1) Congress has the power to regulate rates within the state for transportation carried on by instrumentalities of interstate commerce, or where intrastate business would affect interstate commerce. (2) Congress has not undertaken, directly or through the agency of the Interstate Commerce Commission, to make rates for the transportation of passengers or property wholly within one state, and not affecting interstate traffic. (3) Where the observance by the carrier of the state-made rate constitutes a violation of the provision of the Interstate Commerce Act prohibiting unreasonable and unjust

discrimination, or undue preference or advantage, Congress has, with reference thereto, exercised its power. (4) Where unjust discrimination or undue and unreasonable preference or advantage is charged, it is a matter primarily for investigation and determination by the Interstate Commerce Commission. (5) Where the Interstate Commerce Commission has held that interstate rates charged by carriers are reasonable, and that the observance by the carriers of state-made rates, affecting the same locality, is an illegal discrimination, the carrier may comply with the order of the Interstate Commerce Commission by so adjusting the state rates as to remove the discrimination.

After the rendition in 1913 of the opinion by the Supreme Court of the United States, the order of the Interstate Commerce Commission was enlarged to affect the rates of all common carriers within Eastern Texas, and, subsequently, further enlarged to include the entire state. The order also fixed the interstate rates between Shreveport and Texas points, and required the use, with reference to Texas business, of the western classification, in lieu of the classification prescribed by the Railroad Commission of Texas.

Being required under the order to adjust their intrastate rates to the Shreveport rates established by the commission, the railroads prepared rate sheets and tariffs, which they claimed to be in conformity with the order, and filed them with the commission.

Pending the determination of the proceedings before the Interstate Commerce Commission, hearings were held by the Railroad Commission of Texas upon an application of the railroad companies for an increase of intrastate rates, and orders were issued by the Railroad Commission, making a number of increases, which were to have become effective September 1, 1916. Upon the filing with the Interstate Commerce Commission of the rate sheets by the Texas railroad companies, the Texas Railroad Commission, without notice, canceled the orders increasing the Texas rates. Thereupon plaintiffs instituted this suit in the Western district of Texas, setting up in detail the facts hereinbefore mentioned. The bill also averred that all the rates, orders, and classifications of the Railroad Commission of Texas were unreasonable and confiscatory. It was alleged that, unless protection was given by injunction, plaintiffs would be subjected to many suits for penalties by the state of Texas and by shippers, for obeying the orders of the Interstate Commerce Commission.

The District Judge not being accessible, application was made to Hon. Don A. Pardee, Circuit Judge, for the temporary injunction now under consideration. A restraining order was made, and the application set down for a hearing. Delays resulted from the concurrent action of the parties, and the application is now submitted to Circuit Judge PARDEE, and Circuit Judge WALKER, and the writer, whom he has called to his assistance, under the terms of the law.

In the meantime, the action of the Railroad Commission of Texas, in undertaking to cancel its orders increasing rates, was abrogated by that body. Also in the meantime, upon applications made by the Attorney General and the Railroad Commission of Texas, the Interstate Commerce Commission had reopened the case referred to and has made provision for hearing additional testimony, refusing, however, to suspend the rates established, pending final action.

The Attorney General and Railroad Commission of Texas have in this case answered, and have filed a cross-action, asking for the cancellation of the order of the Interstate Commerce Commission. To this cross-bill, the Interstate Commerce Commission and the United States have filed pleas to the jurisdiction.

In the submission of this application the parties have filed transcripts of the records in the several hearings before the Interstate Commerce Commission, of the hearing extending over many weeks before the Railroad Commission of Texas, and many affidavits. It would probably not be possible for all this testimony to be read in less than two or three months. The application may be disposed of without delay, which would be inconsistent with the purpose of the law to expedite cases of this character.

If the rates from Texas points to Shreveport are reasonable, and if the application of the rates made by the Railroad Commission of Texas to points within Texas constitutes unjust discrimination against Shreveport, the Texas-made rates are invalid. Under the terms of the Interstate Commerce Commission Act, the railroads of Texas may be prosecuted for charging the Texas rates. This results entirely without reference to any action which may be taken or which may have been taken by the Interstate Commerce Commission. The Texas railroads are entitled to protection against contemplated state action, which would result from their failure to violate the law.

The Interstate Commerce Commission has established the Texas-Shreveport rates. These rates must be regarded as reasonable until set aside in the manner provided by law. The Interstate Commerce Commission has declared that the use of the Texas rates will constitute a discrimination against Shreveport. This commission is one of the agencies designated by the law for the purpose of primarily determining whether a discrimination exists.

The law evidently contemplates that, when the Interstate Commerce Commission shall have made an order, it is ordinarily to be obeyed until that order is set aside in the manner indicated by the law.

Whether this rule is universal in its application it is not necessary in this proceeding to determine. The Supreme Court has held that the commission may determine what is a reasonable interstate rate, and what rate must be charged on intrastate business to prevent a discrimination, when both rates are in use. But the authority of the Interstate Commerce Commission with reference to intrastate rates is purely incidental and remedial. The qualities of such an order are radically different from those of an order resulting from the exercise of the legislative function involved in rate-making. To hold that it may, under any circumstances, regulate a state rate, is to carry the rules of interpretation to the extreme limit, in view of the proviso in the first section of the Interstate Commerce Commission Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. 1916, § 8563]). It may be held that it has the power to make such orders affecting intrastate rates as are necessary to prevent discrimination; certainly, the authority will not go beyond the necessity. When the Interstate Commerce

Commission acts with reference to such a matter, it makes, or should make, the same character of investigation and the same character of determination that would be made by a court if a carrier charging the intrastate and the interstate rates were prosecuted for a violation of the Interstate Commerce Commission Act. Its action would be more nearly judicial than legislative. Whenever such an order is under consideration by a court, the court would have to determine whether the jurisdiction of the Interstate Commerce Commission had been exceeded; and it would doubtless decline to apply the same rules with reference to the conclusiveness of the action of the Interstate Commerce Commission that obtain when that body is, in the exercise of its established legislative authority, making rates. It would not permit the Interstate Commerce Commission to conclusively determine its jurisdiction by determining the fact of the discrimination upon which its jurisdiction would depend.

The order under investigation in this case is exceedingly comprehensive. It breaks down the intrastate rates of the state of Texas. These rates have not been held unreasonable. They are the result of many years of labor by an authorized rate-making body. They have, until the Interstate Commerce Commission acted, been acquiesced in by the railroads. Some of the rates which have been set aside could not have had an appreciable effect on the commerce of Shreveport, or any interstate commerce. Affidavits on file in this court indicate that, in some instances, the results of the order are disastrous to industries within the state. In other instances, the effects are grotesque. No reason has been made to appear why it is necessary to supersede the Texas classification in order to prevent discrimination.

But the order is. It may be that it has been improvidently made. It may be that parts of it are invalid. It may be that when this case is finally tried it will be set aside in whole or in part. But it is not possible for us to hold the order void. A part of it has already been passed upon by the Supreme Court of the United States, and has by that tribunal been declared valid.

The opinion of the Supreme Court is vigorously attacked. In capable, well-considered opinions, the state courts of Texas and South Dakota have declined to follow the opinion until reannounced. It is the obligation of the state courts, as it is the duty of the federal courts, to vigilantly maintain the rights of the states, and to carefully determine the authority of federal agencies exercising powers claimed to be in derogation of those rights. It is not surprising that state courts should be reluctant to follow an opinion which adds vastly to the power heretofore assumed to be in the Interstate Commerce Commission, and which destroys the power which has been assumed to be in the state rate-making bodies.

In the Minnesota Rate Case, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, there is unequivocal recognition of the right of the states to make intrastate rates. In the Shreveport Case, 234 U. S. p. 358, 34 Sup. Ct. 833, 58 L. Ed. 1341, the right of the Interstate Commerce Commission to enter an order affecting intrastate rates "where interstate commerce itself is in-

volved," is as definitely expressed. In the oral submission of this case, the representative of the Interstate Commerce Commission suggested the intimate relationship between all intrastate and all interstate business, and made it easy to see how the commission could supersede the state rates in every state, as it had in Texas, and nullify the congressional declaration that the provisions of the act which created the commission "shall not apply to the transportation of passengers or property wholly within one state."

That Congress could make all railroad rates, or delegate the making to a commission, is not, under the authorities, seriously to be questioned. That it has not exercised this power is made clear by the Minnesota Rate Case; that it has given authority to the Interstate Commerce Commission, which indirectly and awkwardly accomplishes the same result, would seem to be the commission's interpretation of the Shreveport Case. But even if the commission's application of the opinion is too broad, the language of the Supreme Court justifies a part, at least, of the order, and warrants and requires the protection we give the railroad companies.

It has been made to reasonably appear that, but for the restraining order heretofore made, the railroads of Texas would have been subjected to numerous and destructive suits for penalties, for the collection of overcharges, and for infractions of the Texas Railroad Commission law. But for this judicial action, their obedience to the order of the Interstate Commerce Commission would have been destructive of their property rights. If they had not obeyed the Interstate Commerce Commission's order, they would have been subjected to the danger of suits and prosecutions by the United States government. Those conditions continue, and would seem to peculiarly demand the interference of the judiciary. It may be the issuing of the injunction will not be without injury to individual shippers, and to localities and industries. It is much to be regretted that all of the unfortunate consequences of conflicting laws cannot be avoided. The issuance of the injunction which is to be entered herein will, it is hoped, be the action least productive of disastrous effects.

The granting of the injunction prayed for by the railroads necessarily carries with it the refusal to grant a temporary injunction to the defendants. A serious question exists as to whether or not their cross-bill can be entertained in this suit. It is an attack upon an order of the Interstate Commerce Commission, and the law provides that it shall be instituted in the District Court of the residence of the party at whose instance the order was made. It may be that, under the facts of this case, jurisdiction would lie only in the Western District of Louisiana. In addition to fixing the venue of suits of this kind, the law contemplates that the order setting aside the action of the Interstate Commerce Commission should be determined by a court of three judges.

It is certainly not contemplated that, in passing upon an application for a temporary injunction, the merits of a case which would require weeks for a proper trial, and the merits of a cross-bill which would require as long a time for disposition, should be considered and

determined. The purpose of a temporary injunction is to protect rights, as far as possible, during the period necessary for the proper disposition of the case. Sometimes such an injunction necessarily involves the merits of a case. We have not considered it necessary or desirable that present adjudication of the matters involved in this case should be undertaken. In addition to reasons suggested heretofore, the whole rate situation in Texas is yet before the Interstate Commerce Commission, and a satisfactory solution of the difficulties which have appeared may be reached. The order entered herein is not intended to adjudicate any of the issues made by the pleadings, but merely to maintain a status which will result in a minimum of harm.

KANSAS CITY, C. C. & ST. J. RY. CO. v. BARKER, Atty. Gen., et al.

(District Court, W. D. Missouri, W. D. May 27, 1915.)

No. 64.

CARRIERS ⇐12(5)—RATES—AUTHORITY TO PRESCRIBE UNREMUNERATIVE RATES. Assuming that Public Service Commission Law (Laws Mo. 1913, p. 576) § 35, subsec. 4, providing that nothing therein, or in any other law, shall limit the power of the Commission to require the sale of, and prescribe reasonable and just maximum fares for, commutation tickets, authorizes the Commission to order the sale of suburban commutation tickets, and to prescribe rates therefor, where a carrier's earnings fall short of a fair return to any extent, the Commission cannot prescribe commutation rates which will still further reduce such earnings, even though to a comparatively negligible extent, and such action is not authorized by reason of local public demand or interest, or by the Commission's views of the probable beneficial effects of such rates upon the company's business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15–20.]

In Equity. Suit by the Kansas City, Clay County & St. Joseph Railway Company against John T. Barker, Attorney General, and others. On motion for temporary injunction. Motion granted.

Justin D. Bowersock, of Kansas City, Mo., and John M. Olin, of Madison, Wis. (Bowersock, Hall & Hook, of Kansas City, Mo., and Olin, Butler, Stebbins, Curkeet & Stroud, of Madison, Wis., of counsel), for complainant.

William G. Busby, of Carrollton, Mo., General Counsel to Public Service Commission.

M. E. Lawson, Ralph Hughes, and W. E. Campbell, all of Liberty, Mo., and Wright & Alford and Frank A. Boys, all of Kansas City, Mo., for defendants.

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

PER CURIAM. This cause is before us on motion for a temporary injunction. The motion is made upon the bill and supporting affidavits. Opposing affidavits have also been filed by defendants. The prayer

of the bill asks that two certain orders of the Public Service Commission, hereinafter called the Commission, made December 5, 1914, be declared void, and that their enforcement be permanently restrained. The orders referred to relate to the following subjects:

One order fixed the fair present value of all the property of complainant, for the purpose of determining reasonable and just rates, at the sum of $3,900,000. The other order is in words and figures as follows:

"Ordered: (1) That the Commission does hereby find as a fact that defendant, Kansas City, Clay County & St. Joseph Railway Company, should be required to put on sale to the public, on and after January 1, 1915, reasonable and just fares as the maximum to be charged for commutation tickets on its road between the stations hereinafter named.

"Ordered: (2) That the reasonable and just fares, as the maximum to be charged by said defendant for commutation tickets, are hereby prescribed as follows:

Between Kansas City, Third and Cherry, and	Distance.	52 Single Trip Individual Ticket, Limited 30 days from Date of Sale.
Avondale	4.41	$3.00
Moscow	5.42	3.50
Winn Wood Lake	6.23	4.00
Winnetonka	7.01	4.50
Maple Park	7.67	5.00
Claycomo	9.02	6.00
Ravena	9.85	6.50
Hymer	10.76	7.00
Urban Heights	11.65	7.50
Withers	12.73	7.75
Liberty, Mo.	14.18	8.50
Darby	3.45	2.25
Schroeder	4.56	3.00
Brenner	5.00	3.25
North Moore	6.27	4.00
Deister	7.19	4.75
Northern Heights	8.24	5.25

"Ordered: (3) That the fares hereinbefore fixed shall be the maximum fares to be charged by said defendant for said commutation tickets from and after January 1, 1915, and thereafter until changed or abrogated by the Commission as provided by statute, and that said defendant shall, at its ticket stations on its line of road, sell commutation tickets at a price not to exceed the maximum rates of fare herein prescribed.

"Ordered: (4) That said defendant keep true and correct records of its total gross sale of commutation tickets, from month to month, and file a monthly statement with the Commission, duly verified by its general manager, setting forth fully all income received from the sale of said commutation tickets.

"Ordered: (5) That complainants and defendant be at liberty, at any time after an actual test of the commutation rates fixed herein has been made, to apply to the Commission by motion or supplemental petition, upon such proof as either may desire, and upon reasonable notice to said complainants or defendant, for a modification or revision of the fares for commutation tickets prescribed herein, if found to be unreasonable or unjust to the public or said defendant, or shall fail to provide a fair and just return on the fair present value of defendant's property as fixed in case No. 179 by this Commission.

"Ordered: (6) That this order shall take effect on December 30, 1914, and that the secretary of the Commission forthwith serve on complainants and defendant certified copies of this order and the opinion filed herein."

A temporary restraining order was granted herein by the District Judge on the filing of the bill, and a hearing before three judges was arranged, pursuant to the provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]). The complainant charges that the order fixing the value deprives complainant of its property without due process of law, not only in that the rates order is based thereon, but for other reasons as well: Because, as is claimed, the Commission erroneously excluded from that valuation large sums alleged to have been expended for interest and commissions during the period of construction and as discounts on the sale of bonds and of preferred stock, and refused to make any allowance for going value or for services performed and expenses incurred in promotion. These contentions, respecting the valuation order, involve matters which must ultimately require careful and serious consideration; but, for reasons which seem to us to be sufficient, their present determination is unnecessary. For the purposes of this hearing, the order fixing the value of complainant's property may be considered as acting only through that establishing and ordering in the commutation rates. It is, therefore, the rates order to which our attention at present must be directed.

The authority of the Commission to require complainant to put in commutation rates is based upon subsection 4 of section 35 of the Public Service Commission Law, which reads as follows:

"Nothing in this section nor in any other provision of law shall be deemed to limit the power of the Commission to require the sale of, and upon investigation prescribe reasonable and just fares as the maximum to be charged for commutation, school or family commutation, mileage tickets over railroads or street railroads, joint interchangeable mileage tickets, round trip excursion tickets, or any other form of reduced rate passenger tickets over such railroads or street railroads: Provided, that all special round trip excursion tickets, the sale of which is limited to less than thirty days, except round trip excursion tickets to state and county fairs and return during the holding thereof, shall be deemed exempt from such regulation by the Commission."

Having determined the value of complainant's property to be $3,900,000, and the net income for the first full year of operation of defendant's line from all sources to be $242,488.22, or a return of 6.2 per cent. on such determined value of its property, the Commission states its conclusions as follows:

"Our conclusion as to the net earnings of the defendant is that while the return is not so high as we would allow if the earnings warranted it, it is a remarkably good showing under the conditions existing during the first year of operation, and does not fall short of a fair return to such an extent as to be a valid reason for refusing to establish reasonable commutation rates, if such rates are otherwise justified. The question remains: Should this Commission, under the facts and circumstances in evidence, prescribe a maximum commutation rate and require the defendant to sell commutation tickets? Answering this question directly, we think the complainants have shown that they are entitled to such relief. Other carriers have voluntarily put such rates into effect with profit. It is shown that many other interurban lines at cities of near the same population as Kansas City and that three other lines at Kansas City now have such reduced rates. There is no doubt that for a distance of several miles from Kansas City there are desirable sites for suburban residence property at stations on defendant's line, and especially at the town of Liberty. In our opinion, a reasonable commutation rate for such

distance will increase the defendant's passenger traffic, and in any event will not result in any material diminution of net earnings."

It is estimated that the commutation rates fixed by the Commission, if fully used by the patrons, would yield a return to the complainant of 1.16 cents per passenger mile. The maximum rate permitted to carriers in the state of Missouri is 2 cents per passenger mile. Speaking to the contention of complainant that this commutation rate would compel the carriage of such passengers at a loss, the Commission finds as follows:

"As the number of such passengers (that is, passengers from Kansas City to the stations mentioned in the rate order) now carried do not exceed 40 or 50, some of them being carried for a short distance, the loss to defendant upon that assumption, considering the magnitude of the total of its business, would be almost negligible."

It was urged at the hearing that these rates were desired by persons, to the number stated, who reside in Liberty and make daily trips to Kansas City. Witnesses gave it as their opinion that, if reasonable commutation rates were put into effect by defendant, a large use would be made thereof by persons who reside in Liberty and make daily trips to Kansas City, and as well in the opposite direction by students attending Liberty colleges whose homes were in Kansas City. From the opinion filed it appears that the Commission attached considerable importance to this suggestion.

Conceding, without deciding, that the section of the Missouri Public Service Commission Law hereinabove quoted confers upon the Commission power to require the sale of, and, upon investigation, prescribe reasonable and just fares as the maximum to be charged for, commutation tickets, it will not, we suppose, be seriously contended that the law, and the authority conferred thereunder, does not presuppose that such rates should be remunerative, or at least that the return from the entire class of traffic affected should be adequate. The Commission, in its opinion, comes dangerously near to holding the contrary. It finds that the present net maximum is 6.2 per cent.—obviously an unusually low percentage of return upon an investment of this character. This is admitted when it is said that that return "is not so high as we would allow if the earnings warranted it," and further that it "does not fall short of a fair return to such an extent as to be a valid reason for refusing to establish reasonable commutation rates if such rates are otherwise justified." But, if the rate is not so high as should be allowed if the earnings warranted it, and if it falls short of a fair return to *any* extent, then it is not such a reasonable and remunerative return as the law guarantees; and any order which still further reduces it to an appreciable, even if comparatively "negligible," extent would appear to be confiscatory. Though the amount be insignificant, the principle involved is none the less weighty.

Since this case was submitted, two opinions have been handed down by the Supreme Court of the United States which have an important bearing upon the question here presented. They are Northern Pacific Railway Co. and Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. State of North Dakota ex rel. T. F. McCue, Attorney General, 35

Sup. Ct. 429, 236 U. S. 585, 59 L. Ed. 735, Ann. Cas. 1916A, 1, and Norfolk & Western Railway Co. v. W. G. Conley, Attorney General of the State of West Virginia, et al., 35 Sup. Ct. 437, 236 U. S. 605, 59 L. Ed. 745. The first of these cases contains many observations pertinent to the case at bar. It is there said:

"But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684 [19 Sup. Ct. 565, 43 L. Ed. 858], the regulation as to the sale of mileage books was condemned as arbitrary, without regard to the total income of the carrier. Similarly, in Missouri Pacific Railway Co. v. Nebraska, 217 U. S. 196 [30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989], it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the state's protective power. * * * The state insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. * * * The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated, and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its services after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority."

What the effect of these late decisions by the Supreme Court, approving the doctrine announced in Lake Shore & Michigan Southern Railway Co. v. Smith, supra, and distinguishing and construing its own previous opinions in St. Louis & San Francisco Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, and Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, may be upon the extent of the power of the state to require and

prescribe commutation rates generally, it is unnecessary to anticipate. It seems clear that that right cannot be created by local public demand or interest; that it cannot be justified by the Commission's views of the probable beneficial effects of such rates upon the company's business, because that would constitute an invasion of the right of the company to conduct and manage its own affairs, subject to a proper exercise of the power of regulation. What other carriers have done, or have been required to do, under different conditions and in different localities, cannot be accepted as contolling. It must at least appear that the net aggregate return to the carrier is just, fair and reasonable; and this does not appear, to our satisfaction, from the statement of the Commission itself.

The power and duty of this court to determine whether the constitutional rights of the complainant have been denied to it is and must be conceded. We think an actual test of the effect of these rates upon the business of complainant would be ineffective, because during the pendency of this litigation, and while the ultimate outcome must be uncertain, there could be no appreciably increased settlement of the suburban districts affected. If, on the other hand, people should be induced to take up such suburban residences upon the faith of rates thus temporarily established, a subsequent adverse decision would work an apparent injustice.

We recognize that this is not a hearing on the merits. The pleadings have not been made up, nor has testimony been taken. It is not intended by the foregoing expression of views to forecast the judgment of the court on final hearing. However, the situation presented, in our opinion, calls for the issuance of a temporary injunction. The court will receive from counsel suggestions respecting the terms of an appropriate order in conformity with the views herein expressed.

WEINHARD et al. v. R. R. THOMPSON ESTATE CO.

(District Court, D. Oregon. May 21, 1917.)

No. 7262.

1. CORPORATIONS ⊜244(6)—SALE OF STOCK—ASSUMPTION OF DEBTS OF CORPORATION.

G. & Sons, owning all of the common stock and most of the preferred stock of a corporation, sold it to defendant by an agreement whereby defendant was to apply the purchase price towards the payment of the corporation's indebtedness, and was to advance G. & Sons on their note the further sum of $35,000, which it was also to apply on the corporation's liabilities, and G. & Sons agreed to guarantee, indemnify, and save defendant harmless against the payment of any further debts and liabilities; the purpose being, as recited, that defendant should obtain title to the corporation's property and assets free and clear of all indebtedness. *Held*, that defendant assumed the entire indebtedness of the corporation by implication, not only up to the amount of the purchase price, but all of the liabilities beyond that amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 968-971.]

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

2. CORPORATIONS ⟸244(6)—ASSUMPTION OF DEBTS—AGREEMENT FOR BENEFIT OF THIRD PERSON—RIGHT TO SUE.

While an executory contract, whereby one party, for a consideration moving from the other, agrees to pay the debt of a third, gives the third party no right of action against the promisor, a party holding a note of the corporation was entitled to sue defendant, under the rule that, where a person has received from another some fund, property, or thing in consideration of which he has made a promise or entered into an undertaking primarily and directly for the benefit of a third party, such third party may sue directly upon such promise or undertaking.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 968–971.]

3. FRAUDS, STATUTE OF ⟸18(3)—ASSUMPTION OF ANOTHER'S INDEBTEDNESS.

The implied undertaking or promise to assume the corporation's debts was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 29.]

At law. Action by Louise Weinhard and others, executrices and executors of Henry Weinhard, deceased, against the R. R. Thompson Estate Company. Judgment for plaintiffs.

Julius Silvestone and Sidney Teiser, both of Portland, Or., for plaintiffs.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for defendant.

WOLVERTON, District Judge. The plaintiffs bring this action to recover against the defendant upon a promissory note executed by the Multnomah Hotel Company, Philip Gevurtz, and I. Gevurtz & Sons, of which the Hotel Company is principal and the other two are accommodation makers. I. Gevurtz & Sons is a corporation. At the time of the execution of the note and the transactions now to be noticed, the defendant corporation was the owner of the Multnomah Hotel, in Portland, Or., and the Multnomah Hotel Company was a lessee of the hotel from it. I. Gevurtz & Sons was the owner of all the common stock and all but 50 shares of the preferred stock of the Multnomah Hotel Company, and on January 10, 1913, gave to the defendant an option to purchase all the common and preferred stock of the company at the price of $175,000. This option ripened into an agreement between the parties, whereby I. Gevurtz & Sons sold to the R. R. Thompson Estate Company all the common and preferred stock of the Multnomah Hotel Company at the figure named in the option. In such sale it was agreed that the defendant company should have the right, in paying the $175,000, to apply the same towards the payment of the indebtedness of the Hotel Company, and it was further agreed, in effect, that the defendant company would advance to I. Gevurtz & Sons the further sum of $35,000 on its promissory note, the same to be also applied in discharge of the Hotel Company's indebtedness and liabilities, and in addition that I. Gevurtz & Sons would guarantee, indemnify, and save harmless the defendant company against the payment of any further debts and liabilities of the Hotel Company, over and beyond the aggregate of the consideration price to be paid for said stock and the $35,000 to be advanced; the purpose being, as expressed by the option, that

the defendant company should obtain good title to the property and assets of the Hotel Company free and clear of all claims, liabilities, and indebtedness, of whatever character or nature. The note and guaranty were given, and the defendant company disbursed the funds which it retained in its hands, namely, the $175,000 consideration and the $35,000, towards the payment of the liabilities of the Hotel Company, and paid liabilities largely beyond these sums in pursuance of the guaranty, but has refused to pay the demand of the plaintiffs on the promissory note of the Hotel Company and its accommodation makers.

The defendant company having answered, the cause was submitted to the court without the interposition of a jury. At the trial it was shown that I. Gevurtz & Sons had been adjudged a bankrupt, and that the defendant company presented a claim against the estate of the bankrupt, which was held by the referee to be provable, which comprised the entire liabilities of the Hotel Company, including the demand of the plaintiffs on the note here sued upon, basing its claim upon the promissory note of I. Gevurtz & Sons for $35,000, the agreement of sale of the common and preferred stock of the Hotel Company, and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and all indebtedness and liability of the Hotel Company. Further than this, the defendant has received from the trustee of the estate of I. Gevurtz & Sons a dividend of 23 per cent. upon all such indebtedness, including the claim which plaintiffs are now suing to recover.

The questions are presented: First, whether the defendant company assumed the payment of the indebtedness or liabilities of the Hotel Company; and, second, whether the defendant company, through and by virtue of its transactions with I. Gevurtz & Sons, rendered itself liable directly to the creditors of the Hotel Company, they being third or outside parties to the dealings between the defendant company and I. Gevurtz & Sons.

[1] On the first question, counsel for the defendant company say that:

"The option, the resolutions of the stockholders and directors of I. Gevurtz & Sons, and the written indemnity all negative the proposition that there was an assumption of the debts of creditors of I. Gevurtz & Sons by the Thompson Estate Company in excess of the purchase price for the stock, namely, $175,000."

This is an admission that the defendant company did assume the debts of such creditors up to the amount of $175,000. But, considering the manner in which the transactions were handled, it is manifest that there was an assumption of the entire indebtedness of the Hotel Company. The purpose of the defendant company, and such was the intendment of the agreement of the parties, was to obtain the stock without impairment of its value because of any impending liabilities of the Hotel Company; and when the note of $35,000 was given, the defendant company retained in its possession the fund arising therefrom, and disbursed it in payment of the creditors of the Hotel Company. None of it was paid directly to I. Gevurtz & Sons; and, as to the indemnity, it operated to reimburse the defendant company in the payment of any liabilities of the Hotel Company beyond the aforesaid amount of $175,-

000, plus the $35,000 disbursed by the defendant company. I am impressed that these transactions import by implication an assumption on the part of the defendant company of the liabilities of the Hotel Company, not only up to the amount of $175,000, but also of all its liabilities beyond that amount.

[2] It is very true, as counsel for defendant contends, that where there is only an executory contract entered into between two parties, whereby one of the parties, for a consideration moving from the other, agrees to pay the debt of a third, the third party has no right of action against the promisor. Washburn v. Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Brower Lumber Co. v. Miller, 28 Or. 565, 43 Pac. 659, 52 Am. St. Rep. 807. But it is settled law now in this state that, where a person has received from another some fund, property, or thing, in consideration of which he has made a promise or entered into an undertaking with such other, but primarily and directly for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and entered into for his benefit, although not a party to the transaction.

"In such case," as was said in Feldman v. McGuire, 34 Or. 309, 55 Pac. 872, "the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action."

The doctrine has been treated of as well in the two cases first above cited, and in Parker v. Jeffery, 26 Or. 186, 37 Pac. 712, and Kiernan v. Kratz, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506, and there has been no modification of it that I am aware of in recent years.

[3] Applying the principle here, there was in legal intendment a fund created and left in the hands of the defendant company for the payment of all the liabilities of the Hotel Company, and for that reason the defendant company was rendered liable directly to all the creditors of the Hotel Company, including the plaintiffs. Nor is the undertaking or promise thus implied within the statute of frauds. Feldman v. McGuire, supra.

THE GEORGE W. ELZEY, JR.

(District Court, E. D. New York. May 18, 1917.)

1. SALVAGE ⊂=38—APPORTIONMENT AMONG SALVORS.

Where a schooner lying at a burning pier was rescued, after being abandoned by those in charge of her, by courageous and extraordinary services on the part of the crew of a tug, and the danger to the tug was much less than that undergone by the members of the crew, the salvage services rendered by the crew should be viewed as a separate item, as should also those of the captain of the tug.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102.]

2. SALVAGE ⊂=27, 38—AMOUNT—APPORTIONMENT AMONG SALVORS.

A fire, destroying a pier at which a schooner was lying, had reached explosive material in cars alongside the schooner, and those in charge of her had abandoned her, when she was rescued by courageous and extraor-

dinary services on the part of the crew of a tug. The tug was worth from $10,000 to $12,000, but the danger to the tug was much less than that undergone by the members of the crew. The schooner before the fire was worth $45,000, and was damaged from $10,000 to $20,000. *Held*, that the salvage services justified an award of $13,500, of which $5,000 should go to the owners of the tug, $5,000 to the crew including the captain, and $3,500 to the captain individually.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66, 93–102.]

In Admiralty. Proceeding by Frederick Bouchard and others against the schooner George W. Elzey, Jr. Decree for libelants in accordance with the opinion.

Foley & Martin, of New York City (J. A. Martin, of New York City, of counsel), for libelant.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The services of the crew of the Gallagher in rescuing the Elzey upon the morning of July 30, 1916, were so courageous and extraordinary that it is impossible briefly to describe them or to adequately state their nature. Fire from the large explosions upon the Black Tom terminal worked to the east and reached explosive material in cars alongside the Elzey just before the rescue. The plight of the Elzey attracted the attention of those boats which had previously been working upon vessels near the scene of the large explosions, and the testimony shows that the Elzey could not have been saved from total loss unless removed from her position alongside the pier. The actual work of putting out the fire was done by the fireboat William L. Strong, but this could not have been accomplished if the Gallagher had not brought the Elzey out in the marvelous manner above referred to.

The tug Genesee, of the Lehigh Valley, claims to have participated in the rescue, while the captain and mate of the Genesee contradict the witnesses from the fireboat, police boat, the revenue cutter Hudson, another tug in the immediate neighborhood, and also the evidence from certain photographs taken by a man in a small motorboat, who took pictures as the Elzey was being towed out. The deck of the Elzey was covered with empty shells and quantities of high explosive powder, as well as with wreckage from the explosions and fire.

The Elzey was later in the same day taken to Erie Basin, where another serious dispute arises as to alleged participation by men from the Gallagher in the looting of certain stores and clothing, of which no further trace has been found. Any looting, which can have occurred, was of small amount. The great number of strangers upon the vessel and the removal of many shells as souvenirs, in boxes and bags, make it extremely doubtful that the crew of the Gallagher committed any acts which detract from their conduct in the rescue of the vessel. Much of the time policemen were present upon the boat, and the circumstances are such as to negative the conclusions reached by those spectators who make the charge of wrongdoing.

A fire occurring from the discharge of the scattered explosives, a couple of days later and after the boat had been redelivered to the own-

ers, has made it impossible to obtain conclusive evidence of the repairs then necessary to restore the Elzey; but the testimony of certain surveyors, who examined the boat in the interval before the second fire, indicates that the damage caused by the explosion and fire at Black Tom would run from $10,000 to $20,000. The value of the boat previous to the explosion was at the very least $45,000, and subsequent events would indicate that she could have been sold for considerably more.

[1] The tug Gallagher was worth from $10,000 to $12,000. The danger to the Gallagher was much less than that undergone by the members of her crew, and it must be held as a proposition of law that the salvage services rendered by the crew with the use of the Gallagher should be viewed as a separate item, as must those of the captain of the Gallagher, who deserves much of the credit of the rescue.

The overwhelming testimony of the witnesses from the other boats makes it impossible to credit the testimony of the witnesses from the Genesee, who claim for themselves substantially all of the credit for the rescue, and who make the captain of the Gallagher merely a meddlesome interloper, who interfered, and who took, according to their story, the boat away from her anchorage by cutting the anchor chain after she was safely riding at anchor.

The testimony in the case shows that the Genesee had been seeking to prevent other operations of the Gallagher in attempted salvage, previous to the time of the rescue of the Elzey, and but little weight can be given to the statements of these witnesses under the circumstances. No similar case of salvage has ever been brought to the attention of any court, so far as this court now knows. The elements of danger were such that no ordinary basis for an award can be found. The Elzey had been abandoned by those in charge of her, and would have been a total loss, in spite of the presence and assistance of the fireboat, if she had been allowed to remain at the pier, which, with many freight cars thereon, was completely destroyed. Like the rescue of an abandoned vessel at sea, in danger of total destruction, the saving of the Elzey must be attributed entirely to the acts of the Gallagher in the few moments which were left, when the Gallagher arrived upon the scene, before a rescue of the vessel became impossible.

[2] Such salvage services justify an award of $13,500, of which $5,000 should go to the owners of the Gallagher, $5,000 to the crew, including the captain, and $3,500 to the captain individually.

Let decree be entered accordingly.

COOK v. BURNQUIST et al.

(District Court, D. Minnesota, Third Division. July 16, 1917.)

1. COURTS ⟸101—NUMBER OF JUDGES—PRELIMINARY INJUNCTION.
Judicial Code (Act March 3, 1911, c. 231) § 266, 36 Stat. 1162 (Comp. St. 1916, § 1243), providing that no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any state statute shall be issued, on ground of unconstitutionality, unless the application shall be heard and determined by three judges, at least one of whom shall be a Supreme Court Justice or Circuit Judge, does not include unconstitutionality under the state Constitution, but only under the federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629.]

2. COURTS ⟸303(2)—FEDERAL COURTS—JURISDICTION—SUITS AGAINST STATE.
A suit to enjoin the members of the Minnesota Public Safety Commission from enforcing an order of such Commission, or prosecuting or threatening to prosecute for nonobservance of such order, injunction being asked upon the ground that such order is not within the purview of the statute creating the Commission, is not a suit against the state, of which federal courts are denied jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½.]

3. CONSTITUTIONAL LAW ⟸26—GRANT OR LIMITATION OF POWER—STATE CONSTITUTIONS.
State Constitutions are limitations, and not grants, of power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 36–38.]

4. CONSTITUTIONAL LAW ⟸81—POLICE POWER—SCOPE AND EXTENT.
The proper extent of the exercise of the police power by a state is determined by the necessities of the situation, within constitutional limitations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148.]

5. INJUNCTION ⟸114(2)—PUBLIC SAFETY COMMISSION—PERSONS ENTITLED.
An order of the Minnesota Public Safety Commission, declaring it necessary and proper for the public safety, the protection of life and property, and as a matter of military expediency and necessity, that licensed saloons be closed at 10 p. m. and remain closed until 8 o'clock the following day, and providing that the city council, board of trustees, or other governing body of municipalities forthwith proceed to enact ordinances executing the provisions of such order, is not directed against any individual, and, if it orders any one to do anything, is directed only against city councils, etc., and hence an individual who has voluntarily closed his saloon at 10 p. m., and who has not been ordered by the Public Safety Commission to do anything, or been threatened in any way by it, is not entitled to an injunction restraining the enforcement of such order, as any loss suffered by him is not directly attributable to the Commission's order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 203–210.]

6. WAR ⟸4—PRECAUTIONARY MEASURES—SAFETY COMMISSION—POWERS.
Such order was within the power granted to such Commission by Laws Minn. 1917, c. 261, § 3, providing that, in the event of war, such Commission shall have power to do all acts and things not inconsistent with the Constitution or laws of the state, or of the United States, which are necessary or proper for the public safety and the protection of life and public property, or private property requiring protection, and to do all acts and things necessary or proper, so that the military, civil, and industrial resources of the state may be most efficiently applied toward the maintenance of the defense of the state and nation, and towards the successful prosecution of such war, and it was also authorized by the specific provision of

such section that the Commission shall have power and it shall be its duty to co-operate with the military and other officers and agents of the United States government, and to aid it in the prosecution of such war and in relation to public safety so far as possible.

7. WAR ⟸4—SAFETY COMMISSION—POWERS.
Laws Minn. 1917, c. 261, § 3, authorizing the Public Safety Commission to do all acts and things "non-inconsistent with the Constitution or laws of the state of Minnesota or of the United States," which are necessary and proper for the purposes therein specified, should not be narrowly construed, but as giving the power to do all things not inconsistent with the broad purposes or the underlying principles and fundamental requirements of the laws of the state.

8. CONSTITUTIONAL LAW ⟸62—WAR ⟸4—SAFETY COMMISSION—POWERS—STATUTORY PROVISIONS.
Laws Minn. 1917, c. 261, § 3, construed as authorizing the Public Safety Commission to require the closing of saloons at 10 p. m., is not invalid, as delegating legislative powers to such Commission, though under other statutes saloons may be kept open until 11 p. m., and until 12 p. m. under a city ordinance, as the Legislature may leave the administrative details to a board or officer, and may permit a change of administrative details by a public board or individual, even after they have been enacted into the statute, and the power in question relates simply to an administrative detail.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102.]

In Equity. Suit by Phil Cook against J. A. A. Burnquist and others. On application for a preliminary injunction. Motion denied.

M. H. Boutelle and E. S. Cary, both of Minneapolis, Minn., for complainant.

Ambrose Tighe, of St. Paul, Minn., for Safety Commission.

C. D. Gould, of Minneapolis, Minn., for city of Minneapolis and its officers.

BOOTH, District Judge. This suit is brought by the plaintiff against the members of the Public Safety Commission of Minnesota, the city of Minneapolis, its mayor its chief of police, and its city attorney, seeking to enjoin the defendants from enforcing an order of the Commission which is known as "Order No. 7," or from enacting any ordinance or regulation enforcing the same, or from threatening to prosecute or from prosecuting for nonobservance of said Commission's order.

The motion now under consideration is a motion made on behalf of the plaintiff for a preliminary injunction, and has been heard on a verified amended bill, several exhibits which have been introduced, and some little oral testimony on behalf of plaintiff, and on behalf of defendants a return to the order to show cause, consisting of a verified answer, certain affidavits, several exhibits and some oral testimony.

The bill of complaint sets up, among other things, the official character of the several defendants, and that plaintiff is, and has been for some time, the proprietor of a saloon and restaurant in the city of Minneapolis located at 25 Washington Avenue North; that he has built up a large and lucrative business, and that he has been conducting the same in accordance with the laws of the state of Minnesota and

the ordinance of the city of Minneapolis. The bill of complaint then alleges that on the 16th day of April, 1917, the Legislature of the state of Minnesota passed a certain act, which is chapter 261 of the Session Laws of 1917, entitled "An act providing for the Minnesota Public Safety Commission, defining its powers and duties in the event of war and otherwise, and appropriating money for carrying out the purposes thereof," and the bill sets forth a synopsis of the act. It next sets forth that on or about June 5th said Commission caused to be adopted a certain order designated as "Order No. 7," and served the same upon the various local officials and authorities of the state. It then sets out a synopsis of the order. It next sets forth that by various threats and otherwise the members of the Commission required the defendant mayor of the city of Minneapolis to instruct the superintendent of police of the city of Minneapolis, and through him the police force, to enforce and carry out the terms of the order, and that the order has been carried out, and that the city council is threatening to pass an ordinance enforcing the provisions of the order. It then sets out that plaintiff has obeyed this order and closed his establishment at 10 o'clock in the evening, whereas formerly he was accustomed to keep it open until 11 o'clock in the evening, in accordance with the provisions of the state law, and that by reason thereof he has suffered great loss and damage in his business. It then sets forth, first, that the act of the Legislature referred to is in contravention of the Constitution of the United States in certain specified particulars; and, second, that said act, if it is construed as authorizing the Commission to make the Order No. 7, is also in contravention of the Constitution of the state of Minnesota; and, third, that if it is construed as not authorizing the issuance of the Order No. 7, then the act of the Commission in issuing Order No. 7 is without authority of law, and is a usurpation of power; and he prays, as I have already stated, an injunction and other relief.

The answer of the defendants admits the passage of the act of the Legislature, and states certain facts and circumstances in view of which it was passed, admits the issuance of Order No. 7, and denies the other allegations of the complaint.

[1, 2] At the commencement of the argument upon the motion for a preliminary injunction, counsel for plaintiff stated that the plaintiff does not seek a preliminary injunction on the first ground stated, namely, that chapter 261 violates the provisions of the federal Constitution, but that he seeks the injunction only on the second and third grounds. With that understanding the court overruled the objection of the defendants to the jurisdiction of the court as at present organized; they claiming that, if such constitutional question was raised under the federal Constitution, at least, it required, under section 266 of the Judicial Code, the presence of three judges to constitute the court. The defendants also objected to the jurisdiction of the court as at present constituted, claiming that the word "unconstitutional," as used in section 266 of the Judicial Code, refers not merely to the federal Constitution, but also includes unconstitutionality as regards the state Constitution. That objection was also overruled. The defendants also attacked the jurisdiction of the court on the ground that, even if it should be held

that the act of the Commission complained of was not within the purview of said chapter 261, still the members could not be enjoined in the present suit, as this would be maintaining a suit against the state of Minnesota. This objection has also been overruled.

Taking up the merits of the motion, the first question is: What is it that is sought to be enjoined by plaintiff? I have already read the prayer for relief contained in the bill. It has reference to Order No. 7. Now there are a number of things in Order No. 7, about which either there is no complaint in this bill, or no showing made upon which preliminary injunction can be based. For instance, there is no complaint here as to that provision of the order covering the closing of saloons until 8 o'clock on the following day, instead of 5 o'clock on the following day; nor is there any complaint, or, if there is, there is no showing for an injunction, on the ground that no women or girls be permitted to enter such saloon, or be served therefrom at any time, because plaintiff's testimony is that he had no such trade; nor is there any complaint, or, if there is, there is no showing for an injunction, based upon the order so far as it touches dancing performances, because the evidence is that there was no such performance in the plaintiff's establishment.

[3] The really vital question in the case is this: Whether an injunction should issue against the defendants to restrain them from taking any steps to prevent the plaintiff from keeping his saloon open between the hours of 10 and 11 o'clock at night. The arguments of counsel upon this motion have taken a very wide range, and perhaps necessarily so. The question of the police powers of the state have been discussed; the nature and character and the extent of these powers; also the question of the delegation or the right of delegation of legislative power by the Legislature to other branches of the government or to administrative boards. It is not necessary, in my view of the situation, to discuss at great length any of these questions. The police power of the state of Minnesota, and indeed the police power of every state in the United States, is exceedingly broad, and the state Constitutions are simply limitations of power, and not grants of power.

[4] The question of what is a proper exercise of the police power may be determined at one time as including certain matters and excluding others, and at another time may be determined as including even those matters that theretofore had been considered as excluded. The proper extent of the exercise of the police power is determined by the necessities of the situation, within constitutional limitations.

The question of delegation of power by the Legislature, and especially legislative power to other branches of the government, to administrative boards or to individuals, has been a question that has caused a great deal of controversy in the courts, not only in the state courts, but also in the federal courts. It has been said that the Legislature makes the law, that the executive executes the law, and that the judiciary expounds or determines what the law is. Of course, that is true as a general statement; but as a matter of fact it is of little help in any particular case, because practically all the cases that arise are border line cases, and the question to be determined is whether the particular act is a legislative act, or whether it is a judicial act, or whether it is an

executive or an administrative act. This question of delegation of power is one that has received the attention of the Supreme Court of the United States, as well as the Supreme Courts of the states. The latest decision of the Supreme Court of the United States is that of First National Bank of Bay City v. Attorney General of Michigan et al., 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed. ——, handed down on June 11th of this year, in which was involved the act of Congress, approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. 261, c. 6 [Comp. St. 1916, § 9794]), and particularly section 11 (k) of the act, giving to that board authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." The question arose whether or not that was a delegation of legislative power to the Federal Reserve Board, such as was not authorized by the Constitution of the United States. The Supreme Court in passing upon that question used the following language:

"Before passing to the question of procedure, we think it necessary to do no more than say that a contention which was pressed in argument, and which it may be was indirectly referred to in the opinion of the court below, that the authority given by the section to the Reserve Board was void, because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them."

Then they refer to a number of cases, and among others to the case of the United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, which was a case where Congress had passed an act with reference to the preservation of forests in the United States, and had placed the carrying out of the plan in the hands of the Secretary of Agriculture, with power to make rules and regulations, and providing that violations of those rules and regulations should be followed by punishment. It was claimed that this was giving the Secretary of Agriculture power to make a law. It was held by the Supreme Court that it was simply a delegation to him of administrative power, and although he had made rules and regulations, violation of which was followed by punishment, yet nevertheless this was not a legislative act on his part within the meaning of that term in the oft-stated principle that a legislative act could be passed by Congress only, and not by boards or by individuals.

There are many decisions in the state of Minnesota, also, as to this power of delegation, and a number of them have been referred to in arguments of counsel at this hearing. The tendency, not only in Congress, but in state Legislatures, is more and more to commit to administrative boards, or to individuals, or to some other branch of the government, administrative details. In the case of Alexander v. McInnis, 129 Minn. 167, 151 N. W. 901, the court in its opinion said, quoting from a previous decision of that court:

"The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government, by imposing upon

other departments duties and powers of a legislative character, which the courts have been inclined to sustain. Perhaps few, if any, cases are to be found, however, where statutes imposing purely legislative duties and powers upon the courts have been upheld; but the authorities are numerous, sustaining statutes which impose upon the courts powers involving the exercise of both judicial and legislative functions—such as the condemnation of land for public purposes, the appointment of commissioners of election in proceedings for adding territory to municipal corporations, and laying out and establishing highways. The proceedings provided for by the statute under consideration involve the exercise of both legislative and judicial powers. The question of the propriety or necessity of public ditches to drain marshy or overflowed lands is one of legislative character. The condemnation of land through which such ditches may be constructed, the assessment of damages, and the determination of the legal rights of parties affected are judicial. The exercise of all these powers is involved in proceedings under this statute."

It must be taken, then, as true in Minnesota that the tendency is more and more to leave administrative details of legislation to either some other department of the government or to boards or to individuals. It need not, however, be decided in this case whether that has been done in chapter 261, Laws 1917. It is possible that this case may be disposed of upon a much narrower basis.

Order No. 7, which is attacked, reads as follows, so far as appertains to this case:

"The Minnesota Commission of Public Safety hereby finds and declares it necessary and proper for the public safety, for the protection of life and property, and as a matter of military expediency and necessity:

"That all licensed saloons in the state of Minnesota be closed at 10 o'clock p. m., and remain closed until 8 o'clock the following day, and that no intoxicating liquors be sold, served, or otherwise disposed of therein between the hours last above stated."

"That the city council, board of trustees, or other governing body of all municipalities in the state of Minnesota forthwith proceed to enact ordinances executing the provisions of this order and prescribing suitable penalties for violations of such ordinances," etc.

[5] Narrowly considered, upon its face, this so-called Order No. 7 does not purport to be a law. It does not purport to be an ordinance. It is not directed against any individual in the state of Minnesota. There are no penalties announced in the order for nonperformance of it, or nonobservance of it. There are no threats made in the order, saying what will happen or what will not happen to persons who pay no attention to the order.

Narrowly construed, this Order No. 7 is simply an announcement of certain findings or a declaration by the Public Safety Commission that certain things are necessary and proper for public safety, for the protection of life and property, and as a matter of military expediency. If any one can be considered to have been ordered to do anything, it is the city councils, boards of trustees, or other governing bodies of municipalities in the state of Minnesota. It is possible that the grammatical construction of the order will allow that interpretation to be placed upon it, and that it is a direct order to the city council, although I think it is fairly open to argument that it is not such order, even as to the city council. But, conceding that it is an order to the city council, the council of the city of Minneapolis and the authorities of the city of Minneapolis are not here making any complaint. They are not

complaining that any threats have been issued to them, or that they have been ordered by the Public Safety Commission to do anything which they do not wish to do, or which they have not the power to do. The complaint here is by a private individual, that by this order of the Public Safety Commission he has been injured in some way in his business. He has had no direct communication from the Commission. He has voluntarily closed his saloon at 10 o'clock p. m., instead of 11 p. m. Giving this narrow construction to Order No. 7, the court would not be justified in granting the application of the plaintiff for a preliminary injunction in this case, because there is no sufficient showing made by the plaintiff that his loss, if any, is so directly attributable to any act of the Commission as would authorize an injunction to issue upon such construction of Order No. 7.

But I do not think that an injunction should issue if a much broader construction is given to Order No. 7 than I have indicated. Let us look at the law under which this Commission of Public Safety was established. It is entitled "An act providing for the Minnesota Public Safety Commission, defining its powers and duties in event of war and otherwise, and appropriating money for carrying out the purposes thereof." There are contained in that act ten sections. The first section simply is the creating part of the act, creating the Commission. The second provides for organization of the board. The fourth section grants power to the Commission to make provision for the comfort of certain persons in military and naval service, and to provide and pay for the support and maintenance of any person or persons dependent for support upon Minnesota soldiers in the military service of the state of Minnesota or of the United States, while such soldier is in service. Section 5 provides for the payment by the Commission of 50 cents per day additional pay to enlisted members of the Minnesota National Guard, for their period of service on the Mexican Border. Section 6 provides for the payment of National Guardsmen from the time of mobilization until they are mustered into the service of the United States government. Section 7 relates to enlistment, organization, and maintenance of a Home Guard.

It is thus seen that the powers conferred on the Commission are of a broad and varied character. In this case it is section 3 that is particularly attacked. Section 3 grants, in addition to the powers granted in sections 4, 5, 6, and 7, certain special powers, five in number, and also certain general powers. The special powers are not attacked in this proceeding. It is the general powers contained in the first paragraph of section 3 that are attacked. That paragraph reads as follows:

"In the event of war existing between the United States and any foreign nation, such Commission shall have power to do all acts and things non-inconsistent with the Constitution or laws of the state of Minnesota or of the United States, which are necessary or proper for the public safety and for the protection of life and public property or private property of a character as in the judgment of the Commission requires protection, and shall do and perform all acts and things necessary or proper so that the military, civil and industrial resources of the state may be most efficiently applied toward maintenance of the defense of the state and nation and toward the successful prosecution of such war, and to that end it shall have all necessary power

not herein specifically enumerated and in addition thereto the following specific powers."

That section contemplates several ends to be attained: First, the public safety is to be guarded. Protection is to be afforded to life and public property, and also to private property of such a character as in the judgment of the Commission requires protection, and, further, the Commission is ordered to do all acts and things necessary or proper so that the military, civil, and industrial resources of the state may be most efficiently applied for the maintenance of the defense of the state and nation, and toward the successful prosecution of such war.

[6] No attempt has been made here to show that the acts which are sought to be accomplished by Order No. 7 are not germane to the purposes set forth in section 3, namely, public safety and the protection of life and property, and the application of the resources of the state to accomplish certain ends. I take it that no attack can successfully be made along that line, because it goes without saying that the order here in question, if it were carried out, would have some relation at least, whether direct or indirect, to the ends sought to be attained; that is, public safety, and the protection of life and property, and the application of the resources of the state to the specific purposes. In fact, it can hardly be disputed that the relation would be direct, and the effect substantial. Nor do I think that the issuance of order No. 7 is without the purview of the provisions of chapter 261. In my judgment, said order is within special power No. 3 in section 3 of the act, and also within the powers granted in the first paragraph of section 3 of the act.

[7] The words "non-inconsistent with the * * * laws of the state of Minnesota," contained in section 3, should not be given a narrow construction, in view of the broad purposes of the act and the great emergency it was intended to meet. The words above quoted should rather be held to mean not inconsistent with the broad purposes, the underlying principles, and the fundamental requirements of the laws of Minnesota. With such a construction placed upon section 3, the Order No. 7 is well within the purview of the act.

The only question that remains in the case is whether or not the Legislature of the state of Minnesota could authorize the Commission to do the acts here in question, namely, to issue Order No. 7. It is claimed that the Legislature could not so authorize the Commission, because it would be a delegation of legislative power. As has been stated here upon the argument by counsel for the defendants, the authorities are almost overwhelming to the effect that a federal court is very loath to declare a state statute contrary to the state Constitution, when that state statute has not received an interpretation at the hands of the Supreme Court of the state. That doctrine has been announced by the Supreme Court of the United States, not only in the case of Louisville & Nashville Railroad v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229, but also in the case of Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, also in the very recent case of Pullman Co. v. Knott, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed.

105, and it has also been announced numbers of times by lower courts. So that, unless it is perfectly plain on the face of it that section 3 of chapter 261 of the Statutes of Minnesota of 1917 is a delegation of legislative power, such as is forbidden or not allowed under the state Constitution, this court would hesitate to hold that statute unconstitutional.

[8] In my view of this section 3, while there may be some doubt as to just what powers are conferred on the Commission, yet I think that section 3 purports to confer merely administrative powers upon the Commission. It is claimed that the act here in question, viz. the issuance of Order No. 7, is not an administrative act, but is an exercise of legislative power. The argument of counsel for plaintiff seems to proceed along the line that, inasmuch as the statutes of the state have heretofore allowed saloons to be kept open until 11 o'clock at night, and inasmuch as the ordinance of the city of Minneapolis has allowed saloons to be kept open until 12 o'clock at night, that this provision of the statute is the law, and that this order No. 7, which provides that saloons shall close at 10 o'clock at night, undertakes to change that law; that this is legislation, and that such legislation cannot be had through this Commission. It seems to me that that argument is not sound in all respects. The Legislature of the state, in passing a law, may include in that law many administrative details, as well as the main vital provisions of the law, or it may pass a law covering a matter broadly and in general, leaving the administrative details to a board, or to certain designated persons; but the administrative details of any particular matter included in a statute still maintain their character of administrative details, and the Legislature may pass an act permitting the carrying out of a change of these administrative details to a public board or to an individual, even after they have been enacted into the statute. It seems to me that this was what was intended to be done by section 3 of chapter 261; that it was not an attempt to confer the legislative power of the state of Minnesota upon the Public Safety Commission, but was simply an attempt to confer power over administrative details in respect to matters pertaining to certain specified things. Those things are the public safety, the preservation and protection of life and property, and the efficient application of the resources of the state toward certain specified purposes. So long as the act of the Commission is simply that of administrative detail, carrying out those various matters, and looking towards those various ends described and designated in section 3, it seems to me that such act is not without authority of the statute, nor legislative in the broad sense, but rather administrative.

That being the view that I take of this law and of this order, it follows that the law is not in contravention of the state Constitution, and it follows, also, that the act of the Commission here complained of is not without the purview of the statute, chapter 261, but is within the purview of the statute; and, that being the case, the plaintiff is not entitled to a preliminary injunction, and the motion is denied.

UNITED STATES v. BILLINGSLEY et al.

(District Court, W. D. Washington, N. D. May 3, 1917.)

Nos. 3492, 3500, 3551.

1. CRIMINAL LAW ⊂⊃1072—ASSIGNMENTS OF ERROR—ALLOWANCE—EFFECT OF ESCAPE.
Assignments of error presented for allowance will not be passed upon, where defendant has escaped from custody, until he surrenders himself.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2703–2706.]

2. CRIMINAL LAW ⊂⊃274—PLEAS—WITHDRAWAL.
Where defendants pleaded guilty after being fully advised of their rights, and subsequently on the trial of codefendants gave testimony which would justify no conclusion other than that of guilt, it was not error or an abuse of discretion to deny leave to withdraw their pleas of guilty and enter pleas of not guilty.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633.]

Logan Billingsley and others were convicted of offenses. On applications for the allowance of assignments of error, etc. Ordered in accordance with the opinion.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash.

Bell & Hodge and Walter B. Allen, all of Seattle, Wash., for defendants.

NETERER, District Judge. Prior to December 28, 1916, the grand jury returned indictments against Logan and Fred Billingsley and a number of other parties, charging conspiracy to violate a federal statute. On December 28th Logan Billingsley was arraigned on one indictment and pleaded guilty to count 1. On January 3, 1917, Logan and Fred Billingsley were arraigned on another indictment and entered pleas of guilty. On January 10th, following, Ora Billingsley was arraigned on another indictment and pleaded guilty. On March 3, 1917, Fred Billingsley was arraigned and entered a plea of not guilty, which was changed to guilty on the 5th of March. On March 5, 1917, Logan Billingsley was arraigned and entered a plea of guilty, and Pielow, also indicted, pleaded guilty. On March 6th, following, the defendants Hodge, Gill, Peyser, Poolman, McLennan, Doom, and Beckingham, who had pleaded not guilty, were placed on trial, and the trial closed on the 31st of March. At the trial Logan Billingsley, Fred Billingsley, Ora Billingsley, and Pielow, under oath, testified. The defendants Gill, Beckingham, Hodge, Peyser, Poolman, McLennan, and Doom were found not guilty. On the 19th of April, following, the defendants Logan, Fred, and Ora Billingsley were brought before the court for judgment and sentence, whereupon they asked permission to withdraw their pleas of guilty and enter pleas of not guilty. The court, in denying the request, said:

"When these defendants were brought into court to be arraigned, Mr. Logan Billingsley was accompanied by counsel. After the first arraignment, he appeared in court without counsel, and stated that he did not desire counsel, and was fully advised of the step he was about to take, and that he was ready to enter his plea of guilty at that time. The other two defendants

declined counsel, and stated that they were advised of the step they were taking, and pleas were received on the first indictment to which arraignments were made. In the subsequent arraignments on the other indictments practically the same proceeding was repeated. This court is always very careful in preserving the rights of defendants, and I have frequently declined to accept a plea on the part of a defendant, when I felt that there might be a question as to whether he was fully advised of his right, even though he expressed willingness to enter a plea of guilty, and have always upon such occasions appointed counsel, where the defendant was not able to employ counsel, to consult with the party prior to entering his plea. The same cautious method was adopted with relation to the defendants now before the court. I do not believe that a defendant, after he has entered a plea of guilty, has an absolute right, as stated by counsel, to withdraw the plea of guilty. It is a discretion which is lodged in the court, and which is always exercised by the court, having in view the justice of the matter presented and the interest of the defendant as the primary consideration. In the matters now before the court, the defendants, after having been duly advised of their rights and of the step they were about to take, entered pleas of guilty. Afterwards this cause was tried; we received testimony for nearly 30 days; all of the defendants now before the bar of the court testified; and for the court, after listening to the testimony of the defendants, to now say that the rights of the defendants require that the court exercise that discretion which is vested in it, in permitting a withdrawal of the plea of guilty and entering a plea of not guilty, would be turning the orderly and proper proceeding of the court into a farcical proceeding. This action the court is not justified under any circumstances to take, from any viewpoint from which the subject can be approached. I remember distinctly the testimony of Mr. Logan Billingsley and Mr. Fred Billingsley. It is impressed on my mind. There isn't anything in the testimony which they gave under oath upon which the court could predicate the slightest excuse for granting this application. The emphasis placed by counsel upon the fact that the defendants who were tried in this case, and who were denominated by counsel as the principal defendants, were acquitted, and that these defendants should therefore not be punished, could not be considered by the court as any reason why, if there has been—I am not saying that there was, but am simply using the language of counsel—a miscarriage of justice with relation to some of the defendants, that there should be further miscarriage of justice, and say that these defendants should not be punished, or that the court should devote time in going over the same matter again to which these defendants have testified, and from which testimony no view can possibly be taken which would justify any conclusion other than that of guilt."

The defendants were sentenced—Ora Billingsley, 30 days in the county jail; Fred Billingsley, 6 months in the county jail; and Logan Billingsley, 13 months in the federal prison at McNeil's Island. On the 25th of April, a petition was filed in this court praying the court to fix—

"the amount of bond to supersede and stay the judgment of the court made and entered herein on the 19th day of April, 1917, pending an appeal to the Circuit Court of Appeals * * * from the order made and entered on the said day, denying them permission to withdraw their pleas of guilty and to enter pleas of not guilty."

Therewith was filed a notice to the district attorney that the motion would be presented to the court on the 26th of April, at 2 o'clock p. m. On the 26th of April a "further petition" was filed in which—

"the above-named defendants respectfully petition that a writ of error may be issued herein, whereby the order and judgment of this court, made and entered herein on the 19th day of April, 1917, denying the motion of the said defendants to be permitted to withdraw their pleas of guilty to the

indictment herein and to substitute therefor a plea of not guilty, was denied, and thereafter sentence was pronounced against the said defendants upon motion of the district attorney for this district, made upon said day, may be reviewed by the Circuit Court of Appeals of the United States for the Ninth Circuit, and also petition this court that in the said order allowing said writ of error to issue it be further provided that the judgment and sentence above mentioned be superseded and stayed, and that the said defendants be admitted to bail pending the disposition of the said writ of error by the said Circuit Court of Appeals of the Ninth Circuit."

At the time said motion and petition were presented the district attorney presented and filed an affidavit stating:

"That on the 22d day of April, 1917, while the defendant Logan Billingsley was in the custody and control of the United States marshal in the United States detention station at the city of Seattle, for the purpose of delivery to the United States penitentiary in execution of the sentence, said Logan Billingsley escaped from said detention station, and since that time has been and now is a fugitive from justice. * * *"

No assignment of errors having been served or filed, in accordance with rule 11 of the Circuit Court of Appeals (150 Fed. vii, 79 C. C. A. vii), or at all, the court, on the request of counsel for the defendants, extended the time for hearing said motion and petition until such assignment of errors could be filed in accordance with said rule. On the last day of the November term, the court, on its own motion, with the consent of the district attorney, extended the term for the period of 10 days for the purpose of affording opportunity of presenting such assignment of errors. On May 1st the defendants filed and presented an assignment of erors, and pray that the same be allowed, and that a transcript of the records, proceedings, and papers upon which judgment was entered, duly authenticated, may be transmitted to the Circuit Court of Appeals, and by stipulation of the attorneys for the defendants and the district attorney the matter was set for hearing at this time, to afford opportunity for the district atorney to examine the same.

[1] The defendant Logan Billingsley having escaped, and not being within the control of the court, either actually or constructively, the court must decline to consider his assignment of errors until such time as he shall surrender himself into the custody of the proper officers of this court. Smith v. United States, 94 U. S. 97, 24 L. Ed. 32; Bonahan v. Nebraska, 125 U. S. 692, 8 Sup. Ct. 1390, 31 L. Ed. 854; Byrne on Federal Criminal Procedure (1916 Ed.) § 390, p. 235, and section 235, p. 136; Ex parte Dorr, 3 How. 104, 11 L. Ed. 514. And for the purpose of affording said defendant Logan Billingsley opportunity to surrender himself to the officers of this court, consideration of his assignment of errors is continued until such surrender, provided he surrenders within the time to which the November term of court has been extended.

[2] The discretion of the court in declining to permit a withdrawal of the plea of guilty was not abused, and I do not believe that error was committed. Andrews et al. v. United States, 224 Fed. 418, 139 C. C. A. 646; United States v. Lewis (D. C.) 192 Fed. 637; United States v. London (D. C.) 176 Fed. 976; United States v. Bayaud et al. (C. C.) 16 Fed. 376; People v. John Lennox, 67 Cal. 113, 7 Pac.

260; Barton v. State, 23 Wis. 587; Commonwealth v. Winton, 108 Mass. 485. While the allowance of a writ of error is a matter of judicial determination, upon a consideration of the grounds set forth in the assignment of errors, the court would not be captious, but would rather invite an expression of the Circuit Court of Appeals; and while the defendant has a right of appeal, irrespective of assignment of errors, I can see no objection to allowing the assignment of errors and affording opportunity to the defendant before the court to present his contentions to the Circuit Court of Appeals from the viewpoint of his choosing.

Pending a hearing in the Circuit Court of Appeals, the defendant Fred Billingsley may be released on bail in the sum of $2,500, approved by the court. Hardesty v. United States, 184 Fed. 269, 106 C. C. A. 411; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; Hudson v. Parker, Judge, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424.

PUGET MILL CO. v. SKAGIT COUNTY.

(District Court, W. D. Washington, N. D. May 10, 1917.)

No. 3467.

1. TAXATION ⟸482(2)—CORRECTION OF ASSESSMENTS—NOTICE TO PROPERTY OWNERS.

Under Rem. & Bal. Code Wash. § 9200, subd. 1, authorizing the board of equalization to raise the valuation of real property which, in their opinion, is returned below its fair value, after at least five days' notice in writing to the owner or agent, a notice to appear before the board and show cause why the valuation of land should not be raised, stating that the board would be in session on Monday, Tuesday, and Wednesday during the first three weeks in August, and on Saturday of the third week, being the 21st of August, was insufficient, as, under the decisions of the state Supreme Court, the property owner must be notified to appear on a date certain.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 855.]

2. COURTS ⟸366(6)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

The Supreme Court of a state having construed a statute as to notice to property owners of a proposed change in the valuation of their property, the federal court must regard such construction as a part of the statute and be bound thereby.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 961.]

At Law. Action by the Puget Mill Company against Skagit County. Decree for plaintiff.

Hughes, McMicken, Dovell & Ramsey and Palmer & Askren, all of Seattle, Wash., for plaintiff.

A. R. Hilen, Pros. Atty., and Thomas Smith, both of Mt. Vernon, Wash., for defendant.

NETERER, District Judge. Plaintiff seeks to recover from the defendant $7,313.86, together with interest from June 1, 1916. It is al-

leged that the board of equalization of Skagit county, without notice, arbitrarily raised the valuation of lands by plaintiff owned in the county, and taxes were levied upon such valuation, and that the amount sought to be recovered is the amount represented by such unwarranted act on the part of the equalization board; that the amount of taxes represented by the valuation returned by the county assessor was tendered and refused, and on June 1st, when said taxes had become delinquent, for the purpose of preventing the issuance of delinquency certificates, the amount claimed was paid, under protest, however, and that demand for such repayment was duly made thereafter, and refused.

It is conceded that a notice was given to the plaintiff company by the board of equalization of Skagit county on the 3d day of August, 1915, which was received by the plaintiff company on the following day. The notice reads, omitting formal parts:

"You are hereby notified to be and appear before the board of equalization of Skagit county, Washington, and show cause, if any you have, why the assessed valuation of the property as per annexed schedule shall not be raised from the items marked 'Present Valuation' in said schedule to the items under the title 'Raised to' in said schedule. And you are hereby notified that if you fail, neglect, or refuse to so appear, or fail to show good and sufficient cause why said proposed raise should not be made, then the said board will proceed to make such raise in assessed valuation on property as specified in said schedule.

"You are further notified that the said board of equalization for the year 1915 will be and remain in session in the commissioners' rooms at the courthouse in Mt. Vernon, Skagit county, Washington, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of each and every Monday, Tuesday, and Wednesday during the first three weeks in August, and will also be in session, between the same hours as stated, on Saturday of the third week in August, being the 21st day of said month, which day will be the last day of said session."

Attached to this notice was a description of the property, with the returned valuation and the proposed valuation opposite each description. The section of the Washington statute under which the board of equalization was proceeding (section 9200, subd. 1, Rem. & Bal. Code) provides as follows:

"They shall raise the valuation of each tract or lot of real property which in their opinion is returned below its true and fair value, to such price or sum as they believe to be the true and fair value thereof, after at least five days' notice shall have been given in writing to the owner or agent."

[1, 2] It is contended that under this section of the statute, as construed by the Supreme Court of the state, the plaintiff was entitled to have a date certain fixed by the notice when the matter would be heard, and Everett Water Co. v. Fleming, 26 Wash. 364, 67 Pac. 82, is cited as conclusive of the contention. In this case the notice reads, omitting formal parts:

"You are hereby notified to appear before the board of equalization within five days from the date of this notice and show cause if any, why the * * * assessment of your company for the year 1901 should not be raised. * * * Board will be in session from the 19th to the 24th of this month."

Notice was dated August 16th, and the Supreme Court (26 Wash. at page 367, 67 Pac. 83) says:

"It will be observed that the statute provides that this action shall be taken after at least five days' notice shall have been given to the owner, and the notice calls upon the company to appear within five days from the date of the notice. So it would seem that in any event the statutory notice, without which the valuation cannot be raised, and which is a jurisdictional prerequisite, was not given. It is, however, contended by the appellants that, inasmuch as the board did not act until the 24th day of August, fully five days had elapsed between the date of the notice and the action of the board in raising the assessment. But we think the statute contemplates a notice given to the property holder with a date certain, fixed for his appearance, and that that certain date must be fixed more than five days from the service of the notice."

It is contended on the part of the defendant that the notice in the instant case is distinguishable from the notice in Everett Water Co. v. Fleming, supra, in that a definite date was named as the 21st, and that the notice merely gave to the owners the option of appearing at any time upon any of the other days.

I think an analysis of the two notices would hardly justify this conclusion, as the 24th, being the last day in the Everett notice, is fully as emphatic as the 21st in the notice in issue. The employment of the term "within five days" in the Everett notice was not the determining factor, and no doubt was employed through inadvertence, and if a day and time certain had been fixed for hearing the matter after five days' notice the term "within" would not have been controlling, as it was not in the decision. There is no legal distinction between the 19th and the 24th of a month, and the Mondays, Tuesdays, and Wednesdays of each week and the 21st or Saturday of the last week, and the Supreme Court of the state having construed this section of the statute, this court must regard it as a part of the statute and be bound thereby. Leffingwell v. Warren, 2 Black (67 U. S.) 599, 17 L. Ed. 261; Lewis v. Monson, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265; Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. The protest was sufficient, and if a verified demand was necessary, it was waived.

A decree may be presented in favor of the plaintiff.

In re ADAMS.

(District Court, N. D. Georgia. May 26. 1917.)

No. 5506.

BANKRUPTCY ⊂=372, 417(2)—REOPENING CASE—VACATING DISCHARGE.

Where a bankrupt honestly tried to schedule a debt due C., but, under a misapprehension as to whom it was due, scheduled it as due the C. Company, an application to set aside the discharge and reopen the case, in order that the schedules might be amended, would be granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 574, 869.]

In Bankruptcy. In the matter of Jesse E. Adams, bankrupt. On application to set aside the discharge. Discharge set aside, and case reopened.

Claude C. Smith, of Atlanta, Ga., for petitioner.
Adamson & Miller, of Atlanta, Ga., for objector.

NEWMAN, District Judge. This is an application to set aside the discharge, granted the bankrupt on December 2, 1916. The petition to set aside this discharge is upon the following ground:

The bankrupt owed Charles H. Cone, $250, made up of 10 notes of $25 each, and, under some misapprehension as to the party to whom the debt was due, he scheduled the Cone Realty Company, at Macon, Ga., in which city Charles H. Cone lived. Charles H. Cone was connected, in some way, with the Cone Realty Company, and notice of the application for discharge was sent to that company, and it seems, from what is before the court, that the notice was sent, in some way, to the attorney of the Cone Realty Company. But, at all events, Cone denies, in his answer to the application to set aside the discharge, that he received any notice. He is proceeding with a suit against the bankrupt on the notes for the $250.

It seems that the bankrupt, Adams, was honestly trying to schedule this particular debt, but was under some misapprehension in some way as to whom it was due. I am inclined to follow the decision of Judge Chatfield, of the District Court of the Eastern District of New York (In re McKee et al. [D. C.] 165 Fed. 269), which was a case very similar to this, and upholds the granting of an application in a case such as this for setting aside the discharge and reopening the case.

Of course, Charles H. Cone will have the right to object to the granting of the discharge, after the discharge is set aside and the case reopened, upon all statutory grounds; but I think, under the circumstances in this case, following the only authority distinctly in point which I have seen, that the application should be granted. And I am of the opinion, independently of any authority, that in a case like this, where there was a sincere and honest effort to schedule a creditor, and a mistake was made as to who the creditor was, it would be only fair to reopen the case, and give the bankrupt a chance to make his schedule conform to the facts.

It is therefore ordered that the discharge heretofore granted be set aside, and the case reopened.

ST. LOUIS INDEPENDENT PACKING CO. v. HOUSTON, Secretary of Agriculture, et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4692.

1. FOOD ⊂⊃3—MEAT INSPECTION ACT—CONSTRUCTION—REGULATIONS OF DEPARTMENT.

The provision of Order No. 211, promulgated by the Secretary of Agriculture under Meat Inspection Act March 4, 1907, c. 2907, 34 Stat. 1260, and effective November 1, 1914, that sausage shall not contain cereal in excess of 2 per cent., nor water in excess of 3 per cent., if construed to include any compound or mixture, however labeled, as contended by the Department, is not within the power conferred on the Secretary to make regulations to carry out the purposes of the act; such purposes being to prohibit generally the sale of products which are unsound, unwholesome, or otherwise unfit for human food, or misbranded, without prescribing formulas for such products.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 2.]

2. CONSTITUTIONAL LAW ⊂⊃74—ACTS OF ADMINISTRATIVE OFFICERS—REVIEW BY COURTS.

Where the head of a department is not acting for the executive, but in the performance of a duty specifically imposed upon him by a law of Congress, whether his acts, where they affect individual rights are within the powers conferred, is a question which the courts have jurisdiction to determine.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124.]

Amidon, District Judge, dissenting.

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

Suit in equity by the St. Louis Independent Packing Company against David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of such Bureau at St. Louis. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 231 Fed. 779. See, also, 215 Fed. 553, 132 C. C. A. 65.

Franklin Ferriss, of St. Louis, Mo. (A. B. Stratton, of Chicago, Ill., on the brief), for appellant.

W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for appellees.

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

SMITH, Circuit Judge. This suit was brought to obtain a temporary and permanent injunction "restraining Hon. David F. Houston, Secretary of Agriculture, Dr. A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, and their and each of their assistants, deputies, inspectors, employés, representatives, and clerks, from refusing to mark, stamp,

tag, or label as 'Inspected and Passed' all meat food products or sausage manufactured by your orator found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food," and that a mandatory injunction issue requiring the defendants to "mark, stamp, tag, or label as 'Inspected and Passed' all the meat food products or sausage manufactured by your orator found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render said meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food."

Upon application to the District Court for a temporary injunction, it was denied, and complainant appealed, and the District Court was reversed, and a temporary writ of injunction ordered issued. St. Louis Independent Packing Co. v. Houston, 215 Fed. 553, 132 C. C. A. 65. We assume that upon receipt of the mandate a temporary injunction was issued by the District Court in accordance with our order, although that fact does not appear in the record. No notice was ever had upon Dr. A. D. Melvin, and he did not appear. Hon. David F. Houston, Secretary of Agriculture, and James J. Brougham, inspector in charge, filed separate answers in substantially the same form, the former on January 21, 1915. The case came on for trial at the September term, 1915, as between the complainants and the defendants answering, and upon the evidence the District Court on March 20, 1916, dismissed the bill at complainant's cost, and it appeals. The opinion of the District Court upon the application for a temporary injunction will be found in 204 Fed. 120, and its opinion upon final hearing, upon which its decree was reached from which this appeal was taken, is found in 231 Fed. 779. The case having been three times reported, we shall not make a full statement of the issues and evidence, but content ourselves with stating such new matters as will be necessary to an understanding of the case, leaving the history of it to be learned from the former opinions.

The appellees earnestly urge a change in our rulings on the former appeal, 215 Fed. 553, 132 C. C. A. 65. This we cannot consider. The former opinion constituted the law of the case. The authorities upon this are so numerous that we cannot cite them individually. They will be found fully reviewed and cited in 2 Enc. of U. S. Sup. Ct. Repts. 412 to 415, and 12 Enc. of U. S. Sup. Ct. Repts. 142. In view, however, of the fact that the Secretary of Agriculture had not been served prior to the time of the former appeal, although his subordinate had been, we concede it is barely possible this rule does not apply to him. We therefore say that the argument in support of a change in our former rulings is not persuasive and the rulings are adhered to.

Notwithstanding its somewhat inaccurate statement in the bill, complainant has not been manufacturing sausage, but a compound which is embraced in the term "meat food products" and known as "sausage and cereal." Water is added, and the power of the Agricultural Department to compel the use of the word "water" in the name of the compound has never been questioned. Thus it can require that plain-

tiff's product be labeled "sausage, cereal and water," if it deems such conduct proper, and it could even require that the label show the percentage of each article used. These meat food products have been marked for years by stamping upon every link of the sausage in large link goods the words "sausage and cereal." Where the links are very small, this has been put upon every third to fifth link. The same inscription is put upon the ten-pound cartons of shipment; but, as this does not reach the ultimate consumer, it will for the present be ignored.

[1] It affirmatively appears that the complainant's manufacture contains no dyes, chemicals, preservatives, or ingredients that would render them unsound, unhealthy, unwholesome, or unfit for human food. The sole question on this branch of the case is whether cereal in excess of 2 per cent. or water in excess of 3 per cent. may be added to sausage not to be sold as sausage, but to be sold as sausage and cereal, or under such other name as the Secretary of Agriculture may prescribe, not, however, denying the right to use the word "sausage." When the practice of mixing cereal with sausage commenced in this country, the cereal was higher priced than the meat. One government witness stated that the mixture of cereal with sausage made the compound less speedy of digestion.

Let us now see what was decided on the former appeal. It was there said:

"The entire Meat Inspection Law (Act March 4, 1907, c. 2907, 34 Stat. 1260 [U. S. Comp. St. Supp. 1911, p. 1366]) was, as distinctly indicated in it, to prevent the sale of food which is unsound, unwholesome, or otherwise unfit for human use or misbranded. It was not the design of Congress in that law to provide standards of quality, except to prohibit the sale of food which was unsound, unwholesome, or otherwise unfit for human use, and secure true branding. The article in question, being sausage with cereal, or sausage and cereal, was not intended to be prohibited by Congress. The act of Congress did contemplate, however, that the purchaser should know what he was buying. * * * We come now to the provision, inserted in section 16 of rule 18, that sausage shall not contain cereal in excess of 2 per cent. If this simply means that it shall not be sold as sausage, it possibly may have been valid: but the government does not contend that this is its true meaning. If it meant that sausage sold as such should not contain cereal in excess of 2 per cent., but that sausage and cereal might contain more, it might be sustained. But the contention is that the Secretary of Agriculture had power to prohibit the manufacture and sale of sausage and cereal, where the cereal was in excess of 2 per cent. This the Secretary of Agriculture had no power to do. * * * The question is simply: Could he prohibit the making of a compound which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives, or ingredients which render such unfit for human food, by a mere regulation? We are constrained to say that he cannot. A compound of beef and pork would not entitle the Secretary of Agriculture to prohibit the words 'beef' and 'pork' to appear in the title, and to condemn all such compounds on the label of which they appear."

It is claimed that the Secretary of Agriculture has issued, effective November 1, 1914, a new set of "Regulations Governing the Meat Inspection of the Department of Agriculture," and that previous regulations are abrogated thereby. This was, of course, long after the commencement of this suit. These new regulations omit the preamble to the order of February 28, 1913, referred to in 215 Fed. 553, 556, 132

C. C. A. 65, 68. The new regulations divide the substance of the circular in question, and so far as material are as follows:

"Regulation 17. Labeling.

"Section 9.

"Paragraph 2. When cereal is added to sausage within the limit prescribed by paragraph 4 of section 6 of regulation 18, there shall appear on the label in a prominent manner, contiguous to the name of the product, the statement 'cereal added.' When water in excess of 3 per cent. and cereal are added to certain kinds of sausage as permitted by paragraph 5 of section 6 of regulation 18, the same shall be labeled 'sausage, water, and cereal'; but when no cereal is added, the addition of water need not be stated.

"Paragraph 3. When cereal is added to any meat food product other than sausage in quantities not exceeding 5 per cent., the statement 'cereal added' shall appear on the label in a conspicuous manner contiguous to the name of the product, and if any such product contains cereal in quantities exceeding 5 per cent., then 'cereal' shall appear as a part of the name of the product in uniform size and style of letters, for example, 'potted meat and cereal': Provided, however, that products such as meat loaves, pates, soups, tripe with onion sauce, Irish stew, stewed kidneys, hash, chile con carne, tamales, boiled dinners, chop suey, scrapple, and the like, may contain cereal and similar substances without the presence of such substances being indicated on the labels."

"Regulation 18. Reinspection and Preparation of Meat and Products.

"Section 6.

"Paragraph 4. Sausage shall not contain cereal in excess of 2 per cent.

"Paragraph 5. Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping, and mixing, in which case the added water or ice shall not exceed 3 per cent., except that sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style, and Bologna style may contain added water in excess of 3 per cent., but not in excess of an amount necessary to make the product palatable."

It is manifest that this is but a rearrangement of the order of February 28, 1913. The prayer of the bill is not to set aside any order of the Department of Agriculture, but has been heretofore set forth in full. Surely a mere rearrangement of the regulations without changing their meaning would not deprive the complainant of the right to maintain this action. It is claimed, however, that the omission of the preamble to the order of February 28, 1913, has a material effect, and while the preamble showed the order was made to prevent misbranding, its omission and the transfer of a portion of the order from "Labeling" to "Preparation of Meat and Products," makes it evident that the Secretary has found, as alleged in the fifth paragraph of his answer, that sausage and cereal with the cereal in excess of 2 per cent. is unwholesome.

We will, for the purposes of this case, assume that the Agricultural Department has determined that sausage and cereal are not sound, healthful, and wholesome, although it appears that paragraph 3 of section 9 of the seventeenth regulation is in conflict with this assumption. It appears from the government's own testimony, as well as from this regulation itself, that under this provision the production of scrapple is permitted. Scrapple is defined by the Century Dictionary as:

"An article of food something like sausage meat, made from scraps of pork, with liver, kidneys, etc., minced with herbs, stewed with rye or corn meal.

and pressed into large cakes. When cold it is cut in slices and fried. It is of Pennsylvania Dutch origin."

Roughly speaking, scrapple is simply sausage and cereal; the latter, however, largely preponderating. It is not put up in any tin container, but as sold it is usually a loaf wrapped up. The Department permits Armour & Co., to make sosera, in which there is sausage and unlimited cereal and water. Other institutions put up other compounds of sausage and cereal under their fanciful names. Meat loaf is so composed and manufactured with the approval of the Secretary. In the actual administration of the law there is no controversy with the Department's officers, so long as they do not use the name "sausage" in the title.

We held in this case on the former appeal that the Department had no right to forbid the use of the word "sausage" on a compound in which it entered, provided the article was not sold under a false or fictitious name, and to that we adhere. When this and the Pure Food Law were pending in Congress, it was well known that there were two distinct plans for pure food legislation. One was to prescribe formulas; the other was to prescribe that food was to be sound, healthful, and wholesome, and that it should be truly branded. See United States v. Lexington Mill Co., 232 U. S. 399, 34 Sup. Ct. 337, 58 L. Ed. 658, L. R. A. 1915B, 774.

This is well illustrated by the controversy which has raged for years about so-called alum baking powders. A number of learned chemists have cheerfully testified on both sides of that question. One side has sworn that the use of alum in baking powder in considerable quantities would make it highly injurious to health; the other has sworn that, while this would be true if the alum was retained in the finished product, the function of a baking powder was to generate a gas, which, in expanding, would rend the product apart and make it light, and the gas in so doing escaped, and there was no alum in the finished product. Confronted by controversies like this, Congress passed the Pure Food Law and the Meat Inspection Law in the same session. In neither of them did it prescribe standards of quality, but it required true branding, and the Meat Inspection Law prohibited the sale of food which is unsound, unhealthful, unwholesome, or otherwise unfit for human use.

We are not prepared to say the regulation in question has any application to the manufacture and sale of sausage and cereal, as distinguished from sausage; but the attempt to so construe it is an attempt to make the act of Congress do just what Congress had no thought of doing—prescribe formulas.

It is claimed that sausage and cereal will decay more rapidly than sausage. The evidence for the defendants shows that under certain conditions fresh sausage, without any water or cereal, will become moldy in 10 days and putrid in 13. Under the same conditions, with 3 per cent. of water and no cereals, it will become moldy in 6 days and putrid in 13 days. With 3 per cent. of water and 2 per cent. of cereal, it will become moldy in 10 days and putrid in 10 days. With no water and 2 per cent. of cereal, it will become moldy and sour in 10 days

and putrid in 13 days. With 10 per cent. of water and no cereal, it will become moldy and sour in 10 days and putrid in 13 days. With 10 per cent. of water and 2 per cent. of cereal, it will become moldy in 6 days and sour and putrid in 10 days. With no water and 5 per cent. of cereal, it will become moldy and putrid in 13 days. With 3 per cent. of water and 5 per cent. of cereal, it will become moldy in 10 days and putrid in 13 days, exactly the same time required for pure sausage to become moldy and putrid. With 10 per cent. of water and 5 per cent. of cereal, it became moldy and sour in 10 days. With 20 per cent. of water and 5 per cent. of cereal, it became moldy in 6 days and putrid in 10 days; and the same was true with 20 per cent. of water and 10 per cent. of cereal. It is claimed that the diminished life of the product is due to fermentation in the corn flour and water. While the length of life of the product seems to slightly vary in inexplicable manner, we shall assume that sausage, cereal, and water will become moldy in 6 days, which we shall also assume would stop its sale, while pure sausage would last 10 days. Does this authorize the Secretary of Agriculture to stop its sale while sound?

Regulation 18, section 1, paragraph 1, is:

"All meat and products, whether fresh or cured, even though previously inspected and passed, shall be reinspected by bureau employés as often as may be necessary, in order to ascertain whether the same are sound, healthful wholesome, and fit for human food at the time the same leave official establishments. If upon such reinspection any article is found to have become unsound, unhealthful, unwholesome, or in any way unfit for human food, the original mark, stamp, or label thereon shall be removed or defaced and the article condemned."

This regulation is clearly within the power of the Secretary of Agriculture, and enables him to see that no product is sold after it becomes moldy, sour, rancid, or putrid. It is a matter of common knowledge that there is the greatest variance in the keeping qualities of organic substances sold for human food. Some early summer apples are short-lived, while others will keep until the next crop is harvested. Could a public officer, who had the power to pass upon whether apples were sound, healthful, wholesome, and fit for human food, condemn summer apples, when they were faultless, because they would not keep as long as Ben Davis, for example? Can food be pronounced unsound, unhealthful, unwholesome, or unfit for human food because within some number of days after its manufacture and sale it may possibly become so?

The compound here in question is ordinarily delivered to the retailer within 24 hours and to the consumer within 48, and upon the assumption that we have made would grow moldy in 6 days, reaching the consumer 4 days before it has so far deteriorated as to become moldy. That is a matter concerning which the Secretary of Agriculture has nothing to do under the law. There is no claim that if the packers kept pure sausage for 4 days, and then offered to sell it to the retailer, the Department of Agriculture could prevent such sale, although confessedly it would have no longer life than the composition produced by the complainants has. While the answer in the fifth paragraph de-

nies that the cereal used is wholesome, there is much evidence that it is wholesome, and none that it is not. The Department now claims that the chief ingredient of the cereal is starch, and that to make this readily digestible it is required to subject it to more heat than the housewife ordinarily applies, and the failure to do this reduces the speed of digestion. Again, there is great variance in organic matter sold as food in the speed with which it is digested. Such variance does not constitute any of the food unsound, unhealthful, or unwholesome as these terms are used in the law.

We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that sausage shall not contain over 2 per cent. of cereal; but he has absolutely no power to refuse to have "passed" sausage and cereal which contains more than 2 per cent. of cereal, and if he has attempted to go further he has attempted to rewrite the act of Congress in his official capacity, and, if so, such assumption of authority by him is not conclusive on all the world. If he wants a law which will enable him to prepare formulas further than the present law does, he may or may not succeed in modification of the existing law.

[2] The defendants contend that the action of the Secretary of Agriculture in declaring meat products unsound, unhealthful, or unwholesome is conclusive. We have already shown that the Secretary has never in fact held that sausage and cereal were unwholesome; but, if he had, his finding would not be conclusive.

The first case cited by appellees is Marbury v. Madison, 1 Cranch, 137, 166, 2 L. Ed. 60. In that case the court said:

"The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

And on page 170 of 1 Cranch (2 L. Ed. 60):

"Where the head of a department acts in a case, in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to a court to control in any respect his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden, as, for example, to record a commission, or a patent for land, which has received all the legal solemnities, or to give a copy of such record, in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

In that case it was held an original action in the Supreme Court for mandamus could not be maintained, but that opinion shows it could have been maintained in a nisi prius court.

Appellees next cite Kendall v. United States, 12 Pet. 524, 9 L. Ed. 1181. That was a suit for a writ of mandamus against the Postmaster General of the United States in the United States Circuit Court of the District of Columbia to compel him to credit the amount allowed by the Solicitor of the Treasury to certain contractors who were the relators in the suit. The court held that the Solicitor of the Treasury had by the act of Congress been created an arbitrator and that his findings were conclusive. This is now elementary. The other cases held that the writ of mandamus cannot run, and one that the writ of injunction cannot issue to control the decision of an executive officer, which we cheerfully concede to be the law.

In Bates & Guild v. Payne, 194 U. S. 106, 108, 24 Sup. Ct. 595, 597 (48 L. Ed. 894), which was started by a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication known as "Masters in Music" received and transmitted through the mails as a matter of the second class, and to enjoin defendant from enforcing an order theretofore made by him denying it entry as such, the court said:

"But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated; and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

The case most nearly in point of any called to our attention is that of School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. That was a case of a fraud order issued against the complainant by the Postmaster General. In the first place, that was a case involving an alleged healing system, which is, of course, somewhat similar to determining the question of wholesomeness of food. The court said:

"That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

And again:

"Conceding, arguendo, that when a question of fact arises, which, if found in one way would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts

being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes."

And again:

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

That whole case is worthy of careful consideration.

In Howe v. Parker, 190 Fed. 738, at page 746, 111 C. C. A. 466, at page 474, this court, speaking by Sanborn, Presiding Judge, said:

"Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive, in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi judicial tribunal a question of law. Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 151, 76 C. C. A. 114, 121; Laing v. Rigney, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Delaware, Lackawanna & Western R. Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213. And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity. The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure, the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross mistake of the facts proved, or by a decision induced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent, and charge the legal title derived from it with a trust in his favor"—citing numerous authorities.

It is claimed that, while complainants sold their sausage and cereal at less than the price of sausage, they did not make such a reduction as they might have made, and this was a fraud upon the public, and makes complainant's hands unclean, and the rule that he who comes into a court of equity must come with clean hands precludes a recovery by them. That plaintiff sold the combination cheaper than pure sausage and at an agreed price, even though it may have given them a somewhat larger profit than they could realize on pure sausage, was not such a fraud as to preclude their maintaining this action.

The case is reversed and remanded, with directions to the District

Court to set aside its decree dismissing the complainant's bill and award plaintiffs a decree substantially as prayed, reserving the right of the defendants to apply for a modification of the injunction upon a showing that the Secretary has adopted new regulations as to labeling sausage and cereal, requiring that the label show that cereal in excess of 3 per cent. and water are used in the compound.

AMIDON, District Judge (dissenting). This case has followed an unusual course, and has led to unfortunate results. When it was here on appeal from the order denying the preliminary injunction, this court, without any judicial investigation of the facts, decided that the name "sausage" could be deprived of its false and deceptive character, when applied to plaintiff's product, by the use of qualifying words, and ordered the temporary injunction to issue. The case then went back to be tried in the lower court upon the merits, but this court had already precluded such an investigation. Our decision was held to be binding upon the trial court that the name was not false and deceptive, and that court was shut up to an investigation of whether plaintiff's product was unwholesome. The result is that the question whether the name is false and deceptive, as used in the channels of trade, is finally decided by this court against the decision of the Department solely on bill and answer, and without any investigation of the question. Fortunately, if this case shall be taken to a higher court for review, our decision on the appeal from the order denying a temporary injunction will be open for re-examination. I shall therefore take occasion now to express my own views upon both branches of the case.

Speaking first to the question of unwholesomeness, the trial court has found as the result of the evidence adduced at the trial that plaintiff's product is unwholesome, and this is in accord with the findings of the department. I think those findings are binding upon this court, and should not be disturbed, and upon that ground the decree should be affirmed.

The case for the government, however, is much stronger upon the ground that the use of the name "sausage," either singly or in connection with other words, when applied to plaintiff's product, is false and deceptive, and I shall now state my views on that subject.

"No meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name. But established trade name or names which are usual to such products, and which are not false or deceptive, and which shall be approved by the Secretary of Agriculture are permitted."

This is the provision of the Meat Inspection Law upon which this case turns. It does not help to a proper decision to emphasize the part of the law which deals with unwholesome meat as a reason for minimizing the provision which I have quoted. By a later section of the statute the Secretary of Agriculture is given full power to make rules and regulations necessary to carry all provisions of the law into effect.

The difference of view between myself and the majority of the court may be stated in a few words. They believe that the Secretary

of Agriculture, in preventing the use of false and deceptive names, is confined to inventing qualifying words which in their judgment will be sufficient to prevent the names being false and deceptive. That it seems to me, is only a part of his power, and to confine him thus to the dictionary is to take away other and more practical powers which the law confers. It is said by the majority that the law does not give the Secretary power to fix the standards for meat products. That, it seems to me, is sticking in mere forms of words. It may be that the Secretary's rules could have been expressed in better phraseology. His letter, however, by which the rules were promulgated, makes clear their purpose. There it is declared that they are enacted "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name." In the light of this purpose the rules must be interpreted as if they read:

"The name 'sausage' shall not be used upon any package containing a meat food product if the product contains cereal in excess of 2 per cent. or added ice or water in excess of 3 per cent.," etc.

Thus interpreted the rules come within the authority of the Secretary of Agriculture to make rules and regulations for the purpose of carrying into effect that provision of the statute which forbids the use of false and deceptive names upon meat food products.

One of the most effective ways of preventing names being false and deceptive is to fix the standard of articles to which those names may be applied. The law not only authorizes the Secretary of Agriculture to compel the use of qualifying words when that method will prove effective, but it likewise empowers him to say that a trade term like "sausage," which will be understood by the general public to include certain elements in the article, shall not be used if the article does not possess those elements. That is a practical way of preventing the use of the name for false and deceptive purposes. The record in this case shows that the Secretary of Agriculture has tried for years to deal with the subject by the use of qualifying words which indicate that other elements like cereal or potato have been added, and we ought to conclude, from the fact that he has abandoned that method, that he has found as the result of the actual experiences of commerce that it is ineffective, and that the word "sausage," even with such qualifiers, still continues to be false and deceptive to the public. As the result of that experience he has changed his method of attack. My Brethren seem almost to assume that an equitable estoppel in pais ought to be applied to his adopting these new measures because of his unsuccessful experiences in using modifying terms. Such a view deprives that officer of the right to profit by experience.

Names and things are but the reverse sides of a single shield. One of the ways to prevent names being deceptive it to prescribe the qualities of articles to which they may be properly applied. That is one of the large features of the Pure Food and Drug Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1916, §§ 8717–8728]). Those who deceive by the use of trade-names understand this well. Their whole art consists in taking from an article having a familiar name some of the qualities which its name implies, and then continuing to apply the

name to the changed article. Plaintiff admits that this is precisely what it is doing. It tells us that sausage was until quite recently made from lean meat. The poorer qualities of sausage are now made from ears, snouts, livers, and other parts of the animal that were formerly waste. These cheaper parts, however, are deficient in fiber, necessary to give the sausage proper consistency. To meet this difficulty something else must be used as a binder. Cornmeal and water supply that need; so the plaintiff adopts them. That all sounds like progress in the industry and the saving of waste. We must not, however, allow it to deceive us. What has really been done is, not only to substitute a poorer quality of food for a better, but to substitute cornmeal and water in place of meat. To apply the old name to this changed article is to make it false and deceptive. In the actual experiences of the meat trade, the addition of modifying words may be wholly ineffective to prevent the deception. My Brethren say, however, that that is the only remedy which the law permits. In my judgment, the statute clearly submits the whole subject to the Secretary, and the able corps of scientific men associated with him, to adopt whatever measure seems wise as the result of their studying the actual facts of the meat trade. It is an unwarranted use of judicial power for a court sitting in a law library to substitute its judgment for that which the law commits wholly to these administrative officers.

There is no just ground for holding that the regulations of the Secretary, or his refusal to stamp plaintiff's products as inspected and passed, are arbitrary. (a) The standard fixed by the regulations is in accord not only with the legislative action of the state of Pennsylvania, but with the scientific investigations of the best students on the subject, particularly the investigation of the Association of German Food Chemists at their tenth general meeting held at Dresden in May, 1911, and numerous other associations of food experts referred to in the briefs for the government. (b) The government inspectors have not refused to mark plaintiff's products, if sound and wholesome, "Inspected and Passed," if they are put up under some name of which the word "sausage" is not the distinctive feature, but base their refusal upon the ground that plaintiff insists upon the right to use the term "sausage," either singly or in composition, and that to permit it to do this would be to approve a false and deceptive name.

The majority opinion really comes to this: Appellant may make any combination of meat, cereals, and water which it sees fit, and affix the name "sausage" to the product, and the power of the Secretary of Agriculture is confined to inventing qualifying words or phrases to prevent this product from being false and deceptive. That I cannot regard as a sound interpretation of the statute. It clothes the department with power to prohibit the use of a name in connection with a product when the product is of such a character as to make the name false and deceptive. In the exercise of that power the Secretary may forbid the use of the name at all in connection with the compound, if in the good-faith exercise of his judgment he is of the opinion that the name, when thus used, is false and deceptive. It may well occur that no qualifying phrase which can be invented will take away the false and deceptive quality of the name in the channels of trade.

The dictionaries all tell us that sausage means a compound of meat, sage, and spices, and I agree with the trial court, and the Supreme Court of Michigan (Armour & Co. v. Bird, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. [N. S.] 616), that this is what it means to the general public. Standard authorities say that 10 per cent. of cereal will absorb 30 per cent. of water. So, if appellant may exercise the right which it claims in its bill, the purchaser who thinks he is getting a meat product will be getting 40 per cent. of cornmeal and water Considering the present high prices of meat, that is probably as clear a fraud as any transaction that has been condemned under the Pure Food and Drugs Act.

I cannot accept the view that the mark "Inspected and Passed" has nothing to do with the name, but means only that the meat product is wholesome and free from dyes and other forbidden ingredients. The section here involved has to do with food products placed or packed in cans or other receptacles. As to these the statute provides that the inspection is not complete until the package is labeled and sealed, or closed under the supervision of an inspector, and as a part of the same sentence it is provided that the meat products thus put up shall not be sold under a false or deceptive name. By the department rules the essential features of the label are: (1) The true name of the product; (2) the inspection legend; (3) the establishment number. From these provisions I think the words "Inspected and Passed," when placed upon the label of which the name is a part, fairly mean, and will be understood by the purchaser of the package to mean, not only that the food product is wholesome and fit for food, but that the name is not false or deceptive when applied to the contents of the package. Under the statute it is as much the duty of the Secretary of Agriculture to protect the public against fraud by a deceptive name as against poison by an unwholesome article, and when a package with a name upon it is stamped "Inspected and Passed," I can find no reason why the Secretary should not see to it that the article is true to the name as well as wholesome. Congress goes so far as to say that established trade-names may not be used if they are deceptive, and requires even such names to be approved by the Secretary of Agriculture. This, in my judgment, commits to that officer the determination, not only what name shall be used, but what thing shall be entitled to use established trade-names.

There is another independent ground for the affirmance of the decree. It is manifest upon the record that plaintiff's cereal and water sausage is a cheat upon the poor to whom it is mainly sold. Such ancient maxims as "he that doeth iniquity shall not have equity" forbid the granting to it of any relief. Our decision, however, awards the extraordinary writ of mandatory injunction commanding officers to stamp what they have found to be a fraud "Inspected and Passed," thus compelling them to aid and abet the fraud which they were appointed to prevent.

In my judgment the decree dismissing the bill was clearly right and should be affirmed.

BARKER et al. v. CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 166.

1. MUNICIPAL CORPORATIONS ⟸360(3)—CONTRACTS—CONSTRUCTION—COMPENSATION.

A contract with a city for the construction of an aqueduct required excavation to a certain line, within which no material should remain, but provided for payment to an arbitrary fixed line, outside the line so specified, whether excavation should be carried to the payment line or not; it being intended to be a fair average of necessary excavation. It provided that the contractor should excavate an open trench, as required, between points to be designated; that whenever the words "directed," "required," "ordered," "prescribed," etc., should be used, it should be understood that the direction, etc., of the engineer was intended; that the work should be done in conformity with the directions of the engineer as given from time to time; that the engineer should make all necessary explanations of the specifications and give all orders and directions contemplated; that the work should conform to the lines and grades and be done in accordance with the drawings and directions given by him from time to time, subject to such modifications or additions as he should determine to be necessary; that exact shapes and dimensions of the excavation and of the aqueduct should be prescribed from time to time; and that, when the materials at the established subgrade should be too soft or unsatisfactory for supporting the aqueduct, the materials should be excavated to such additional depth and within such limits as might be ordered, for which one of the prices stipulated, according to location, would be paid. *Held* that, where the engineer ordered the aqueduct made wider than the contract drawings called for, the payment line followed the modifications directed by him, and the contractor was entitled to payment to the line as so changed, and not merely to the payment line shown by the contract drawings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

2. MUNICIPAL CORPORATIONS ⟸360(3)—CONTRACTS—CONSTRUCTION—COMPENSATION.

Under a provision of such contract that, wherever the lower portion of the trench was in rock, that part of the excavation should be measured as if excavated with certain specified slopes to the surface of the rock; that the side slopes of the excavation in earth, for measurement purposes, should start at the rock surface, four feet from the measurement line for excavation in rock, and be measured as 1 vertical on 1 horizontal, such four feet was to be measured from the measurement line for excavation in rock as changed by the engineer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

3. MUNICIPAL CORPORATIONS ⟸360(3)—CONTRACTS—CONSTRUCTION—COMPENSATION.

Under provisions of the contract that the payment line for excavation was the payment line for refill, that embankments were to have certain dimensions and slopes, that the contractor should make such modifications as might be ordered, and payment should then be made to the ordered lines, and that the quantity of refilling and embanking to be paid for would be the quantity in the finished refills or embankments below the prescribed lines and above the original surface of the ground or prescribed excavation line, whether or not the excavation might have been taken out fully to the prescribed lines, the contractor was entitled to payment

for refilling and embanking to the line as changed by the engineer, though actual excavation and refilling was not done within the enlarged spaces, as the contract did not contemplate that work was to be paid for only when actually done, but fixed an arbitrary line upon which payments were to be based.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

4. MUNICIPAL CORPORATIONS ⊂=352—CONTRACTS—CONSTRUCTION—COMPENSATION.

Under provisions of such contract that the quantity of concrete masonry to be paid for should be that deposited in place in accordance with the drawings, specifications, or requirements, and that, wherever the aqueduct was of such type that masonry was to be built against the sides of any excavation, the concrete should be measured as if the excavation were made exactly to the prescribed lines, the contractor was entitled to payment for concrete masonry to the payment line, although not actually placed, since, if the "prescribed lines" meant the lines prescribed for concrete, and not for excavation, or the line to which the engineer ordered the concrete placed, and the concrete was therefore to be measured as placed, there would be no use for the words "as if," or the word "excavation."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 883.]

5. MUNICIPAL CORPORATIONS ⊂=360(1)—CONTRACTS—CONSTRUCTION—COMPENSATION.

Under provisions of the contract relative to the tunnel for such aqueduct, that the contractor should excavate all ledge rock to lines shown on the drawings or ordered, and that the quantities to be paid for should be the number of cubic yards of ledge rock before excavation, reckoned to the payment line, and a further provision that the contractor should bear all losses resulting on account of the character of the work, or because the nature of the land in or on which the work was done was different from what was assumed or expected, where rock outside the payment line fell into the excavation by reason of unexpected faults in the rock, and had to be broken by blasting and then removed, the contractor was not entitled to payment therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892.]

6. MUNICIPAL CORPORATIONS ⊂=360(7)—CONTRACTS—ENGINEER'S CERTIFICATE—CONCLUSIVENESS.

Under a provision that the engineer should in all cases determine the amount, quality, etc., of the work to be paid for, and decide every question which might arise relative to the fulfillment of the contract, and that his estimate and decision should be final and conclusive upon the contractor, the engineer's decision that the contractors were not entitled to payment for removing rock which fell into the excavation from outside the payment line was conclusive against the contractor, in the absence of unfairness or fraud.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892½.]

7. MUNICIPAL CORPORATIONS ⊂=360(7)—CONTRACTS—CONSTRUCTION—COMPENSATION.

Under provisions making the engineer's decisions as to the amount of work to be paid for conclusive upon the contractor, and providing that the inspection of the work should not relieve the contractor of any of his obligations, that defective work should be made good, and unsuitable materials might be rejected, though such work and materials had been previously overlooked by the engineer, and accepted or estimated for payment, and that if the work, or any part thereof, should be found

defective before the final acceptance of the whole work, the contractor should forthwith make good the defect, where the engineer and inspector marked points needing to be trimmed to complete the excavation to the contract lines, but failed to mark a great many of such points until after the tunnel had been otherwise completed, and the contractors were put to considerable expense in trimming them, the engineer's decision that the contractor was not entitled to payment therefor was final and conclusive on the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892½.]

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

Action by Benjamin Barker and another, as receivers of Patterson & Co., a copartnership, against the City of New York. Judgment for plaintiffs for an insufficient amount, and they bring error. Reversed, and new trial granted.

Spencer, Ordway & Wierum, of New York City (Nelson S. Spencer, of New York City, of counsel), for plaintiffs in error.

Lamar Hardy, Corp. Counsel, of New York City (Terence Farley, Charles J. Nehrbas, and John F. Collins, all of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an action to recover damages for breach of contract. The city of New York on March 24, 1909, entered into a contract in writing with the firm of Patterson & Co., which had its principal office in the city of Pittsburgh, in the state of Pennsylvania. The contract was made by the city, through the board of water supply, by virtue of the power vested in it by chapter 724 of the Laws of 1905 of the state of New York, and the amendments thereto, for the construction of a portion of the Hudson river division of the Catskill aqueduct, including Bull Hill tunnel, in the town of Phillipstown, Putnam county, N. Y., and was known as "Contract 22." After the execution of the contract Patterson & Co. entered upon the performance of the work therein specified, and did a large amount of work, and furnished a large amount of materials in executing the same.

On September 20, 1910, a decree was entered in the Circuit Court of the United States for the Southern District of New York, appointing the plaintiffs temporary receivers of all the property, business, rights, assets, and effects of said firm. That decree also authorized the receivers to conduct the work under contract No. 22 until the further order of the court. They were also empowered:

"To institute suits at law or in equity for the recovery of any estate, property, damages, or demands existing in favor of the said copartnership, and in their discretion to compound and settle with any debtor of the copartnership, or with persons having possession of its property, or in any way responsible at law or in equity to the said copartnership."

The receivers thereafter and pursuant to the decree took possession of the properties of the said copartnership, managed and operated the same, and conducted the work under contract No. 22, with the consent

of the board of water supply and of the defendant. On October 13, 1910, a further decree was entered, and the temporary receivers were made permanent, with authority to conduct the work under the contract; and they completely performed the work and during the progress of it received from time to time from defendant payments on account.

The contract contained the following provision concerning the final payment on completion of the work:

"Whenever, in the opinion of the engineer [defined to be the chief engineer of the said board of water supply], the contractor shall have completely performed this contract on his part, the engineer shall so certify, in writing, to the board, and in his certificate shall state, from actual measurements, the whole amount of work done by the contractor, and also the value of such work under and according to the terms of this contract. On the expiration of 40 days after the acceptance by the board of the work herein agreed to be done by the contractor, and the filing of a certificate of the completion and acceptance of the work in the office of the comptroller, signed by the chief engineer and the board, the city shall pay to the contractor, in cash, the amount remaining after deducting from the amount or value stated in the last-mentioned certificate, all such sums as shall heretofore have been paid to the contractor under any of the provisions of this contract, and also any sum or all such sums of money as by the terms hereof the city is or may be authorized to reserve or retain."

After complete performance of the contract the chief engineer duly certified in writing to the fact. Thereupon the board of water supply accepted the work and a certificate to that effect, signed by the engineer and the board, was filed in the office of the comptroller of the city. The certificate stated that the work was completed on September 7, 1912. It also stated that the value of the work was $724,642.97, and that the amount due was $98,518.17. The amount therein stated to be due was paid to the plaintiffs, less the sum of $4,000, which the comptroller refused to pay on the ground that the amount retained was improperly included in the final certificate.

The complaint which the plaintiffs have filed alleges three causes of action. The first is for the recovery of the $4,000 included in the final certificate and which the comptroller has refused to pay. The second and third causes of action are based upon items not included in the final certificate, but which the plaintiffs claim should have been included. At the close of the trial counsel for plaintiffs moved the court to direct a verdict in their favor for the sum of $4,000 principal and $352 interest on the first cause of action. The motion was granted. He then moved that a verdict be directed in favor of plaintiffs for the sum of $5,640 principal and $497.03 interest, making a total of $6,137.03, on the second cause of action. This was denied. He then moved that a verdict be directed in favor of plaintiffs in the sum of $39,446.30 principal and $3,476.21 interest, making a total of $42,922.51, on the third cause of action, making a final total of $53,411.54. This was denied. He then asked to go to the jury on the second cause of action, as to the amount to which the plaintiffs were entitled to recover. This was denied. He then asked to go to the jury upon the third cause of action, upon a direction that the plaintiffs were entitled to recover upon an assessment of damages to be made by the jury. This was de-

nied. He then asked to go to the jury upon the question as to whether or not the contract lines were in fact given by the engineers of the board of water supply to the plaintiffs, and whether those lines were erroneous, and also upon the question of damages which the plaintiffs suffered by reason of the error; and this was denied. The jury accordingly brought in a verdict for $4,352, pursuant to the court's direction.

Thereafter the court granted a motion of defendant's counsel and reduced the verdict to $2,109.98. The defendant concedes, therefore, that the sum of $4,000 arbitrarily deducted by the comptroller was erroneous, and that only $2,060.68 should have been deducted, if its defense is good. Whether its defense is good is the question which arises under the first cause of action, and which must now be considered.

As respects the first cause of action, attention has been already called to the fact that, while the final certificate showed that there was due to the contractors $98,518.17, the comptroller only paid the plaintiffs $94,518.17, retaining $4,000. It appears that the contract provided that the city should not be precluded or estopped by any certificate given by the board, or the chief engineer, or any other agent of the city, from at any time showing the correct amount and character of the work done or that the certificate was incorrect, or that the work done or materials furnished did not in fact conform to the specifications. By virtue of the above provisions the comptroller contended, and the city interposes it as a defense to the first cause of action, that the engineer extended the lines of payment in violation of the terms of the contract, and that the contractor was permitted to change the type of aqueduct to a type not shown on the contract drawings and that the final certificate was incorrect and improperly made.

This sum of $2,060.68, which the defendant now claims should be deducted, is made up of three items: (1) A deduction of $1,681.57 for open cut excavation work; (2) a deduction of $325.93 for refilling and embanking; (3) a deduction of $53.18 for concrete masonry in open cut and on embankment.

We shall consider these various items in their order. The general scheme of the contract is that the waterway should be excavated to a certain specified line shown on the contract drawings, within which no material of any kind could be permitted to remain. In order to secure this result, it was necessary that actual excavation should be carried beyond this specified line, because in earth the sides of the excavation slip into the excavated prism, and in rock the blasts cannot be made to break geometrically true. The city undertook to pay, therefore, for excavated material removed, refilling, and other work done to an arbitrary fixed line, called the payment line, outside of the specified line within which no material could remain, and it undertook so to pay, whether excavation was carried to this arbitrary line or not, or beyond it. The reason for this was that, given the width of the bottom of the invert of the aqueduct under normal conditions, the payment line was intended as a fair average of necessary excavation; if in any part of this section of the aqueduct the soil or rock proved better than the average, the contractor was to get the benefit in the

cost of the work of actual excavation; if it proved worse than the average, he was to lose the cost of necessary excavation and refilling beyond the payment line.

The scheme of the contract contemplated, therefore, that the contractor might find it necessary to do certain work outside of the contract payment lines for which he would not be entitled to payment, and, again, that he would be entitled to payment, for work inside of the payment lines which had not been found necessary to perform. The theory of this was that these items would offset each other and would result in a fair average to both parties.

[1] That payment has been made to the payment lines shown on the contract drawings is admitted; and the question presented to us is whether the contractors are entitled to be paid according to a changed payment line fixed by the engineer which required the contractors to perform additional work. That the contractors performed additional work is not disputed. The aqueduct was made wider than the contract drawings called for. This was done because the engineer thought widening necessary, owing to the character of the earth or rock which was found at the time of the excavation. The board of water supply therefore ordered a thicker side wall for the aqueduct and the payment line was moved back one foot. The contract expressly provides that:

"The contractor shall excavate an open trench for the aqueduct, as required, between points to be designated," etc.

It provides that:

"Whenever in the specifications or upon the drawings the words 'directed,' 'required,' 'permitted,' 'ordered,' 'designated,' 'prescribed,' or words of like import, are used, it shall be understood that the direction, requirement, permission, order, or prescription of the engineer is intended," etc.

It provides that all the work must be done—

"strictly pursuant to, and in conformity with, the attached specifications, and the directions of the engineer as given from time to time during the progress of the work, under the terms of this contract, and also in accordance with the contract drawings."

It provides that:

"The engineer shall make all necessary explanations as to the meaning and intention of the specifications, shall give all orders and directions contemplated therein or thereby and in every case in which a difficult or unforeseen condition shall arise in the performance of the work required by this contract."

It provides that:

"The work, during its progress and at its completion, shall conform to the lines and grades given by the engineer, and shall be done in accordance with the drawings and directions given by him from time to time, subject to such modifications or additions as he shall determine to be necessary during the work."

It provides that:

"Wherever the bottom of the aqueduct trench is in rock, it shall be excavated and the aqueduct constructed substantially in accordance with the type designated 'In Rock and Earth' on sheet 10. Exact shapes and dimensions will be prescribed from time to time."

It provides that:

"Wherever the materials at the established subgrade are too soft or unsatisfactory for supporting the aqueduct, either by reason of the excavation being partly in earth and partly in rock, or for any other reason, the materials shall be excavated to such additional depth and within such limits as may be ordered, for which one of the prices stipulated in items 2 to 5, according to location, will be paid."

It is apparent that the contract drawings were intended to indicate the general lines and plans upon which the work was to be conducted, and that the contract contemplated that the conduct of the work might require modifications, alterations, or additions, necessitating the payment of additional compensation to the contractor. In this case the materials at the established subgrade were found unsatisfactory and the engineer ordered new limits under the authority of the specifications. It is contended that the excavation in rock and earth should be measured as provided in section 2.14 of the contract "as of the bottom width shown on the drawings," and that, no matter how much the bottom width may have been extended by the engineer, such extension could not affect the payment lines. This is to overlook the provisions as to the obligation of the contractor to observe the directions and requirements of the engineer and especially the provision in section 2.3 that where the materials are too soft or unsatisfactory the materials shall be excavated "within such limits as may be ordered, for which one of the prices stipulated in items 2 to 5, according to location, will be paid," and again the provision in section 2.13 that excavation shall be measured for payment "as of the cross-section included within the prescribed limits hereinafter described and of the actual length made in accordance with directions." The words "prescribed" and "directed," as has been pointed out mean prescribed or directed by the engineer.

The authority of the engineer to widen the aqueduct and to require the additional excavations is not doubtful. It follows that the payment line described in the specifications follows the modifications directed by the engineer.

[2] Section 2.14 of the specifications provides how excavation is to be measured for payment where the aqueduct trench is wholly in earth, and it provides a different rule where the trench is in rock. As to the latter, and it is that with which we are now concerned, it provides as follows:

"Wherever the lower portion or the whole of the aqueduct trench is in rock, that part of the excavation shall be measured as of the bottom width shown on the drawings and as if excavated with the side slopes of 6 vertical on 1 horizontal, up to the points at which these slopes intersect the outside surface of the concrete section of the aqueduct. Above these points the measurement shall be made as if excavated with a horizontal beam of 1 foot at such point of intersection, and with the side slopes of 6 vertical on 1 horizontal up to the surface of the solid rock, as shown for the section 'In Rock and Earth' on sheet 10. Wherever the lower part only of the aqueduct trench is in rock, the side slopes of the excavation in earth, for the purposes of measurement, shall start at the surface of the solid rock, 4 feet out from the measurement line for excavation in rock and shall be measured as 1 vertical on 1 horizontal."

The bottom width shown on the drawings having been increased by the engineer for reasons already stated, the line of payment ascends

from that width on a side slope of 6 vertical on 1 horizontal (with a 1-foot beam where the slopes intersect the outside surface of the concrete) to the surface of the solid rock.

It is conceded by defendant that, to the surface of the solid rock, the engineer had authority to move the payment line; and the comptroller has in fact paid the plaintiffs, both for excavation and refilling, for work done below the surface of the rock, although neither the excavation nor the refilling was made altogether to the payment line. The contention of the city is that the remainder of the measurement specified in section 2.14, above quoted, should not be followed. The Board of Water Supply followed the direction specified in section 2.14. It measured out 4 feet from the measurement line for excavation in rock, as fixed by the increased width of the invert, and to which line the comptroller does not object and for which excavation in rock he has paid. The comptroller, on the other hand, measured 4 feet out from the line as shown on the drawing for rock and earth on sheet 10. That makes his measurement in the typical sheet 2½ feet, instead of 4 feet.

In doing this the comptroller is not only inconsistent with himself, because he has recognized the engineer's line below the surface of the rock, but he is without warrant in the contract.

[3] As respects the second item, which relates to the deduction for refilling and embanking, little need be said. The facts relating to it are substantially the same as those concerning excavation. It is admitted that the excavation lines prescribed by the engineer included a volume wider than that shown by the contract drawings in the instances with which we are concerned. The plaintiffs, therefore, were entitled to payment to the lines as prescribed by the engineer; for the specifications declare that "the payment line for excavation is the payment line for refill," and after declaring that embankments are to have in general the dimensions and slopes shown on the drawings the specifications provide that:

"The contractor shall make such modifications in the lines as may be ordered, and payment shall then be made to the ordered lines."

They also provide that:

"The quantity of refilling and embanking to be paid for will be the quantity in the finished refills or embankments below the prescribed lines and above the original surface of the ground or the prescribed excavation lines, whether or not the excavation may have been taken out fully to the prescribed lines."

The prescribed lines mean, as we have already held, the lines prescribed by the engineer. As the defendant's only claim is, as respects the item now under consideration, that it should not pay for the additional volume included between the lines shown by the contract drawings and the lines prescribed by the engineer, its defense to the claim is without merit.

The District Judge based his decision upon the ground that actual excavation and refilling was not done within the enlarged spaces. He admitted that, if it had actually been done, the defendant would have been bound to pay for it, inasmuch as the engineer had ample au-

thority under the contract to order the excavation. In this position he is without support from the provisions of the contract. There is not a single instance which may occur under the contract where work of construction is to be paid for only when actually done. In every such case such work is to be paid for to an arbitrary line, known as the payment line.

[4] The third item involved, relating to concrete masonry, presents the same point that was involved in the two preceding items, namely, whether or not concrete is to be paid for to the payment line, although not actually placed. The specifications provide in this particular, as in the case of refilling, that payment shall be made to the prescribed lines for excavations. The language is:

"Wherever the aqueduct is of such type that masonry is to be built against the sides of any excavation, the concrete shall be measured as if the excavation were made exactly to the prescribed lines."

The claim of the corporation counsel that "prescribed lines" means lines prescribed for concrete, and not for excavation, is a strained construction, which we cannot accept. What do the words "as if" mean, unless they mean to provide a mathematical, and not an actual, volume for which the concrete is to be measured? And why use the word "excavation" at all in this connection, if the concrete is to be measured "as placed?" The contract drawings show a payment line for concrete above the rock surface, as well as for concrete below the rock surface. Below the rock surface the comptroller has paid for concrete to the prescribed lines. Above the rock surface he disputes the right of the contractors to payment, although there is no warrant whatever in the language of the contract, that we have been able to discover, for making any distinction based upon the rock surface. The only essential is that the concrete is to be built against the side of the excavation. If this is done, and it was done in this case, payment must then be made to the prescribed lines. The language of the contract (section 11.32 of the specifications) is that:

"The quantity of concrete masonry to be paid for under items 11 and 12 shall be that deposited in place in accordance with the drawings, specifications, or requirements," and whenever "masonry is to be built against the sides of any excavation" (not an excavation below the surface of the rock, but any excavation), "the concrete shall be measured as if the excavation were made exactly to the prescribed lines."

Neither is there anything in the claim that "prescribed" refers to the line to which the engineer ordered the concrete to be placed. The contractors were obligated by the contract to conform to the engineer's orders, and by the terms of the contract they cannot be deprived of compensation for having done so; and as they are entitled to compensation for excavation and refill to the prescribed lines, although excavation and refill were not actually made, and, as the defendant concedes, they are entitled to be paid for concrete below the surface of the rock to the prescribed lines, although not actually placed, so for the same reasons they are entitled to like compensation for concrete above the surface of the rock to the prescribed lines.

[5] The second cause of action is upon a claim that there should have been included in the final certificate $5,640 representing rock ex-

cavated at $6 a cubic yard, that being the price for rock excavation as fixed in the contract. It is claimed that because of "faults" in the rock the blasting of the tunnel resulted in the removal of more rock than was expected or intended, and that the contractors should have been paid for the removal of this excess quantity of rock. The contract provided that the contractor should "excavate all ledge rock encountered in the grade tunnel to lines shown on the drawings or ordered in accordance with section 52, and in a manner to fulfill section 35 and sections 46 to 50." It also provided that the quantities to be paid for under the preceding provision "shall be the number of cubic yards of ledge rock before excavation, reckoned everywhere to the authorized 'B line.'" The "B line" is a line shown on the contract drawings. It is a line specified to be fixed arbitrarily 13 inches outside of the "A line" shown on the contract drawings, which latter line is a line within which no unexcavated material of any kind could be permitted to remain.

The plaintiffs alleged that during the course of the work they excavated 940 cubic yards of rock encountered in the grade tunnel to the "B line." The engineer refused to include that work in his certificate, and the comptroller refused to pay for it. The court below had also rejected the claim for reasons we do not find it necessary to pass on. The 940 cubic yards of rock involved in this claim relate to rock outside the "B line," and which fell from the sides or roof of the tunnel; the fall being occasioned by seams in the bedrock. This rock, after it had fallen, had to be broken up by blasting and then removed. It is said that, as the rock fell from defects in the formation, and was not contemplated in the specifications, nor by the contractors, when bidding, it should be allowed for. Every blast makes rock tumble into the hole or bore already made when a tunnel is being driven, and why the contractors should receive extra pay because the blast brings down more rock than was expected, or because it falls where it was not intended it should fall, we confess ourselves unable to see. Certainly the contract does not authorize such payments, and we know of no principle of law which entitles a recovery. Not only does the contract not authorize such payment to be made, but it makes clear that the contractors assumed the risk of just such happenings as they now complain of; for the contract expressly provided that the contractors should bear "all losses resulting * * * on account of the character of the work or because the nature of the land in or on which the work is done is different from what is assumed or was expected." See Mairs v. Mayor, 52 App. Div. 346, 65 N. Y. Supp. 160; Dunn v. City of N. Y., 205 N. Y. 342, 351, 98 N. E. 495. We think that this put upon the contractor the risk of such faults in the land as might cause rock to fall into the tunnel. The contractor is under the contract to be paid only for excavation to the "B line" and is not entitled to charge for removing the rock that slipped beyond it.

In Merrill-Ruckgaber Co. v. U. S., 241 U. S. 387, 36 Sup. Ct. 662, 60 L. Ed. 1058, the plaintiff entered into a contract for the construction of the foundation for the extension of the United States Assay Office in the city of New York. The contract provided that the work was to be done in accordance with the specifications, and specifications

and drawing were to be reciprocally explanatory, and the decision of the supervising architect as to the proper interpretation of the drawings and specifications was to be final. The contractor brought suit for extra work claimed to have been done on the foundations of the building. There being ground for dispute as to whether the work performed was extra work or was required by the terms of the contract, the decision of the architect was held to be final; there being no just foundation for a charge of unfairness on his part.

[6] In the instant case the contract provides in article 3 as follows:

"To prevent disputes and litigations, the engineer shall in all cases determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract, shall determine all questions in relation to said work and the construction thereof, and shall in all cases decide every question which may arise relative to the fulfillment of this contract on the part of the contractor. His estimate and decision shall be final and conclusive upon said contractor, and in case any question shall arise between the parties thereto, touching this contract, such estimate and decision shall be a condition precedent to the right of the contractor to receive any money under this contract."

This court is of the opinion, following the doctrine recognized in Merrill-Ruckgaber Co. v. U. S., supra, that by virtue of the above provision the engineer had authority to determine every question as to the amount the contractors were entitled to be paid under the contract, and that his decision is final and conclusive as against the contractors, in the absence of fraud, although not conclusive upon the city of New York. His final certificate was his decision as to what the contractors were entitled to receive for the work performed, and, as there is no charge of unfairness or fraud, his decision stands, and the court is not at liberty to go behind it.

[7] The third cause of action is upon a claim for damages for work required by the engineer to be done in retrimming the tunnel after completion. This claim the District Judge thought could not be sustained. This claim differs from the first two claims, in that it is not based upon any precise provision of the contract, but is founded upon an alleged increased cost of the work occasioned by the acts of the defendant, or its agents or engineers. The complaint alleges that prior to September 20, 1910, the contractors had fully completed the work of excavation upon that portion of the work to be done under the contract for the tunnel known as Bull Hill tunnel, and that the work as done conformed to the lines and grades as fixed by the engineer. It is said that thereafter the engineer ascertained that the lines and grades as given by him were erroneous, and that he then directed the contractors to perform, and that they thereupon did perform, a large amount of excavating within the tunnel outside of the lines and grades first given by him. And the plaintiffs claim to have proved that the amount of the damages they are entitled to, according to their computation is $39,446.30, exclusive of interest.

The allegation is not sustained by the facts. The specifications provided that all lines and grades were to be given by the engineer, and that the work should conform to the lines and grades given by him, and be done in accordance with the drawings and his directions.

The engineer did in fact give the lines and grades and directions as to driving the tunnel; and one of the contractors testified that he did not know of any erroneous lines having been given to him by the engineer or other agents of the city in the tunnel work. It appears that the engineer and inspector established the center line of the tunnel by sighting back through lights hung in the roof of the portion already excavated. Having so obtained the center line, they painted that line on the heading—that is, the face of the rock—and, after measuring out certain distances from it, painted an elliptical line to mark the new portion to be excavated. This elliptical line was intended to be the C line of the contract drawings; that is, the line which is the line of effective average thickness of masonry lining. The contractors then drove the holes for blasting, filled them with dynamite, shot the blast, and removed the muck. The result was not a clean break. There were portions of rock remaining inside of the "A line," within which no unexcavated material was to remain. The engineer and inspector then drew a new line on the heading for a new excavation, and at the same time marked with red paint the points remaining from the last blast inside the A or C line, which the contractors had to remove or "trim" off. To the extent that the contractors did this trimming at the time when they drilled the holes for the new excavation on the heading, it was done easily and inexpensively, as the drilling machines were in place. When not then done, it had to be done by the re-erection of the drilling machines on platforms or scaffolding at a considerable expense. The holes drilled in these points to be trimmed were likewise filled with dynamite and shot off at the next blast. This process was repeated until the tunnel was completed.

It was found, after the tunnel had been driven through, which was on December 24, 1910, that the engineers required the retrimming of the tunnel, and the contractors were engaged in doing that work for five months. There were very few places not necessary to be trimmed, so as to excavate to the "A line." That was properly fixed; but it is said that the inspectors did not, on their first inspection of the rock excavation, paint all the rock projections found to extend inside the "A line," and that this was equivalent to the giving of erroneous lines. But, as the contractors were bound to excavate everything within the "A line," and the "A line" was not erroneously fixed, it is not clear what basis there is in view of article 13 for the claim advanced. Article 13 of the contract provides as follows:

"The inspection of the work shall not relieve the contractor of any of his obligations to fulfill his contract as herein prescribed, and defective work shall be made good, and unsuitable materials may be rejected, notwithstanding that such work and materials have been previously overlooked by the engineer and accepted or estimated for payment. If the work or any part thereof shall be found defective before the final acceptance of the whole work, the contractor shall forthwith make good such defect in a manner satisfactory to the engineer."

However that may be, there is a conclusive reason why the third claim cannot be sustained. We are unable to distinguish the third claim from the second, and think that the one is as much subject to article 3 as the other. That article was inserted in the contract to

prevent disputes and litigations, and the engineer's decision was, as we have seen, made final and conclusive on the contractor. For the reasons stated, this case does not fall within the principle that, if a municipal corporation by its own act causes the work done by a contractor to be more expensive than it otherwise would have been, according to the terms of the original contract, it is liable to him for the extra work. Messenger v. City of Buffalo, 21 N. Y. 196; Mulholland v. Mayor, etc., 113 N. Y. 631, 20 N. E. 856.

A case in the Supreme Court of New York, H. S. Kerbaugh, Inc., v. City of New York, reported in the New York Law Journal of September 23, 1915, and affirmed without opinion by the Appellate Division, New York Law Journal, March 3, 1917, 163 N. Y. Supp. 1120, involved the construction of an aqueduct contract similar in its provisions to the one here involved. The controversy in that case, as in this, was over the three items relating to excavation, refill and concrete. The comptroller objected in that case, as in this, to certain work and materials not actually done and supplied. The city claimed that the payment lines shown upon the contract drawings could not be allowed by the engineer although the exigencies of the undertaking required additional work to be done under his direction. There, as here, the engineer fixed the payment line upon the extended width of the excavation. The case was decided against the city and in favor of the contractor. It was held that the engineer had power to alter or modify the specifications, and, as he had exercised that right, the payment lines shown upon the drawings ceased to control, and the contractor was entitled to compensation to the changed payment line, whether it was necessary for him to perform the work or not.

As respects the first two disputed items, we have reached the same conclusion at which the New York courts arrived in the case cited. As respects the third item—that relating to the concrete—our conclusion is at variance with that of the New York courts in the case referred to. This court holds, therefore, that as respects the first cause of action it was error for the court below to grant the motion of defendant's counsel to reduce the verdict, which the court originally directed on behalf of plaintiffs for the sum of $4,352, to the sum of $2,109.98. As respects the second and third causes of action, no error was committed.

Judgment is reversed, and a new trial granted.

PICKENS et al. v. MERRIAM et al.*

(Circuit Court of Appeals, Ninth Circuit. May 21, 1917.)

No. 2783.

1. EQUITY ⟨⟹72(1)—"LACHES"—PREJUDICE FROM DELAY.
Laches is not a mere matter of time, but principally a question of the inequity of permitting a claim to be enforced because of some change in the condition or relations of the property or the parties.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210–213, 225.
For other definitions, see Words and Phrases, First and Second Series, Laches.]

2. CANCELLATION OF INSTRUMENTS ⟨⟹45—SUIT FOR ACCOUNTING—PRESUMPTIONS.
In a suit by a husband's heirs to require the wife's administrator to account respecting property of the husband coming into his possession and fraudulently omitted from his inventory and accounts, to set aside deeds from the wife, and to set aside releases which plaintiffs were induced to execute by fraud, defended on the ground of laches, a marked increase in the value of property in Los Angeles and San Pedro would not be presumed; this being a matter of defense to be established by proof.
[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 100, 101.]

3. EXECUTORS AND ADMINISTRATORS ⟨⟹513(10)—ACCOUNTING—CONCLUSIVENESS.
The action was not barred by the proceedings in or decree of the probate court wherein the administrator had accounted, where by reason of the conduct of defendants in concealing the facts concerning the estate there had been no adversary trial or decision upon the issues involved in such suit.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2279, 2284.]

4. EXECUTORS AND ADMINISTRATORS ⟨⟹513(15)—ACCOUNTING—CONCLUSIVENESS.
The settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2289, 2290.]

5. EXECUTORS AND ADMINISTRATORS ⟨⟹469(3)—ACCOUNTING—JURISDICTION OF EQUITY.
If property be omitted from an administrator's account by mistake, but be subsequently discovered, a court of equity may exercise its jurisdiction, and take such action as justice to the heirs or creditors may require, even though the probate court might open its decree and administer upon the omitted property.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2007, 2009.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Suit by Louisa Pickens and another against J. H. Merriam and others. From a decree dismissing the bill, plaintiffs appeal. Reversed and remanded.

⟨⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied October 8, 1917.

Suit for an accounting on the part of the defendants for certain property belonging to the estates of Ferdinand Fensky and Jeanette Fensky, deceased, alleged to have been acquired by the defendants through various fraudulent acts perpetrated by them and by Jeanette Fensky and to be wrongfully withheld from the complainants, who claim to be the lawful heirs of Ferdinand and Jeanette Fensky, and for the cancellation of certain deeds. The complaint alleges, in part, as follows:

That the complainants are sisters of Ferdinand Fensky, who died intestate in Los Angeles county, Cal., on August 7, 1903, leaving property in California and Kansas, consisting of real and personal property; the latter being in the form of notes and contracts for the sale of real property located in Topeka, Kan., and cash amounting to $10,000, aggregating $100,000 in value. That in October, 1903, Jeanette Fensky was appointed by the superior court of Los Angeles county, Cal., administratrix of the estate of Ferdinand Fensky, and that one M. T. Campbell, agent and representative of Jeanette Fensky in Topeka, Kan., was appointed administrator of the estate by the probate court of Shawnee county, Kan., a few days thereafter. That after the appointment of Jeanette Fensky as administratrix she came into possession of real property, cash, notes, and other evidences of indebtedness due the deceased; that she caused the California real estate to be falsely and fraudulently appraised and inventoried at a total sum of about $6,000; and that, instead of returning a true inventory of the personal property, she inventoried but one promissory note for the sum of $400, and purposely failed to list and inventory the cash and evidences of indebtedness to the deceased from the purchasers of his real property in Kansas. That she sent all of the promissory notes and other evidences of indebtedness to her agent and representative, M. T. Campbell, and entered into a fraudulent and collusive agreement with him to obtain releases from the complainants of their interest in the estate. That Campbell filed his inventory showing personal property amounting to $20,927.64, consisting of $4,297.14 cash and a part of the promissory notes, but omitted the notes of W. C. Stein and Simms and the indebtedness owing from purchasers of the Kansas real estate.

That the Kansas law provides that the real property of an intestate husband dying without children descends directly to his widow, which was well known to Jeanette Fensky and Campbell, who, knowing that the contracts of sale of the real estate had not been recorded, and that complainants had no knowledge that it had been sold, concealed the fact that the real estate had been sold, and, by listing the same as real property, falsely represented to complainants that the real estate so sold belonged to the widow under the law of Kansas. That prior to his death Ferdinand Fensky and Jeanette Fensky had drawn up and signed deeds of conveyance to the several purchasers of the Kansas real property, but did not deliver the same. That all of said undelivered deeds came into the hands of Jeanette Fensky upon the death of her husband. That, well knowing that the execution by her or by Campbell, as administrator, of deeds to these purchasers, would reveal the fact that the real estate had been sold, and that the purchase money constituted personal property of the estate, Jeanette Fensky and Campbell began negotiations with the purchasers, as a result of which the purchasers accepted the undelivered deeds, notwithstanding the death of Ferdinand Fensky, and executed mortgages to Jeanette Fensky for the amount of the unpaid purchase money due under the contracts of sale, which mortgages were omitted from the inventories of Jeanette Fensky and Campbell and have never been accounted for by them, and the same are unadministered assets of the estate of Ferdinand Fensky, in which these complainants have an interest as his heirs at law.

That, shortly after the appointment of Campbell as administrator, he represented to complainants that it would take a long time to close the estate, that many of the promissory notes were of little or doubtful value, that the costs of administration would amount to a considerable sum, that, even if he should be able to collect the notes, the shares of the estate to which each of the complainants ultimately might be entitled would not exceed $1,000 in value, that the real estate in Topeka, Kan., all went to the widow, and that

the property left by the intestate was community property, and offered to buy their claims against the estate for $1,000 each, which offer was accepted by the complainants, and thereupon the complainant Louisa Pickens, on or about July 29, 1904, executed and delivered to the said Campbell for the said Jeanette Fensky (a release and quitclaim of) all of the right, title, and interest of the said Louisa Pickens in and to the property and estate of her said deceased brother, and on or about August 3, 1904, the complainant Johanna Schutt executed and delivered to the said Campbell for the said Jeanette Fensky a similar release and quitclaim of all of the right, title, and interest of the complainant Johanna Schutt in and to the property, assets, and estate of her said deceased brother. That all of the foregoing representations made by Campbell were false, fraudulent, and misleading, and known to be such by Campbell and by Jeanette Fensky, and that complainant's shares would have amounted to more than $8,000. That the $1,000 paid to each of the complainants by Campbell was paid from funds in his hands collected from the assets of the estate, and was only a part of the money then due to complainants from the estate, and Jeanette Fensky parted with nothing of value for the releases and quitclaims, which are without consideration, fraudulent, and void.

That Campbell remitted to Jeanette Fensky about $35,000 in cash and secured notes, being proceeds of the assets of the estate which came into his hands. That on or about March 30, 1905, Jeanette Fensky filed a pretended final account, in which she represented that she had secured the interest of all the brothers and sisters and other heirs at law of her deceased husband, and that she was the only one entitled to said estate; and, there being no opposition to the account, the same was received and approved by the superior court, and an order entered discharging her as administratrix and closing the estate. That thereafter, upon the faith of the deeds of release and quitclaim from the complainants, Jeanette Fensky secured purchasers for some of the property in California, and with the proceeds of the sale of this property, together with the money and mortgages received from Campbell, purchased real estate in Los Angeles county, Cal. That Jeanette Fensky died on July 8, 1908. That before her death she had executed, without consideration, deeds to the property so acquired. "That all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky," and that, therefore, title did not pass to the grantees but was in Jeanette Fensky at the time of her death.

That J. H. Merriam, who had been appointed administrator of the estate of Jeanette Fensky by the superior court of Los Angeles county, Cal., upon the petition of the defendants Eugene Wellke, Amanda Katzung, and Alma J. Schmidt, filed a pretended inventory of the estate showing the total assets as consisting of $2,324.38 in cash, a claim against the defendant Amanda Katzung, and a note of the defendant Don Ferguson for $1,050. That thereafter Merriam filed a final account, representing that the estate had been wholly administered and distributed, and that the sole heirs at law were the defendants Eugene Wellke, Amanda Katzung, and Alma J. Schmidt. That Merriam knew that Jeanette Fensky at the time of her death owned the real estate mentioned; that the same was distributable among the heirs at law of Ferdinand Fensky and defendants had no interest therein. That Merriam, well knowing all the facts, wholly omitted the real property from his inventory and accounts, and distributed a portion of the estate to the defendants Wellke, Katzung, and Schmidt.

On information and belief, it is alleged that Merriam, while pretending to act as administrator of the estate of Jeanette Fensky, was employed by and acted as attorney and agent for the defendants Wellke, Katzung, Loveland, Farnsworth, and Schmidt, with full knowledge of the rights of the complainants, and with the purpose and design of preventing them from securing their just share of the estate of their deceased brother, and has failed, refused, and neglected to further administer the estate, and pretends to deny the rights of the complainants in respect thereof. It is further alleged that all of the estate of Ferdinand Fensky was his separate property, and as such, upon the

death of his widow, the estate and its avails descended ratably to the surviving brothers and sisters of Ferdinand Fensky, and not to the sisters and brother of Jeanette Fensky, and that whatever right, title, or interest the defendants have in any of the property of Jeanette Fensky is subject to the claims of complainants as heirs at law of Ferdinand Fensky and of Jeanette Fensky; that complainants did not have any notice, knowledge, or suspicion of the truth respecting the amount, extent, and value of the estate of their deceased brother, nor of the frauds and fraudulent conduct of Campbell, Jeanette Fensky, and Merriam, until late in the summer of 1912, when one of the daughters of Louisa Pickens, while visiting in Los Angeles, accidentally secured access to the correspondence between Campbell and Jeanette Fensky, which disclosed a part of the truth relative to the estate of Ferdinand Fensky and the dealings of Campbell and Jeanette Fensky in reference thereto.

The complaint prays that an account be taken of the estate of Ferdinand Fensky, deceased, and that it be determined and adjudged by the court that the same was his separate estate; that the deeds of release and quitclaim, executed by the complainants to Jeanette Fensky, be declared fraudulent and void; that an account be taken of the estate of Jeanette Fensky, deceased, and that upon final hearing it be determined that the same is distributable among the heirs of Ferdinand Fensky, deceased; that it be determined by the court that the deeds under which the defendants Willke, Katzung, Schmidt, Farnsworth, Ferguson, and Loveland claim are void, and that those defendants have no right, title, or interest in the estate; and that the defendant Merriam be required to account to the complainants for their distributive shares of the estate of Jeanette Fensky, deceased, which came into his hands and was by him distributed to the defendants Wellke, Katzung, and Schmidt.

On August 14, 1915, the court granted the motion of certain of the defendants to dismiss the bill of complaint and entered an order dismissing the same, without prejudice, upon the grounds that the suit was barred by the laches of the complainants, and that the fraud alleged in the bill was intrinsic in character, being an imposition by false evidence, and all inquiry into such fraud was precluded by the final decree of distribution, which is conclusive as to the rights of heirs, legatees, or devisees. In a written opinion, filed at the time this order was entered, the court also calls attention to certain allegations of the complaint which are defective for uncertainty, although the action of the court in dismissing the complaint is based upon the two former grounds.

R. W. Kemp and Davis, Kemp & Post, all of Los Angeles, Cal., and D. R. Hite, of Topeka, Kan., for appellants.

Wm. J. Hunsaker, E. W. Britt, Leroy M. Edwards, and Joseph L. Lewinsohn, all of Los Angeles, Cal., and J. H. Merriam, of Pasadena, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. The statutory period in which an action may be brought in California for relief on the ground of fraud is three years. The appellees invoke this statute, and the analogous doctrine of laches in equity for a corresponding period, as a bar to this cause of action. But the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Section 338, subd. 4, California Code of Civil Procedure. This last provision is derived from the principles of equity jurisdiction. Bailey v. Glover, 88 U. S. (21 Wall.) 342, 348, 22 L. Ed. 636.

Ferdinand Fensky died intestate in the county of Los Angeles, Cal., on August 7, 1903, leaving property in California and in Topeka, Kan.

The intestate died without issue, but he left a widow, Jeanette Fensky, and other heirs at law, including the complainants, who were his sisters. On September 9, 1903, M. T. Campbell was appointed administrator of the estate in Kansas, by the probate court of Shawnee county, and on October 15, 1903, Jeanette Fensky, the widow was appointed administratrix of the estate in California, by the superior court of Los Angeles county. On July 29, 1904, the complainant Louisa Pickens, for the sum of $1,000, executed and delivered to M. T. Campbell, the administrator of the estate in Kansas, for Jeanette Fensky, a release and quitclaim, releasing and conveying unto the said Jeanette Fensky all of the right, title, and interest of the said complainant in and to the property and estate of her deceased brother. On August 3, 1904, the complainant Johanna Schutt, for the like sum of $1,000, executed and delivered to the said Campbell, for Jeanette Fensky, a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title, and interest of the said complainant in and to the property, assets, and estate of her deceased brother. Jeanette Fensky died on July 8, 1908, and on August 1, 1908, the defendant J. H. Merriam was appointed administrator of the estate of Jeanette Fensky.

The bill of complaint in this case was not filed until July 8, 1914. With the releases and quitclaims executed by the complainants in 1904 standing against their cause of action for alleged fraudulent acts in dealing with the estate of Ferdinand Fensky, the statute of limitations and the doctrine of laches would be a bar to this suit, but for the allegation in the bill that not until late in the summer of 1912 did the complainants, or either of them, have any notice or suspicion of the truth respecting the amount, extent, and value of the estate of their deceased brother, or of the frauds and fraudulent conduct of M. T. Campbell, Jeanette Fensky, and J. H. Merriam in dealing with the said estate in the matters charged in the bill of complaint. This discovery is alleged to have been made in July, 1912, when—

"one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, Cal., accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto."

Referring to certain real estate located in the state of Kansas, which, it is alleged, the deceased, Ferdinand Fensky, had owned, and, prior to his death, had sold, and the proceeds of which belonged to the deceased as personal property, subject to distribution to the complainants and other heirs at law of the deceased, but which was fraudulently represented by the said Campbell and the said Jeanette Fensky to the complainants as not having been sold, and, under the law of Kansas, had descended directly to the widow, without complainants having any interest therein. It is alleged that the said real estate had been sold, although the deeds had not been delivered to the purchasers, and complainants had an inheritable interest in the proceeds as heirs at law of the said Ferdinand Fensky. It is further alleged that it was not until the early part of 1913 that the complainants had any

notice or knowledge that the deeds conveying the said real estate had not been delivered to the purchasers, or any notice or knowledge of the facts relating to the said estate.

Prior to the commencement of this action the complainants brought suit by petition in the district court of Kansas against the administrator of the administrator who administered upon the estate of Ferdinand Fensky in Kansas and his bondsmen to have the settlement of the latter estate set aside for fraud, and for an accounting of the assets with which he was chargeable. The cause of action in that case is identical with the cause of action in this case, except that the former relates to the estate in Kansas and the latter to the estate in California. In the district court there was a demurrer to the petition interposed by the defendants upon substantially the same grounds as the motion to dismiss the complaint in this case. The demurrer was overruled, and the defendants appealed. In the Supreme Court of Kansas these questions were reviewed, and the cause of action stated in the petition sustained (Pickens v. Campbell, 98 Kan. 518, 159 Pac. 21); the court holding, among other things, that in an action for relief on the ground of fraud, brought more than two years after its alleged perpetration, the petition, to be good against a demurrer, need not set out the manner of its discovery, and that constructive knowledge of the falsity of a statement that real estate, the record title to which stood in an intestate at the time of his death, had not been sold by him, is not a matter of law to be implied on the theory that it could have been discovered through inquiry from the purchasers. This decision disposes of these questions so far as they relate to the estate in Kansas and is persuasive as to the rules applicable to the same questions as they relate to the estate in California.

Returning, now, to the bill of complaint in this case, and its reference to certain deeds to real estate in Los Angeles county, Cal., executed by Jeanette Fensky in her lifetime in favor of certain of the defendants, without consideration, and delivered after her death to the grantees, and the knowledge of that fact by J. H. Merriam, the administrator of her estate, and his omission to account therefor in his inventory of the estate: It is alleged that it was not until early in 1913 that the complainants had any notice or knowledge that said deeds had not been delivered during the lifetime of the said Jeanette Fensky. It is further alleged that all of the estate of the said Ferdinand Fensky was his separate property, and as such, upon the death of the widow, the said estate and its avails descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky. It is alleged that complainants believed the statements made by Jeanette Fensky, Campbell, and Merriam concerning the matters stated, and that, except for such representations, they would not have released the estate of Ferdinand Fensky from their just claims, but would have enforced the same.

The appellees contend that the suspension of the statute of limitations and of the analogous doctrine of laches until discovery by the aggrieved party of the facts constituting the fraud is qualified by the rule that knowledge of facts which would put a reasonably prudent person upon inquiry is equivalent to a discovery, and, with respect to the principles governing the statement of such a cause of action, cite

the case of Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807, where the Supreme Court said:

"In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' Stearns v. Page, 7 How. 819, 829 [12 L. Ed. 928]. * * * A party, seeking to avoid the bar of the statute on account of fraud, must aver and show that he used due diligence to detect it, and, if he had the means of discovery in his power, he will be held to have known it."

The appellees contend that under this rule the bill of complaint in this case does not sufficiently state a cause of action. On the other hand, the appellants contend that when the fraud, which is the foundation of the suit, has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by the party suing, and that the statement in the bill of complaint concerning the facts of concealment and discovery is sufficient. In support of this rule, the appellants cite the case of Bailey v. Glover, 88 U. S. (21 Wall.) 342, 347, 22 L. Ed. 636. In this case Mr. Justice Miller, speaking for the court, said:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud."

Concerning this rule, the learned justice said further (88 U. S. [21 Wall.] 349, 22 L. Ed. 636):

"And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

In Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395, the action was brought by the assignee of a bankrupt to recover the value of property alleged to have been fraudulently transferred by the bankrupt in violation of the provisions of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 544). The defendant resisted recovery on the ground that the action was not brought within two years from the time when the cause of action accrued. The petition disclosed upon its face that the suit was brought more than four years after the cause of action arose, and more than three years after the appointment of the plaintiff as assignee. The plaintiff replied that the facts were fraudulently concealed and that the suit was brought within two years after they came to his knowledge. It was alleged in the petition that both the said Carney (the bankrupt) and the defendant (Rosenthal, to whom the bankrupt had transferred certain of his property), kept

concealed from the plaintiff (the assignee) "the fact of the said payment and transfer of the said aggregate sum of $30,000, * * * and * * * the fact of the sale, transfer, and conveyance of the said goods * * * and that he, the said plaintiff, did not obtain knowledge and information of the said matters, or either of them, until the 29th day of November, 1879, and then for the first time the said matters were disclosed to him and brought to his knowledge." The plaintiff relied upon Bailey v. Glover, supra, to sustain the cause of action upon the averment of concealment after the statute of limitations had run. The defendant relied upon Wood v. Carpenter, supra, to defeat the cause of action as stated in the complaint, notwithstanding the averment of concealment. The court sustained the cause of action, saying (111 U. S. 191, 4 Sup. Ct. 385, 28 L. Ed. 395):

"The case of Bailey v. Glover has often been cited by this court, but has never been doubted or qualified."

In Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467, the same question was again before the Supreme Court. The allegations in the complaint as to concealment and discovery were:

"Mrs. Traer's connection with the transaction was studiously concealed from plaintiff and his assignor, and plaintiff had no knowledge of it previous to his discovery, September 24, 1879."

It was objected that there was neither pleading nor proof to avoid the bar, under the rule stated in Wood v. Carpenter. The court held that under the ruling in Bailey v. Glover, which had never been overruled, doubted, or modified by the court, the pleadings and evidence were sufficient, and the suit was not barred by the statute of limitations. In 19 Am. & Eng. Ency. 243, the rule is stated as follows:

"It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud; the defendant, having, by his own wrongdoing, prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up the statute as a defense. This rule is provided for by statute in many of the states, but exists in equity courts independently of statutory provision."

See, also, 25 Cyc. 1214; Pickens v. Campbell, supra. This is the rule in California. Kane v. Cook, 8 Cal. 449; Currey v. Allen, 34 Cal. 254, 257.

[1] 2. Coming to the specific question, whether the appellants have been guilty of laches such as will defeat the cause of action stated in the bill of complaint, we find a broader field of inquiry than is involved in the running of a statute of limitations. As said by the Supreme Court in Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738):

"The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They 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 condition or relations during

this period of delay, it would be an injustice to the latter to permit him to now assert them. * * * Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

[2] The appellants contend that a change of condition will be presumed, and that prejudice may be presumed from the lapse of time; that a change in position might have occurred; that an important witness has died; that a large part of the estate consisted of real property situated in Los Angeles and San Pedro; and that a marked increase in the value of the property will be presumed. It may appear to be a too strict adherence to the rules of procedure to hesitate to entertain the last-named presumption; but we think such matters are matters of defense, and should be established by proof upon the hearing of the case. We find nothing in the bill of complaint showing such a change of conditions in the property, or in the relations of the parties thereto, or such a lack of equity as would prevent a court of equity from granting appropriate relief.

[3] 3. The next question is whether the acts of fraud alleged in the bill of complaint are intrinsic or extrinsic to the matters determined by the superior court in the probate proceedings. The relief sought is, in effect, among other things: (a) An accounting by the defendant Merriam, the administrator of the estate of Jeanette Fensky, for so much of the estate as has come into his hands and for which no account has been rendered; (b) that the deeds of release and quitclaim executed by the complainants to the said Jeanette Fensky be declared fraudulent and void and of no effect; (c) that the deeds under which the defendants Wellke, Katzung, Schmidt, Farnsworth, Ferguson, and Loveland claim certain lands conveyed to them by Jeanette Fensky be declared invalid and void; and that neither of the defendants has any right, title, or interest whatever in or to the said estate or any part of the same. The leading case upon this question is that of United States v. Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93, cited by the appellees. In that case Mr. Justice Miller, speaking for the court, said:

"There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, 'Interest reipublicæ, ut sit finis litium,' and 'Nemo debet bis vexari pro una et eadam causa.' * * * But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case; where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent."

The court then mentions a number of acts of this character, and concludes as follows:

"These and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

Because of the conduct of the defendants in concealing the facts concerning the estate, it appears that there has been no adversary trial or decision upon these issues; and we find nothing in the proceedings or decree of the superior court of Los Angeles county, as set up in the bill of complaint, to estop the complainants from having these matters inquired into, and the question of the alleged fraud determined by the court.

[4, 5] How far such a hearing may go is indicated in the case of Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934, where Mr. Justice Field, delivering the opinion of the court, said:

"It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property; and a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity."

The case of Lataillade v. Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219, involved questions very similar to those involved in this case. The suit was against a guardian for an accounting of the estate of a minor. It was alleged in the complaint that from time to time after 1849 defendant sold certain property, belonging to plaintiff's estate, but for what sums plaintiff was not advised. In 1868 defendant sold certain cattle and ranchos, likewise belonging to plaintiff's estate, for which he received payment, and mingled the money with his own funds, and wrongfully and fraudulently converted the same to his own use, with intent to deprive the plaintiff of his share thereof. It was charged in the complaint that the defendant concealed the facts from the plaintiff, and wrongfully and fraudulently represented to him that his father died insolvent, and that he had no interest in the cattle and ranchos. The defendant, as guardian of the plaintiff, filed in court an inventory purporting to show all the estate of the ward, but did not include in the inventory any of the above-mentioned property, and, when he applied for and obtained a final discharge from his trust, he falsely stated in his petition and represented to the court that he had returned a full and true inventory of all the estate of the plaintiff which had come into his hands as guardian, and had paid over and delivered the same to the plaintiff. The plaintiff was born December 2, 1849, and became of age December 2, 1870. The suit was not filed until February 21, 1887, and called for an accounting from the guardian, mainly for the transactions in the sales of cattle and ranchos made in 1868. The defendant demurred to the complaint, substantially upon the grounds upon which the motion to dismiss was based in the present case. The court sustained the demurrer. This judgment was reversed in the Supreme Court, with directions to overrule the demurrer. The Supreme Court cited, in support of its decision, among others, the case of Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934. We do not find that this case has been overruled or in any way modified.

In Pickens v. Campbell, supra, the Supreme Court of Kansas, referring to the facts of this case, said:

"The defendants maintain that the order of settlement has the force of a judgment, and is not open to attack by the method here pursued. The allegation, however, is that the settlement was procured without an actual accounting as to the claims of these plaintiffs, by the use of a release of all demands against the estate (including that in California as well as that in Kansas) which had been obtained by intentionally false statements concerning facts which affected its value, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would, of course, have vested in his widow upon his death. A fraud so accomplished we regard as extrinsic to the issue determined by the probate court, and therefore capable of forming a basis for setting aside its order. See Plaster Co. v. Blue Rapids Township, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A. (N. S.) 861, note 106 Am. St. Rep. 640-642, 645-647."

We must accept these cases as stating the law applicable to this case, and we conclude, therefore, that the allegations of the bill of complaint are sufficient to sustain the cause of action.

Decree reversed, and the cause remanded for further proceedings in conformity with this opinion.

MIDKIFF v. COLTON et al. *

(Circuit Court of Appeals, Fourth Circuit. May 1, 1917.)

No. 1421.

1. DEEDS ⊜45—EXECUTION BY GRANTEE—NECESSITY.
Where a deed from the successful plaintiff in an action of ejectment to the defendants, with a reservation of minerals, contained a provision that the grantees thereby accepted the deed and the estate thereby conveyed upon the terms and conditions, and subject to the exceptions and reservations, therein contained, it contemplated that the acceptance by the grantees should be evidenced by their signatures to the paper itself.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 89-94.]

2. DEEDS ⊜208(6)—ACCEPTANCE—SUFFICIENCY OF EVIDENCE.
Evidence *held* to show that such deed, found in the possession of one of the defendants, unsigned by any of the grantees, more than 30 years after it was left with the grantees, had not been accepted by them.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 631.]

3. DEEDS ⊜66—DELIVERY AND ACCEPTANCE—QUESTIONS OF LAW OR FACT.
The delivery and acceptance of a deed is a mixed question of law and fact; it being the province of the jury to find the facts, whereupon the court applies the law.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633.]

4. DEEDS ⊜194(4)—DELIVERY AND ACCEPTANCE—PRESUMPTIONS AND BURDEN OF PROOF.
Where the successful plaintiff in an action of ejectment executed a deed to the defendants, reserving minerals, and contemplating that the grantees' acceptance should be evidenced by their signatures, and defendants had been in possession of the land long before the action was brought, and continued in possession uninterruptedly for more than 30 years after the judgment was rendered, and the plaintiff never executed any writ of possession, exercised dominion over any part of the land, or undertook to assert ownership of either the surface or the minerals during that time, the mere fact that the deed, unsigned by the grantees, was found in

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

*Rehearing granted May 31, 1917.

possession of one of the grantees, did not raise a presumption of a delivery and acceptance, which would shift the burden of proving delivery and acceptance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 579, 634.]

5. DEEDS ⟸208(6)—DELIVERY AND ACCEPTANCE—SUFFICIENCY OF EVIDENCE.

If such presumption existed, it was overthrown by the positive, direct, and uncontradicted testimony of the only witness examined in regard to it that the deed was never accepted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 631.]

6. VENDOR AND PURCHASER ⟸233—BONA FIDE PURCHASERS—UNRECORDED DEED.

An unrecorded deed from the successful plaintiff in an ejectment action to the defendants, with a reservation of the minerals, even though binding on such defendants, did not affect the rights of a subsequent purchaser, in the absence of notice of its existence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563–566.]

7. VENDOR AND PURCHASER ⟸244—BONA FIDE PURCHASERS—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that a purchaser of land had no notice of an unrecorded deed to his predecessors in title from a party recovering against them in ejectment, containing a reservation of minerals.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611.]

8. PRINCIPAL AND AGENT ⟸111(4)—AUTHORITY OF AGENT—COMPROMISE—"PENDING."

A power of attorney, authorizing the agent to make such deeds as might be necessary in order to settle and compromise certain actions of ejectment, described as then pending and undetermined as to some of the defendants therein, and to carry out compromises already agreed upon with other defendants, against whom judgments by default had been or might be obtained, did not authorize the agent to execute a deed in consideration of the grantees' consent to a reservation of minerals to persons against whom judgment had been recovered, in an action in which they entered their plea denying plaintiff's right to recover, since the judgment against them was not by default, there was no basis for a compromise, and the action was not pending, as "pending" means begun, but not yet completed, settled, determined, or in process of settlement or adjustment, and an action or suit is said to be pending from its inception until the rendition of final judgment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 329, 376.

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

9. PRINCIPAL AND AGENT ⟸150(2)—ACTS IN EXCESS OF AUTHORITY—LIABILITY OF AGENT.

An attorney under a special power cannot bind his principal by an act ultra vires; the authority of the agent in fact being limited by the terms of the instrument conferring the power.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 557.]

10. PRINCIPAL AND AGENT ⟸97—CONSTRUCTION OF POWER OF ATTORNEY.

The authority of an agent acting under special power must be ascertained from the terms of the instrument itself.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 344–376.]

Woods, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suit by Sabin W. Colton, Jr., and others, trustees of the Guyandotte Land Association, against Newton Midkiff. From a decree in favor of plaintiffs, defendant appeals. Reversed and remanded.

In 1874, William H. Aspinwall, Abiel A. Low, and others brought action of ejectment against Winchester Adkins and others, in the United States District Court for the then District of West Virginia, claiming title, under grants, to 200,000 acres of land within a common boundary, and included within this boundary was 194 acres in possession of Lewis Midkiff, who had been living on it for several years before the commencement of the action, claiming to be the owner in fee simple. Lewis Midkiff was made one of the defendants in the action. He died in 1880, whilst the action was pending, and an order was entered making his heirs at law parties defendant to the suit, among whom were Abraham Midkiff and Solomon Midkiff, sons, and Harriett Adkins, a daughter. In May, 1880, these defendants came in without process and entered a plea of "not guilty," and on the same day the record shows that the cause was heard and judgment entered against all of the defendants, awarding the title to the lands sought in the action to the plaintiffs. On the 20th of August, 1880, a writ of possession was issued on the judgment against the Midkiff heirs and others of the defendants, but it appears from the record that this writ was never served.

In April, 1879, whilst the action of ejectment was pending and before the final judgment, as stated, the plaintiffs in the action executed an instrument, constituting J. I. Kuhn their attorney in fact, conferring upon him authority to make compromises and settlements in regard to the lands in controversy; this authority being contained in the following, which we copy from the instrument: "To make, execute, sign, seal, and acknowledge for record, and deliver for and in our names, such deeds of grant and release (but without warranty or covenants of any kind, general or special, express or implied), in the form below given, as may be necessary and proper to execute, in order to settle and compromise certain actions of ejectment now pending in the District Court of the United States for the District of West Virginia, and undetermined as to some of the defendants therein, and to convey out compromises already agreed upon with other defendants in said actions, against whom judgments by default have been or may hereafter be obtained. * * *"

On the 15th of September, 1882, Kuhn went to the house of Abraham Midkiff, one of the defendants, and left in his possession a paper writing, purporting to be a deed executed by the said Kuhn, as attorney in fact, for the plaintiffs in the ejectment suit, to Abraham H. Midkiff, Solomon R. Midkiff, and Harriett Adkins, the three defendants before named. This instrument recited that for a nominal consideration the lands which were recovered from the defendants, about 194 acres, in the action of ejectment (without stating that they had been so recovered), were conveyed to the said Abraham H. Midkiff, Solomon R. Midkiff, and Harriett Adkins in fee simple, reserving, however, to the grantors the minerals, oil, and gas, with the right of entry for the purpose of utilizing them, which reservation is set out in the instrument in the following language: "But it is expressly understood that the parties of the first part reserve and except from the operation of this deed to themselves, and to their heirs and assigns forever, all the minerals, mineral substances, and oils, of every sort and description, in and upon said real estate herein described, and in every part thereof, with the privileges of mining, digging, and excavating for said minerals and mineral substances, and of boring and pumping for said oils, and of erecting and maintaining thereon all of the necessary buildings, oil tanks, machinery, and apparatus for working and operating all mines, pits, excavations, and oil wells, which now are, or may be hereafter, opened, worked, and operated on said real estate, or any part of it, and for storing and taking care of the products thereof, by the parties of

the first part, their heirs and assigns. They also except and reserve, as aforesaid, all necessary rights of way in, through, on, or over said real estate to and from all said mines, pits, excavations, oil tanks, and oil wells, and the right and privilege to construct, operate, and maintain thereon such railroads and other roads, and pipe lines, in, through, on, or over said real estate as may be necessary to the successful and convenient discovery, working, and operating of the said mines, pits, excavations, and oil wells, and for carrying away the products thereof."

This instrument also contained the following as the closing paragraph: "And the parties of the second part hereby accept this deed, and the estate hereby conveyed, upon the terms and conditions, and subject to the exceptions and reservations, herein contained and set forth." It further appears that the paper writing was never probated or put to record.

In 1888, Abraham Midkiff and his brother Solomon bought from the other heirs at law of Lewis Midkiff their interests in the 194 acres, taking their deed therefor, and in 1892 they made partition between themselves; each having assigned to him 97 acres. On the 14th of April, 1899, Newton Midkiff, the appellant, who is a son of Abraham Midkiff, bought the 97 acres, which belonged to his father, under the division between him and his brother Solomon, which was conveyed to the said Newton Midkiff by deed, for the consideration of $1,000 cash. Newton went immediately into possession of the land and erected thereon a house costing some $2,500, and made other valuable and permanent improvements. He has continuously since resided upon the lands claiming them as his own in fee simple.

The record further shows that these lands, from the time that Lewis Midkiff went into possession in 1867, have been listed for taxation in his name, and subsequently in the name of his heirs heretofore mentioned, and then the one-half in the name of appellant, Newton Midkiff, after he purchased from his father, and that the taxes have from time to time been paid by them, without any deduction for mineral rights, or other interests claimed not to be owned by them.

In the present case, Sabin W. Colton and others, trustees of the Guyandotte Land Association, as the successors in interest to the said Low and Aspinwall and others, claiming under the proceeding in the ejectment suit, and by virtue of the instrument left by Kuhn in the possession of Abraham Midkiff, have filed their bill of complaint in equity, alleging that the instrument referred to conveyed only the surface of the land to the Midkiffs, reserving the mineral rights, etc., and that Newton Midkiff, the appellant, purchased the lands now in controversy with notice of that fact. The bill further alleges that this instrument, the paper writing which was never put to record, had been lost, and in the suit it is sought to establish this lost paper as a deed, and thereupon to have a decree that the complainants are the owners of the minerals, oil, and gas in the appellant's lands. It further appears from the record that the appellant had leased to G. H. Dimmick & Co. the mineral rights in the 97 acres of which he was in possession. These lessees are also made defendants. The complainants also prayed in their bill that said appellant and said lessees be enjoined from carrying out the terms of the lease.

The only testimony bearing upon the paper writing which is undertaken to be set up as a deed, and which is alleged to have been lost, is that of Abraham Midkiff and Newton Midkiff, the appellant in this case; Kuhn, the attorney, having died in the meantime. Abraham Midkiff testified that Kuhn came to his house with this instrument, which the witness describes as some kind of a deed for everybody that would compromise with him (Kuhn). Kuhn said to witness: " 'We claim a big judgment against your father and your uncle, and if you will deed us the mineral, we will deed you the land.' And I told him I would see about it, and 'if you have got a judgment, why, of course, I will give you the minerals, rather than for you to take the land.' He then says, 'You see, and if you find out I am telling the truth, we will compromise.' But I did not compromise, but after investigating what I had heard I did not make any deed of compromise with Kuhn. He left the deed with me and said, 'If I wanted to compromise to send it to him.' I never bothered about it, and never did write to him. I never accepted the deed in any way."

Newton Midkiff, the appellant, testified in substance, that after the bringing of this suit he called upon his Uncle Sol. to confer with him about making some arrangements about it, and "he asked me if I knew where the deed from Kuhn was, and I says, 'No; I don't know anything about it.' He went on talking about this deed, and he informed me that he had it, and I told him to give it to me, and I would lock it up in my safe. I never knew there was such a deed on earth. When my father and Uncle Sol. made the division, they must have gotten that deed in between them in some way or another. That was the first I ever knew of that deed."

There were only three witnesses examined in the trial; the third being John H. Meek, who was introduced by the complainants and testified as to being local attorney and business agent for them, and had occupied that relation for the last 10 years. He knew the lands embraced in the verdict in the ejectment suit, and about the possession of the same by complainants: had mined on this land at a point called Dingess, and drilled some oil wells at other places; these points were some distance from the Midkiff lands. There was no evidence that the complainants or their predecessors had at any time taken actual possession of the land in controversy, or had entered thereon to assert any right or interest therein. The Kuhn paper was produced on the trial of the present case by order of court by the appellant, and when exhibited it showed that neither Abraham Midkiff, Solomon Midkiff, nor Harriett Adkins had signed it; the only signature being that of Kuhn as attorney in fact for the several parties, who executed the power of attorney to him.

The case was heard, and the District Court entered a decree, from which the following is copied: "That the Kuhn deed to the Midkiffs be and the same is established; that the title of the plaintiffs in and to the minerals, oils, coal, or gas in, under, and upon the tract or parcel of land in the said deed mentioned, including the mining rights and privileges by the said deed excepted and reserved by them, are hereby confirmed and established unto the plaintiffs, and that the said plaintiffs be quieted in the possession and title thereto; that all deeds, leases and other evidences of title under which the defendant, Newton Midkiff, or any one claiming through, by, or under him, asserts title or claim to the said minerals, oil, coal, or gas in and underlying so much of the tract of land in the deed aforesaid described as was conveyed to him by Abraham H. Midkiff and others, and described in the deed filed with his answer herein in words and figures following, to wit: 'Beginning at the mouth of the third branch above Fall creek, thence with said branch to the head thereof, thence a straight line to a stone in the back line, thence in a southeasterly direction to ash corner of G. H. Damron land, thence in a northeasterly direction with the line of Emmer Slone and Bennett Midkiff to Viola Midkiff line, and thence with her line back to the river, thence down with the river to the beginning, containing one hundred acres, more or less. This deed made in lieu of a deed that has been heretofore made and was destroyed by fire'—be and the same are hereby set aside, canceled, and held for naught, in so far as they purport to convey, lease, or otherwise alienate any interest in the said minerals, oil, gas, or coal in, under, or upon said land, or any part thereof, as clouds upon the title of the plaintiffs thereto; and the defendant, Newton Midkiff, G. H. Dimmick, Interstate Gas Company, and all persons claiming under them, are perpetually enjoined, restrained, and inhibited from incumbering, conveying, alienating, or in any wise asserting title to the minerals, oil, gas, or coal in, under, and upon said land, or upon any part thereof, and from in any wise hindering, delaying, obstructing, or interfering with the plaintiffs or their lessees, or the servants, agents, or employés of their lessees, or any one claiming under them, in the use and development of the said minerals, coal, oils, or gas; and leave is given the plaintiffs to withdraw the original deed from J. I. Kuhn, attorney in fact, to Abraham H. Midkiff and others, filed by Newton Midkiff herein, for the purpose of having the same recorded in Lincoln county, West Virginia, and when so recorded said deed shall be redelivered to the said Newton Midkiff." And from this decree, the defendant, Newton Midkiff, appealed to this court.

Maynard F. Stiles, of Charleston, W. Va., for appellant.

W. R. Thompson, of Huntington, W. Va. (J. S. Clark and H. A. McCarthy, both of Philadelphia, Pa., and W. C. W. Renshaw, J. H. Meek, and Z. T. Vinson, all of Huntington, W. Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). There are several questions presented to the court upon this appeal, and which were argued orally by counsel, and are also discussed in the briefs which have been filed. The question of jurisdiction of a court of chancery to entertain the case at all is raised. The view is advanced that the instrument left by Kuhn with Abraham Midkiff had never been lost, but was in existence and was produced in court when it was called for, and therefore a bill to establish a lost paper could not be maintained. It is further argued that the question as to whether there was an actual delivery of the Kuhn paper as a deed is an issue of fact to be tried by a jury, and is not a matter cognizable in a court of equity. It is also insisted that the appellant was in adverse possession of the land involved in this controversy, claiming it as his own in fee simple, to well-defined metes and bounds, for a sufficient length of time to ripen a title, and that this is also an issue of fact to be tried by a jury.

The further question, as to whether the appellant took the deed from his father for the land in controversy, with notice of the existence of the Kuhn paper, is also presented. There is still another proposition which is called to our attention by appellant's counsel, and that is that the Kuhn paper contemplated that there was to be an acceptance of it by the two Midkiffs and Harriett Adkins; not only that they were to accept the custody or the possession of it, but to testify their acceptance by signing the instrument itself, under the provisions of the last paragraph.

[1] We do not deem it necessary, in order to dispose of this case, to consider all of these several questions, but to advert only to the instrument itself (which we shall refer to as the Kuhn paper), and which the complainants rely upon as their muniment of title authorizing a recovery. The first proposition is whether this paper was delivered by Kuhn and accepted by the Midkiffs as a deed. The last paragraph undoubtedly contemplated that the acceptance by the grantees should be evidenced by their signatures to the paper itself; but it was never signed by them or any of them, its delivery to them was never acknowledged, nor was it admitted to probate or recorded; indeed, there was no evidence that Harriett Adkins, one of the Midkiff heirs and one of the grantees, ever saw it.

[2] The testimony relative to what occurred between Abraham Midkiff and Kuhn at the time the paper was handed to the former is exceedingly meager. Kuhn died before the trial of the case, and there was no witness, save Abraham Midkiff, who testified as to that transaction. On the stand he stated in substance: That Kuhn came to

his house with this instrument, which witness describes as some kind of a deed for everybody that would compromise with him (Kuhn). Kuhn said to witness: "'We claim a big judgment against your father and your uncle, and if you will deed us the mineral, we will deed you the land,' and I told him I would see about it, and 'if you have got a judgment, why, of course, I will give you the mineral rather than for you to take the land.' He says then, 'You see, and if you find out I am telling the truth, we will compromise.' But I did not compromise, but after investigating what I had heard I did not make any deed of compromise with Kuhn. He left the deed with me and said, 'if I wanted to compromise to send it to him.' I never bothered about it, and never did write to him. I never accepted the deed in any way." After the present suit was brought, this paper was found in the possession of Solomon Midkiff, still unsigned by any of the grantees.

[3] The principle is well settled that the delivery and acceptance of a deed is a mixed question of law and fact. It is the province of a jury to find the facts; thereupon the court applies the law. Johnston v. Kramer Brothers & Co. (D. C.) 203 Fed. 733; Henry v. Heggie, 163 N. C. 523, see page 527, 79 S. E. 982. In the present case, the trial court in chancery, we must assume, in view of the decree entered, found as a fact that the Kuhn paper was delivered by Kuhn and accepted by Abraham Midkiff, Solomon Midkiff, and Harriett Adkins. We are unable to find in the record any evidence sufficient to warrant such finding; on the other hand, as we have stated, the only testimony upon this question was a denial of acceptance. As bearing upon the question as to whether the Midkiffs accepted this paper as a deed, it is an undisputed fact that they remained in possession of the entire premises, beginning long before the institution of the original action of ejectment, and continuing uninterruptedly until the bringing of the present suit, which was in 1911, save in so far as their possession was affected by the entry of the judgment. No writ of possession was ever executed, and the parties who recovered the judgment in the ejectment action never, so far as the record shows, exercised any dominion over any part of the Midkiff land, or undertook to assert ownership of either the surface or the minerals, but permitted more than 30 years from the rendition of the ejectment judgment to elapse before the present suit was brought.

It seems to us that a court of equity should not incline to favor parties guilty of such laches. During the intervening years between the ejectment judgment and the commencement of this suit, those claiming under that judgment, or their successors, who are now undertaking to recover possession of the minerals, etc., under the Kuhn paper, could have investigated and ascertained, if it had been accepted by the Midkiffs in the form contemplated, or if it had been acknowledged by them, or if it had been put to record. None of these things were done, nor were any steps taken to assert or protect the claim of ownership under the said judgment or under the paper now in controversy.

[4, 5] The mere fact that this paper was found in possession of one of the persons named therein as grantee does not, we think, under

all the circumstances connected with the transaction, raise a presumption of a delivery and acceptance which would shift the burden from complainants of proving delivery and acceptance. If, however, the presumption did exist, it was overthrown by the positive, direct, and uncontradicted testimony of the only witness examined in regard to it, to the effect that it was never accepted. We cite Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874, as bearing upon this point. The court in that case says:

"A deed must not only be delivered by the grantor, but must also be accepted by the grantee. Acceptance may be expressed by signing the deed or otherwise, or may be implied from circumstances. The assent of the grantee will be presumed, where the deed is beneficial to him, until dissent appear. Where dissent or disclaimer appears, the deed is inoperative, and the title to the thing granted reverts to the grantor by remitter from such disclaimer."

[6] We go further, and assuming, for the sake of the argument, that under all the circumstances the Kuhn paper estopped Abraham Midkiff, Solomon Midkiff, and Harriett Adkins from controverting the claim of complainants, it would not affect the rights of appellant, Newton Midkiff, in the absence of notice of its existence. The trial court must have been of the opinion that he had notice. The record does not disclose any direct testimony or forceful circumstances to lead to the conclusion that appellant had ever seen or heard of the Kuhn paper anterior to the time it was found in the possession of Solomon Midkiff after the present suit was brought.

[7] Appellant, when examined with reference to the paper, testified as follows:

"Q. Mr. Midkiff, when was the first time you ever saw this deed, or knew anything about its existence? A. Some time after this suit was brought. Q. Was the time you spoke of having gotten it from Solomon Midkiff the first you knew anything about it? A. The first time I ever remember of that deed. Q. Did you have any knowledge or information of that deed, its whereabouts or existence, from Kuhn to Abraham H. Midkiff and others for this land? A. No, sir. Q. Did you ever have any knowledge of this deed or its existence before the time you obtained it from Solomon R. Midkiff? A. I never heard of it that I remember of. Q. Are you positive that the Sunday morning you went down and got this deed from Solomon R. Midkiff was after you had been notified in this suit? A. Yes, sir; I went down there to make same arrangements about getting a lawyer to attend to the suit, and we got to talking about the deed, and he asked me if I knew where it was, and I told him, 'No, I didn't know anything about it.'"

Abraham Midkiff, when he was interrogated about it on the stand, said this:

"Q. Did you talk to the boys about this Kuhn deed—about what to do with it? A. Everybody was talking about 'em then. Q. Did you talk to your wife about it? A. She said to sign no deed until we found out about it. Q. And you talked to the boys about it? A. I don't remember. Q. When did you and Newt first talk about it? A. I reckon it was when I first sold him the land. I told him Kuhn wanted me to compromise, and I never had, and never expected to. I told him Kuhn wanted me to acknowledge it, and I never would do it."

The appellant's testimony is positive and direct in its character and to the effect that he never saw, knew of, or heard about the Kuhn paper until after the bringing of the present suit, when he found it in the

possession of his Uncle Solomon. Abraham Midkiff's testimony in respect to the Kuhn paper in connection with the appellant is not of a positive nature or direct character. He reckons (to use his own expression) that he first talked to appellant about it when he sold him the land, and told him that Kuhn wanted him to compromise, but he never did, and never expected to, and told him further that Kuhn wanted him to acknowledge the paper, and that he would never do it. It will be observed that Abraham nowhere says that he ever exhibited any paper purporting to be a deed of conveyance to appellant, or informed him of the existence of such paper, and there is no evidence worthy of consideration that the appellant ever saw the Kuhn paper until the time he states.

A forceful fact in this case is that the Midkiffs had been at all times in possession, beginning with the possession of Lewis Midkiff, the appellant's grandfather, anterior to the bringing of the ejectment suit; following after the death of Lewis Midkiff was the joint possession of his heirs at law, Abraham Midkiff, Solomon Midkiff, and Harriett Adkins. They exercised undisputed dominion and control over the entire lands, the boundaries of which were certainly defined and well known, and during all this time no one appeared to assert any right, title, or claim to the land or any interest whatever therein. The appellant was cognizant of this situation; saw the character of ownership which his grandfather and his father and his uncle and his aunt asserted. Under these circumstances he bought the parcel of land now in controversy, paid for it, not only a valuable consideration, but a fair price, took a deed from his father, which the evidence shows he caused to be registered, and thereby gave notice to the world of his title. He set about and erected a valuable dwelling and made other substantial improvements upon the premises. It is not, in our opinion, a reasonable conclusion that the appellant would have done all these things if there was any suggestion to him that there was a defect in the title to the lands. We say further that the weight of the evidence sustains the view that appellant had no notice of the Kuhn paper, and we think that it should have been so held by the trial court. We cite as in unison with the views we have been expressing the case of Hodges v. Eddy, 41 Vt. 485, 98 Am. Dec. 612, and also 10 R. C. L. 845, under the head of "Burden and Quantum of Proof."

[8] Aside from what we have said, there is another view of the Kuhn paper which we entertain, and which we regard as decisive of the case, and that is, at the time Kuhn delivered this paper to Abraham Midkiff and sought his acceptance of its provisions, together with the acceptance of his brother Solomon and sister Harriett Adkins, he was not authorized as the attorney in fact of the plaintiffs in the ejectment suit to execute and deliver a deed in this particular instance. There is no ambiguity in the power of attorney, for it plainly sets forth what was intended, viz. that Kuhn was empowered to execute deeds to carry out settlements and compromises in pending suits, not yet determined, and to make deeds to carry out compromises already agreed upon with defendants against whom judgments by default had been, or might thereafter, be obtained. It will be seen from this that Kuhn's

authority to execute deeds was limited to two contingencies; the one, when compromises were effected pending the action, and the other, in cases where judgments by default were obtained, terms of compromise having been already agreed on. It is a reasonable conclusion that the plaintiffs in the action of ejectment, after they had obtained a judgment for the recovery of the entire lands of a defendant, would not concede to such defendant an interest in the land as a gratuity, and therefore the power to Kuhn to execute a deed after a suit was ended was limited to instances in which there were judgments by default obtained after terms of settlement, or terms of compromise, were agreed on, but not completed.

There was nothing to induce a compromise by the plaintiffs in the ejectment suit with the two Midkiffs and their sister, Harriett Adkins, at the time of the execution of the Kuhn paper sought to be set up as a deed. The action so far as they were concerned was ended by a final judgment, by virtue of which the whole interest in the land was awarded to the plaintiffs, and there is no suggestion that there had been any compromise agreed on with them before the judgment against them was obtained. Further than this, the judgment against the two Midkiffs and their sister was not by default; but, as appears from the record, they had entered their plea, denying the right of plaintiffs to recover, and the issue thus raised was decided against them, so they had no interest left in the subject-matter of the action to constitute a basis of compromise. Further, at the time Kuhn visited Abraham Midkiff and left the paper, the action against the two Midkiffs and Harriett Adkins, as heirs at law of Lewis Midkiff, had been ended by a final judgment, and the issuance of the writ of possession. Mr. Black, in his Law Dictionary (second edition, page 887), under the head of "Pending" uses this language:

"Begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is said to be pending from its inception until the rendition of final judgment."

And he cites in support these cases: Wentworth v. Farmington, 48 N. H. 210; Mauney v. Pemberton, 75 N. C. 221; Ex parte Munford, 57 Mo. 603.

To restate our views, we are of the opinion that the Kuhn paper was not executed during the pendency of the suit against the persons named therein as grantees; that the judgment against the two Midkiffs and Harriett Adkins was not by default, but was taken after they had appeared and entered their formal plea, denying plaintiffs' right to recover; that there were no terms of compromise or settlement entered into with the parties named, during the pendency of the action against them; that under the circumstances Kuhn was not authorized to execute a deed, in the name of his principals, to the two Midkiffs and their sister Harriett Adkins. The purpose of the principals in constituting Kuhn their attorney and empowering him to make deeds was undoubtedly to secure compromises of controversies or to settle adverse claims affecting the lands involved in the suit. It was not to empower him to give away lands, or interests in lands, to which their title in fee simple had been finally confirmed by a judgment of court

in a trial of an action of ejectment, upon the issue raised by defendant's plea of "not guilty."

[9] It is well settled that an attorney under special power cannot bind his principal by an act ultra vires; in other words, the authority of an attorney in fact is limited by the terms of the instrument which confers the power. Holladay v. Daily, 19 Wall. 606, see page 610, 22 L. Ed. 187.

[10] The authority of an agent acting under special power must be ascertained from the terms of the instrument itself. Henry v. Lane, 128 Fed. 243, see page 250, and cases cited in the opinion (62 C. C. A. 625).

It necessarily follows, from the views that we have expressed, that our opinion is that the Kuhn paper could not be established as a deed, and that the decree of the District Court to that effect was erroneous. The said decree is therefore reversed, and the case remanded, to the end that complainants' bill may be dismissed.

Reversed.

WOODS, Circuit Judge. I dissent. The statement of the case made in the majority opinion makes clear the questions involved and the nature of the suit.

It is first contended by appellant that the suit must fail, and the judgment must be reversed, because the deed executed by Kuhn under power of attorney which complainants seek to establish was not authorized by the authority conferred on him. It is true that the power of attorney on its face gives authority to execute such deeds "as may be proper and necessary to execute in order to settle and compromise certain actions of ejectment now pending," and the deed here in question was not executed until after the suit had culminated in a judgment in favor of the plaintiffs. But if the grantees accepted the deed and held the land under it, they would be estopped from alleging its invalidity against Kuhn's principals, ratifying it and claiming under it. They could not accept the benefit of it by remaining in possession and using the land, and afterwards repudiate it in the effort to escape its limitations and reservations.

The next defense is that the deed conveying the surface to the Midkiffs and reserving the mineral rights was never accepted. At the time the deed was made the grantees had been adjudged to have no interest whatever in the land. Since the deed conferred benefits on them, and was found in the possession of one of the grantees, Abraham Midkiff, there is a strong presumption of its acceptance, at least by him. Abraham testified that he could not remember whether Solomon and his sister, Harriett Adkins, the other grantees named in the deed, were present when the deed was given to him or not, but he testified that he had talked to Solomon about it. The ejectment suit and its results were subjects of great notoriety in the community. The deed was the subject of earnest discussion in the family. It was retained and carefully preserved by Solomon and Abraham Midkiff, two of the grantees. Abraham, the grantee who originally received the deed, afterwards acquired the interests of the others. After that acquisi-

tion he was still presumptively holding under the deed when he sold to his son, Newton Midkiff, in 1899. He testified that at the time he sold to Newton he talked with him about the deed.

I cannot resist the conclusion from the evidence that the existence of the deed was well known and much discussed in the entire family, and that it had been accepted and preserved as a muniment of title. The only evidence tending to show that the deed was not accepted is that of Abraham Midkiff that it was brought to him by Kuhn as a proposition to compromise the judgment in ejectment, and was received by him with the understanding that if it was accepted as a compromise he was to return it to Kuhn, and that he concluded not to accept it, and said nothing more to Kuhn about the matter. The statement that the grantees were to return to the grantors the deed if accepted, which was their only protection from actual ejectment, even if it were not disproved by the circumstances, is intrinsically improbable, if not incredible. The danger of its acceptance by the court is emphasized by the fact that Kuhn, the attorney in fact who made the deed, is dead. When its improbability is considered in connection with the other circumstances showing acceptance of the deed, it seems to me the defendant's case is without substantial foundation. If the grantee of a deed, who had no title to the land, and who received the deed from the true owners at the time it was made, carefully preserved it, and produced it from his possession, can be allowed to defeat it by testifying that he never accepted it, and that he has been holding adversely to it, the result would be unfortunate insecurity of land titles.

Equally untenable is the position that Newton Midkiff was a purchaser for value without notice. It is true he denies that he had any notice of the deed until the commencement of this suit; but Abraham Midkiff, his father, a witness introduced by him, testified that he talked with him about the deed at the time he purchased. Thus he was put upon notice of its contents. Nor is Newton Midkiff in a position to claim the minerals by adverse possession. At the time he purchased from Solomon, the minerals and the surface had been severed by a conveyance of the true owners of the land with a reservation of the minerals. He bought with notice of this severance, and therefore could not claim the coal by adverse possession of the surface. Adverse possession of the coal could have been started only by actual working of the coal, or some other act of dominion over the minerals, showing assertion of title and use in accordance therewith. Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140; Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; Kiser v. McLean, 67 W. Va. 294, 67 S. E. 725, 140 Am. St. Rep. 948; Steinman v. Jessee, 108 Va. 567, 62 S. E. 275.

The finding of the District Court seems to me to be supported by the clear preponderance of the testimony.

THE PIEDMONT.

THE NO. 25.

(Circuit Court of Appeals, First Circuit, April 6, 1917.)

No. 1193.

COLLISION ⊂⊃95(7)—SCHOONER AND TOW—LENGTH OF TOW—SPECIAL CIRCUMSTANCES.

A schooner in Vineyard Sound in the daytime, taking a course practically parallel to and half a mile to windward of a tug with three barges in tow, after proceeding a mile or so, crossed the towline of the leading barge and came into collision with it. There was a strong wind which drove all the vessels to leeward. There was testimony that the tug changed her course toward that of the schooner, and also that the sagging over of the schooner brought her course in convergence with that of the tug. *Held* that, whichever was in fault in that respect and without regard to which was the privileged vessel, the tug was in fault for using hawsers which made her tow more than twice the length permitted by the regulations adopted under authority of Act May 28, 1908, c. 212, §§ 14, 15, 35 Stat. 428, 429 (Comp. St. 1916, §§ 7969, 7970), and that the schooner was also in fault for not keeping a lookout and taking such action as was necessary under the special circumstances to keep her at a safe distance from the tow.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Suit in admiralty for collision by Lewis Holmes, owner of the schooner Henry D. May, against the tug Piedmont and barge No. 25; the Consolidation Coal Company, claimant. Decree for libelant, and claimant appeals. Reversed.

J. Walter Lord, of Baltimore, Md. (Theodore Hoague, of Boston, Mass., on the brief), for appellant.

Edward E. Blodgett and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for appellee.

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

DODGE, Circuit Judge. This case arises out of a collision between the appellee's schooner Henry D. May, and the appellant's barge No. 25, on the morning of October 14, 1913, not more than a mile and a half from Pollock Rip Lightship, in a general direction toward Shovelful. The barge was at the time one of three coal-laden barges, all being towed in line by the appellant's tug Piedmont, and was the barge following next after the tug. The libel, which claims damages for injuries sustained by the schooner, is brought against both tug and barge.

The collision was in the daytime, and in weather clear, though overcast. A wind from the N. or N. by E., of moderate to strong gale force, was blowing and had been blowing all night. It had caused the tug and barges, which were bound for Boston around Cape Cod, to turn back, after passing Nauset, for shelter in Vineyard Sound. They had returned through the Slue, rounded Pollock Rip Lightship, and thereafter headed for Shovelful Lightship, before the collision.

The schooner, a three-masted vessel, bound over the Shoals for New York, had been not far behind the tug and barges during their return through the Slue. Loaded with lumber, and her draft permitting, she passed to the northward of the gas buoy opposite Pollock Rip Lightship, instead of going, as the tug and barges did, between it and the Lightship; after which, coming up into the wind, she headed for Shovelful Lightship on the starboard tack, close-hauled, or nearly so. Just before doing this she had lost her flying jib and had set her spanker, reefed, carrying also thereafter only her foresail, forestaysail, and jib.

Shovelful Lightship is distant from Pollock Rip Lightship 3½ miles, the direct course from the latter to the former being W. by N. ⅝ N., according to Eldridge's Chart. The heavy wind to which the starboard sides of vessels pursuing this general course were exposed made it impossible for the tug and barges, and for the schooner as well, to proceed in the desired direction without making considerable leeway.

The schooner, thus adopting a course toward Shovelful not far from parallel with that adopted by the tug and barges, was, at the time she hauled up on said course, as above, considerably to the windward of their course. As the vessels proceeded, the schooner came in some manner to be between the tug and the barge, over the hawser connecting them, and ahead of the barge, which struck her stern; she thereafter went off to leeward of the tug and barges, anchored, filled with water, and was ultimately left at anchor by her master and crew, near the Stone Horse Shoal.

The respective courses toward Shovelful, parallel or nearly so, as above, originally adopted by the tug and barges, and by the schooner as well, near Pollock Rip Lightship, involved no risk of collision if duly adhered to on both sides. The course which is claimed to have been that which both parties were then steering, and intending to pursue as nearly as possible, was W. N. W. Without a departure from these original courses, on one side or the other, or on both sides, changing a situation of safety to one of danger, the schooner could not have come to be in the position above referred to, between the tug and barge, over the towing hawser and in the barge's way; a situation escape from which without collision was hardly possible. The question to be determined is: Upon which side was the negligence through which said situation was brought about?

On the schooner's behalf it is contended that the burden of avoiding collision, and therefore of excusing the collision which happened, is on the tug and barge, constituting (with the other barges) one vessel under steam, and therefore bound by article 20 of the applicable Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. 1916, § 7894]) to keep out of the way of sailing vessels. If this rule governed the case, as the District Court held, the schooner was bound to hold her original course without change.

On behalf of the tug and barges it is contended that the schooner was an overtaking vessel as to them all, bound by article 24 (Comp. St. 1916, § 7898) to keep out of their way, and under the burden therefore of excusing this collision. Assuming this as the governing rule, the tug and barges were bound to hold their original course without change.

Whether the duty of maneuvering, if necessary to avoid collision, was on the tug and barges or on the schooner, under the rules, an alteration of or departure from the original course on the part of either in the direction of the other's course, would have been a maneuver tending in no way to avoid, but, on the contrary, to incur danger of collision, and therefore, in any case, fault contributing to the collision, and, on the part of the privileged vessel, whichever of them it may have been, such alteration of the original course would have been fault bringing about the collision, as is equally obvious. Without determining, therefore, which side was bound to keep clear, and which entitled to claim privilege, under the above Inland Rules, it is believed sufficient to inquire only by which side does the conflicting evidence show that change of course to have been made which placed the schooner in the position above referred to, relatively to the tug and barge, and thus brought about collision between them. The circumstances, as will appear, are shown by uncontradicted evidence to have been such as forbid holding the tug and barges in fault merely for failure on their part so to change their course as to head more away from the schooner's.

The libel alleges that the Piedmont suddenly changed her course to starboard and pulled directly across the schooner's course. These allegations are denied in the answer. The finding of the District Court was that the Piedmont did make such a change, in order to avoid risk of collision with another tug, called the Donahue, also towing three barges in line toward Shovelful, and which, after preceding the Piedmont through the Slue, had been carried to leeward and was heading across the Piedmont's course in an attempt to get herself and her barges further to windward. The pleadings make no reference to the Donahue or her barges. The appellant contends that the above finding was unjustified on the evidence.

The evidence is much in conflict, and on neither side can it be called very clear or satisfactory upon any disputed question. Nearly 11 months had passed since the collision, before any of it was taken. On September 5, 1914, the libelant took the deposition of the schooner's mate. On November 24, 1914, the claimant took the deposition of Capt. Quinn, master of another tug (the Nottingham), who saw the collision from on board her. The hearing was on December 1, 1914, at which the remaining witnesses gave their testimony in person.

The libelant's evidence tending to prove such a change of course on the Piedmont's part as the libel alleges came in part from witnesses who were on board the schooner. Only two such witnesses testified—her master, who was all the time at the wheel, and her mate, as to whose position or doings after the schooner was headed for Shovelful nothing definite appears, except that he was on the deckload amidships, and engaged, or part of the time at least, before the collision, in getting out fenders with the rest of the crew. The crew is said to have consisted also of three colored seamen and a cook; but no testimony from any of these men was before the court.

The testimony from the schooner's master and mate regarding the Piedmont's alleged change of course can hardly be called definite or convincing. It is unsupported by any testimony from a specially de-

tailed lookout performing that duty at a proper station on the vessel forward, because the schooner entirely fails to show that she had any such lookout. The master said in cross-examination that the mate was detailed as lookout; the mate, however, said on cross-examination that there was no one so detailed.

The claimant's testimony that no such change of course was made by the Piedmont came in part from witnesses on board the tug and barges. The master of the tug, in her pilot house until just before the collision, denied that, at any time before the schooner had come in between the tug and barge, he ever changed the W. N. W. course toward Shovelful, or made any attempt to haul off to starboard, or that he was ever closer than half a mile to the Donahue. Although that tug and her barges was ahead of his tug and across his course, he had not, as he testified, got near enough to her to require any change by him. With him in the pilot house were the second mate and man at the wheel, neither of whom testified, nor another man said by him to have been on lookout on the tug, but aft at the time, watching the towing hawser. The tug's engineer was a witness, but, having been below at the time, made no statement bearing on the matter now under consideration. The master of the colliding barge (No. 25) testified that he was watching the Piedmont in order to follow her properly; that he saw the Donahue ahead of her, but that she made no change after once taking up the course for Shovelful; and that his barge made no change. Although he saw the schooner cross the hawser between him and the tug, he did not know at the time, according to his testimony, that his barge struck her, but thought she had gone clear. There was no other witness from on board his barge.

One witness only was called by the claimant from on board each of the two other barges composing the Piedmont's tow. The master of the second barge from the tug (No. 10) occupied on her deck forward, after the turn had been made at the Lightship, in setting sail on her with two other men, said that the tug never changed her course at any time until the schooner crossed her hawser. The master of the third barge from the tug (No. 9), though in his pilot house and steering after barge No. 10, did not see what happened, and did not undertake to testify to any change, or absence of change, in the tug's course.

If the result were left to depend solely upon the evidence thus far referred to, it might well be doubted, even upon the assumption that the burden of proof was on the tug, in view of the character of the evidence from the schooner and her failure to show that a sufficient lookout was kept on board her, whether the above conclusion reached by the District Court was justified. But upon the issue whether any such change of course was in fact made by the tug, or not, neither side relied wholly upon testimony coming from the vessels immediately involved.

The libelant relied also upon testimony by Murphy, master of the schooner Herrick, anchored at the time further toward Stone Horse Shoal, at a point half a mile to a mile away from the place of collision. After describing the Piedmont as approaching, just before the collision, another tug towing barges (the Donahue), he said:

"It looked to me as though this towboat [the Piedmont] was pulled over toward the northerly, and this vessel [the schooner] came between the towboat and the barge [No. 25]."

On the other hand, the claimant relied also upon testimony by Quinn, master of the tug Nottingham, and Kelley, keeper of the life-saving station on Monomoy Point. The Nottingham, also towing three barges, had been following the Piedmont and her barges through the Slue, and was at the time following after them toward Shovelful on a course somewhat to leeward of theirs. Capt. Quinn, claiming to have watched all that happened from on board her, said he saw no change of course on the Piedmont's part. Capt. Kelley, claiming to have seen all that happened from his lookout tower, about three miles away, with the aid of glasses, said that the Piedmont did not turn to starboard at all, but kept right on her course to Shovelful, except that she stopped and fell off to leeward just before the schooner and barge came together.

As to Capt. Kelley, there was evidence tending to show statements made by him since the collision at variance with his testimony in court. But, without discussing this evidence in detail, or other evidence relied on by either side to impeach, qualify, or affect testimony introduced by the other, we are unable, after careful consideration of the whole evidence, to find sufficient ground for adopting a conclusion contrary to that reached by the District Court, before whom all the witnesses except the mate of the schooner and Capt. Quinn testified in person. We further agree with the District Court in holding the tug and tow in fault in any case, because of the length of the hawsers upon which the barges were being towed at the time, which was such as to make the total distance from the tug to the rear barge some three-quarters of a mile, more than twice the length permitted by the department regulations established under statutory authority. 35 Stat. 428, 429. We agree with the District Court in finding the evidence insufficient to excuse so gross a failure to obey the regulations, and as insufficient also to show that the failure could not have contributed to bring about collision.

Holding the navigation of the tug and barge as above to have been the "direct and sole cause of the collision," the District Court exonerated the schooner; and it remains to determine whether or not the evidence justified this result.

Assuming the duty of avoiding her to have been upon the tug and barges, as the District Court held, they had a right to expect the schooner, after taking up her course for Shovelful, parallel with theirs, to adhere to that course, so far at least as was necessary to prevent any approach into dangerous proximity with theirs. If, as there is evidence tending to show, she failed to do this, and let herself be carried on a course constantly converging toward theirs, the nearer she came to their course the more she increased the risk of collision, by her own fault. That the Donahue and her barges were in such a position relatively to that of the Piedmont and her barges as made any change to port on the part of the latter dangerous for both towing fleets was known to the schooner's master and mate, as sufficiently appears from

their testimony. Under such circumstances, if the schooner found herself unable to keep to her original course, safely parallel with that of the tug and barges, and unavoidably carried instead upon a course so converging with theirs as to involve dangerous proximity if persisted in, we think the case was one of special circumstances, due regard for which required her, under article 27 of the Rules, to take in time some action to arrest or prevent any closer approach, even though not herself otherwise charged with the whole duty of keeping clear.

In its answer the claimant alleged that, although the course toward Shovelful first adopted by the schooner was to windward of the tug and tow's course and nearly parallel therewith, she afterward appeared to lose her headway or become unmanageable, and finally kept off as if to cross the bow of barge 25. As appears from the opinion, the claimant contended in the District Court that the schooner was being driven to leeward by the wind and lost her flying jib just prior to the collision, which loss caused her to become unmanageable and pay off to leeward. The court held, however, that she lost her flying jib, not after she had laid her course for Shovelful from the Lightship, but before she had passed out of the Slue between the buoys, and that she was at the time of the collision holding her course with no more leeway than was to be expected.

We find no sufficient ground for disagreeing with the conclusion that the schooner lost her flying jib before, and not after, she had come upon her W. N. W. course toward Shovelful. While it may well be true that she thereafter held her course with no more leeway than was to be expected under all the circumstances, that she made more leeway than the tug and barges, under her shortened and scanty sail, from that time until the collision, can hardly be doubted in view of her own evidence. According to her master, at her wheel, she fell off whenever the wind baffled, heading to windward again when a heavy spell would strike. He claims to have kept her headed for the Shovelful Lightship all the time, but he says it was bearing one point on his weather bow when he first noticed the tug turning to the northward. Once he intentionally let the schooner come into the wind, in order to see whether she would come about or not, letting her fall off again after he found that she was not likely to do so. Neither in his testimony nor in that of the mate do we find sufficient reason for doubting the statement by Capt. Quinn, who was following in the Nottingham, that after passing the buoys, changing her course so as to head toward Shovelful and thereafter getting into the wind, the schooner "sagged right over for the Piedmont's tow." Failing, as she does, to show that a proper lookout was maintained on board her, the schooner is in no position to contradict the testimony from the tug and barges, thus supported, that between the buoys and the place of collision the course she actually followed constantly converged toward theirs.

Whether, at the point where she took up her course toward Shovelful, the schooner was abreast barge No. 25, or further astern relatively to the tug and barges, and whether the place of collision was within a mile of Pollock Rip Lightship or about a mile and a half distant there-

from, are disputed questions, regarding which satisfactory foundation for a definite conclusion can hardly be found in the evidence. Whatever the schooner's previous speed in comparison with that of the tug and barges, her speed while heading toward Shovelful, and while navigating as above, can hardly be supposed to have materially exceeded theirs. We think that the careful observation on her part demanded by the circumstances would necessarily have enabled her to discover in time that persistence upon a course such as that upon which she was being carried, involved constantly increasing risk of collision or entanglement with the tug and barges, and that they were not free so to alter their course as to diminish that risk materially. If there is evidence tending to show that the schooner could not have tacked, there is none to show that she could not have anchored in time, as other sailing vessels not far off had done, and as she herself did after the collision. Not only did she persist in keeping on as above toward the course of the tug and barges, without any properly stationed lookout, but her evidence fails to show any such careful and constant observation on her part, meanwhile, as she ought in any case to have maintained, and as was especially requisite in view of her own inability to keep herself at a safe distance from them and the obvious limitations upon their power to maneuver with regard to her.

In The Mary E. Morse (D. C.) 179 Fed. 945, and The Helen (D. C.) 204 Fed. 653, and 230 Fed. 601, 145 C. C. A. 11, a schooner was, as here, approaching by daylight a line of barges towed by a tug, on a course converging with theirs. She had a properly stationed lookout, besides having all hands on deck, and kept a careful and constant watch upon the movements of the tug and barges for the purpose of performing her duty of avoiding collision with them. Even if not charged with that duty, we think that the circumstances shown in this case required no less vigilance in the matter of lookout on the part of the libelant's schooner. While her failure to exercise such vigilance might not necessarily have been by itself contributory fault on her part, it leaves her unable under the circumstances here shown to prove that collision could not have been escaped had there been no such failure, and unable therefore to establish the conclusion that the collision was solely due to the tug's change of course to the northward. We are therefore unable to hold the schooner altogether exonerated. See Eastern, etc., Co. v. Winnisimmet Co., 162 Fed. 860, 862, 89 C. C. A. 550; The Anna W., 201 Fed. 58, 119 C. C. A. 396.

When the schooner got so close to the hawser connecting the tug and barge that she could not avoid striking or crossing it, the tug slackened her speed to let her cross without fouling it, as she did by falling off herself from the wind. We cannot, however, hold either vessel in fault in respect to any of these last maneuvers, adopted as they were at the last moment, after a situation had been reached which so inevitably led to immediate collision.

There being nothing to show independent fault on the part of the barge, whose movements were wholly under the tug's control, we think the result required by the evidence is that both schooner and tug were to blame for the collision.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dividing equally the damages and the costs in that court, and the appellant recovers its costs of appeal.

CITIZENS' TRUST CO. v. ABSTON, WYNNE & CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1917.)

No. 4543.

BANKS AND BANKING ⟸109(3)—REPRESENTATION BY OFFICERS—POWERS OF CASHIER—ISSUANCE OF DRAFTS.

The Missouri Negotiable Instruments Law (Rev. St. Mo. 1909, § 10102 et seq.) provides that an acceptance must be in writing and signed by the drawee, that the drawee is allowed 24 hours after presentation in which to decide whether or not he will accept the bill, but that where he "destroys the same, or refuses within 24 hours after delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." The president and manager of a mercantile corporation, who was also cashier of the bank in which it was a depositor, made a time draft on the bank in its behalf in favor of a holder of the corporation's note, requesting that it be sent direct to the bank for acceptance. This was done, with a request that it be accepted and returned at once. A few days later the payee again wrote, asking to be informed by return mail whether the draft would be returned. It was not returned, but the bank, by the cashier, sent its own draft on a correspondent bank for the amount, which was received by the payee, and the note, which was signed by solvent sureties, was surrendered. Some 2½ years afterwards a receiver for the bank brought suit to recover the money paid on its draft. *Held*, that the action of the bank amounted to an acceptance, which made it the principal debtor on the draft, and that it was bound by the payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 260.]

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

Action at law by the Citizens' Trust Company, as receiver of the Pemiscot County Bank, against Abston, Wynne & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

C. G. Shepard, of Caruthersville, Mo. (Everett Reeves, of Caruthersville, Mo., on the brief), for plaintiff in error.

James H. Malone, of Memphis, Tenn. (A. B. Knipmeyer, of Memphis, Tenn., on the brief), for defendants in error.

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

PER CURIAM. Caruthersville is the county seat of Pemiscot county, the southeast county of Missouri. The Pemiscot County Bank was organized there, and at the times here material William A. Ward was its president and A. C. Tindle its cashier. Mr. Tindle was a stockholder, president, and general manager of the People's Gin Company and a stockholder in the Missouri Cotton Oil Company and the Tindle

Cotton Company. He had a heavy interest in the Famous Store Company, which carried a stock of $20,000 in a building of its own worth about $5,000. He was president and a dominating and controlling officer of this company. He also owned a great quantity of land and town property. John H. Poston, Jr., an agent of the defendants, who went to Caruthersville to investigate him and others, reported in October, 1911, that he was worth upwards of $40,000 after deducting all incumbrances, exclusive of his interest in the Pemiscot County Bank and the Famous Store. The defendants were a firm of wholesalers and cotton factors at Memphis, Tenn. In the fall of 1910, Mr. Tindle, acting for the People's Gin Company and the Missouri Cotton Oil Company, made an arrangement with the defendant to advance $7,500 to each of said companies to assist in carrying on their business. Each of the companies gave its note for the amount of advances to it, signed by the company and Mrs. Sallie M. Roberts, Mr. W. H. Johnson, Mr. W. A. Ward, who was president of the Pemiscot County Bank, and Mr. A. C. Tindle, heretofore fully referred to. This money was drawn by drafts on the defendants. These two companies would send products of theirs to the defendant firm for sale and credit. After any consignment had been sold, the net proceeds would be credited to the proper company, and when the notes given matured they were charged to the proper company in its general account.

In 1911 the same system was followed on a more extensive scale. In September, 1912, the defendants loaned the Tindle Cotton Company $20,000 in a similar manner but no additional loans were made this year to the People's Gin Company or to the Missouri Cotton Oil Company. On January 25, 1912, Mr. Tindle was at Memphis, and then on behalf of the People's Gin Company and the Missouri Cotton Oil Company settled their accounts with Abston, Wynne & Co., and gave in the names of the respective companies, two in the name of the People's Gin Company and two in the name of the Missouri Cotton Oil Company, drafts upon the Pemiscot County Bank. These drafts were one drawn by the People's Gin Company for $5,007.62, to be paid February 1, 1912, one drawn by the Missouri Cotton Oil Company for $5,021.91, to be paid February 15, 1912, one drawn by the People's Gin Company for $3,497.61, to be paid March 1, 1912, and one drawn by the Missouri Cotton Oil Company for $2,868.86, to be paid March 15, 1912. That these drafts were all drawn for bona fide indebtedness of the companies drawing them is without dispute. Mr. Tindle did not offer to accept these drafts as cashier of the Pemiscot County Bank, but suggested that they be sent direct to that bank for acceptance.

While it may be negligence to send a draft direct to the drawee for acceptance, there is nothing to indicate that by such negligence the payee will be prejudiced in a suit with the drawee. Abston, Wynne & Co. sent these drafts in a letter, January 25, 1912, in which they said:

"Please accept and return these drafts to us at once."

This letter in all probability reached Caruthersville not later than January 26 or 27, 1912. Who got the letter from the postoffice is not clear. Under date of February 3, 1912, the Pemiscot County Bank, by A. C. Tindle, its cashier, sent to Abston, Wynne & Co. its draft on the

National Bank of Commerce of St. Louis for $5,007.62 in payment of the first draft of the People's Gin Company. On February 5th Abston, Wynne & Co. wrote as if they had not received this remittance to the Pemiscot County Bank referring to these drafts, saying:

"We now ask that you please let us know by return mail whether these drafts will be returned or not."

Apparently later the same day Abston, Wynne & Co. acknowledged to Mr. Tindle the receipt of the draft of $5,007.62 in payment of the People's Gin Company debt and added:

"We cannot understand why the bank does not return us the three other drafts, and wish you would please let us know at once whether or not they are going to do so."

On February 10, 1912, the Pemiscot County Bank, by William A. Ward, its president, sent back the second People's Gin Company draft and the second Missouri Cotton Oil Company draft accepted, and stated they would remit promptly for the first Missouri Cotton Oil Company draft, which was then due in five days, and this they did on February 24, 1912. On July 21, 1914, the Missouri circuit court of Pemiscot county appointed the Citizens' Trust Company as receiver of the Pemiscot County Bank, and on July 29, 1914, it brought this suit, by filing a petition in the state circuit court for Pemiscot county, Mo., seeking to recover the amount paid on the first People's Gin Company draft. The case was removed to the United States District Court for the Eastern District of Missouri, where the parties filed a stipulation waiving a jury, and the case was tried, and the court dismissed the case at plaintiff's cost, and it sued out a writ of error to this court.

It is contended that Ward, the president of the now defunct bank, had signed the People's Gin Company notes for which this draft was given in payment, and that Tindle, the cashier of the bank, had not only signed the notes, but was the president and general manager of the People's Gin Company. There is no room to claim, however, that Ward and Tindle were anything but sureties upon these notes as between them and the People's Gin Company.

It is first insisted that the draft issued on the St. Louis Bank of Commerce was never paid for, and was issued by Tindle in payment of his own debt. Among the powers ordinarily inherent in the position of cashier is that of issuing drafts drawn on his bank's funds on deposit with a correspondent bank. Morse on Banks and Banking (4th Ed.) § 154; Zane on Banks and Banking, § 100.

It will be conceded for the purposes of this case that there is this exception to that rule: That the cashier has no implied authority to issue such drafts in payment of his own debts, and where he issues such a draft to an individual creditor in payment of his individual debt, such creditor, knowing the law, is charged with notice of the apparent lack of authority of the cashier to draw the draft, and in the absence of a showing that the cashier had been expressly authorized to draw the draft or the like for his own debt it would be liable to the bank in an action such as this for money had and received. The question then arises, if he issue a draft, not for the debt of the cashier, but for the

debt of a corporation in which he is a stockholder and managing officer, and upon which debt he is surety, does the same rule apply, and does he have no implied authority to draw a draft in payment on the bank's funds? This identical question was before the Supreme Court of Tennessee in a case between these same parties. Pemiscot County Bank et al. v. Central State Bank et al., 132 Tenn. 152, 177 S. W. 74. In that case the court said:

"In this state of the law, and in this attitude of the court in respect to the doctrine above stated, we are asked to take a step further in advance, and to hold that, where the cashier of a bank issues a draft of his bank on its correspondent, over his signature as cashier, to the collecting bank or agency of a creditor of a mercantile corporation in honoring that corporation's draft or check on the bank, or for a note payable there, the same rule as to imputed notice of embezzlement shall apply. The matter may be presented in sharper outline if, purely for the purpose of test, the case be conceded to be that the draft was drawn directly in favor of Abston, Wynne & Co., as payees, as a way of the Pemiscot County Bank's paying the draft on it issued to the Memphis firm by the Famous Store Company. May the doctrine be fairly or justly extended, so as to hold the Memphis firm to have been put on inquiry as to the cashier's authority by what would thus appear on the face of the bank's draft? In our opinion it cannot, and we are entirely satisfied in declining to so hold.

"The Famous Store Company was an entity distinct from Tindle; it was accepted and dealt with as a customer by the bank as such entity. To the extent that Tindle, as president of the Store Company, controlled its affairs, it would have cast at least a shade of suspicion on the bank in the community, had that company failed or refused to do business with the bank of which Tindle was cashier. It would be an undue stretch to hold that the drawing of a draft on a correspondent city bank by Tindle as cashier in favor of the Store Company or its creditor imparted notice to the creditor on reception that Tindle was unfaithful in his trust as cashier. Abston, Wynne & Co. were not his individual creditors. We must assume, even if Tindle dominated the Store Company, that there were directors and agencies in that company who were true to their trusts, and would refuse to join Tindle in looting the bank in its behalf, and who would, at least in the view of the trading public, operate to deter Tindle from such peculation for that company's benefit. The counsel of the appellee cite no authority which supports such an advanced position; they concede that after diligent search they have been unable to find any.

"It is apparent that appellees must maintain the position that Tindle, as cashier, and therefore as chief executive officer, of the bank, was without power or authority to act in accordance with the usage, practice, and course of business of banking institutions in drawing drafts in favor of corporations in which he was also an officer. Touching the principle bearing upon that point, it was said in Mining Co. v. Bank, 10 Colo. App. 339, 347, 50 Pac. 1055, 1058, as follows: 'It is contended that the note appeared upon its face to be executed by a corporation, and to a corporation of both of which the same person was president, and that this was sufficient notice to put J. B. Wheeler & Co. and each subsequent transferee upon inquiry as to all matters affecting its validity. * * * In any event, the argument depends for its force upon the theory that where a note is executed by one corporation to another, and the same person is president of both, it is prima facie void. These premises are not correct, and the argument therefore falls to the ground. However much such a circumstance may render it obligatory upon a court to scrutinize closely the bona fides of a transaction in certain cases, it by no means follows that it creates a presumption as to the invalidity of the paper, either as to want of authority to execute it, or of consideration. * * * The note did not disclose any suggestion that the maker was without authority to make it, or that it was for the benefit of any one of the officers making it.' See also Cheever v. Pittsburg, etc., R. Co., 150 N. Y. 59,

44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646 (cited and quoted with approval in Bank v. Butler, 113 Tenn. 574, 83 S. W. 655), and Orr v. South Amboy, etc., Co., 113 App. Div. 103, 98 N. Y. Supp. 1026.

"To enlarge the above exception to the general rule as to the power of a cashier to issue bank drafts, so as to include in that exception drafts or cashier's checks drawn in favor of such corporations or its creditors, would be to seriously hamper commercial transactions. The settlements made with such paper as exchange vastly exceed in number and amount those made with currency. Sound policy dictates that no further burden be placed by the courts on such paper to the embarrassment of commerce. The free flow and the amplest acceptance by the trading public of such paper should be facilitated by the law, not further embarrassed or hindered. Judge Peckham well said that bank or cashier's drafts are used so enormously at the present time in payment of debts and in settlements that they have almost acquired the characteristics of money, and are regarded by the commercial community as so much cash. True, money bears no 'earmarks' that may give rise to suspicions on the part of the recipient as to the manner in which it was obtained by one who pays it (Thompson v. Clydesdale Bank, [1893] 3 A. C. 202, 69 L. T. N. S. 156; Ball v. Shepard, 202 N. Y. 247, 95 N. E. 719; Goshen Nat. Bank v. State [141 N. Y. 379, 36 N. E. 316], supra), while bank drafts may, as we have observed, still the better policy does not look towards the courts adding to such drafts other marks of dissimilarity to currency. It is more reasonable and just to place upon the directors of a bank the hazard of guarding their institutions from embezzlement by the cashier, who is chosen, and may be caused to be adequately bonded, by them, than to shift the perils incident to his wrongdoing against the institution to the public which is without voice in that regard. Such dishonesty is, fortunately, a thing sporadic, and its results, practically speaking, are confined to a limited territory and to comparatively few persons; whereas, further restrictive rules would affect the currency of such commercial paper, measureless in volume, every business day of the year.

"As was said in Cheever v. Pittsburg, etc., R. Co., supra, in reply to a suggestion that a similar ruling would open an easy way for the perpetration of frauds: 'It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.' If the results of delinquency or lack of diligence on the part of the management or supervising agencies of a bank are to be shifted to and borne by the public, then from the standpoint of economics this should be done by way of an undisguised tax levied on the holdings of the public, rather than by way of further depreciating and clouding a medium of exchange so widely in use."

In these days of interlocking officers and directors, now happily passing away, we should be inclined to follow that case, except for a doubt as to whether in effect the case has not been otherwise decided recently. German Savings Bank v. Des Moines National Bank, 122 Iowa, 737, 98 N. W. 606; Ft. Dearborn National Bank v. Seymour, 71 Minn. 81, 73 N. W. 724.

There is another ground upon which it is somewhat more clear to us that plaintiff cannot recover. In 1905 the state of Missouri adopted a negotiable instruments act. This provided (section 10102, Revised Statutes of Missouri 1909):

"The acceptance must be in writing and signed by the drawee."

Section 10106 provides that:

"The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill."

Section 10107 provides that:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuse within twenty-four hours after delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same."

In Ruling Case Law, vol. 3, p. 1303, it is said:

"It is not to be supposed that, under the Negotiable Instruments Law, a bill can only be accepted by writing signed by the drawee. It is true that verbal and implied acceptances have been abolished by the section which provides that the acceptance must be in writing and signed by the drawee. But the statute also declares that the action of a drawee in destroying a bill or in not returning it, as required by the section, shall be deemed an acceptance of it."

And in 8 Corpus Juris, 303, it is said:

"The Negotiable Instruments Law expressly provides that 'the acceptance must be in writing and signed by the drawee,' and it is held thereunder that an oral acceptance is not binding on the drawee. This provision applies equally well to checks, but does not affect constructive acceptances by delay in returning a bill."

It was held in Wisner v. First National Bank of Gallitzin, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, that the mere retention of a bill or check for more than 24 hours constituted an acceptance under a statute very similar to the Revised Statutes of Missouri, § 10107. While the statute was largely declaratory of the common law, the question, so far as we can find, has never been before the Supreme Court of Missouri since the enactment of the Negotiable Instruments Law. It was before that court in Rousch v. Duff, 35 Mo. 312, and has been before the Court of Appeals in Dickinson v. Marsh, 57 Mo. App. 566, the latter under substantially the same provision contained in the Negotiable Instruments Act, and it was held that the mere retention of a bill would not constitute acceptance. There are many authorities sustaining this rule under the Negotiable Instruments Act, and, conceding this to be the law, the question is whether the record shows any other acts which, taken with retention, would under section 10107 constitute acceptance.

When the drafts were sent to the Pemiscot County Bank by mail by Abston, Wynne & Co., they did not content themselves with simply sending the drafts, but wrote, "Please accept and return these drafts to us at once." While the bank had remitted for the first People's Gin Company draft under date of Saturday, February 3, 1912, on Monday, February 5, 1912, apparently not having heard from the Pemiscot County Bank, Abston, Wynne & Co. wrote, "We now ask that you please let us know by return mail whether these drafts will be returned or not." Not only did the Pemiscot County Bank remit the amount of the People's Gin Company draft under date of February 3d, but sent in formal written acceptances of the second draft of both the People's Gin Company and the Missouri Cotton Oil Company, but agreed in writing to accept the first Missouri Cotton Oil Com-

pany draft and to pay it when due. The Pemiscot County Bank has never returned or offered to return the draft of the People's Gin Company on it to Abston, Wynne & Co., although repeated demands have been made upon them to do so. These circumstances all show that it accepted the draft within the meaning of the Missouri statute. So far is this true that it is practically conceded by plaintiff in error who say in their brief:

"In January, 1912, the defendants were insisting on payment of the notes which they held made by the People's Gin Co., and indorsed by Wm. A. Ward, A. C. Tindle, Sallie M. Roberts, and W. H. Johnston, and Tindle went to Memphis, and in settlement of the amount due on the note of the People's Gin Co., as aforesaid, made to them time acceptances on the Pemiscot County Bank, signed by the People's Gin Company, by A. C. Tindle, president, and requested the defendants to send the acceptances direct to the Pemiscot County Bank for acceptance, which was accordingly done, and Wm. A. Ward, as president of the Pemiscot County Bank, accepted the time draft so drawn on the Pemiscot County Bank in payment of the notes made by the People's Gin Co."

The case is therefore argued upon the theory that the draft in question was drawn in payment of a draft accepted by the Pemiscot County Bank. Assuming this to be true, the instant the bank accepted this bill drawn on it by the People's Gin Company, it became the principal debtor thereon. Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Superior City v. Ripley, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914. And the issuance of a draft on its St. Louis correspondent by its cashier was in payment of its own debt, and not the debt of any other person, and was clearly within the powers of the cashier.

It is perhaps proper here to say that the counsel for the plaintiff below said:

"It is admitted here by the plaintiff that the proof in the case does not show any fraud, any actual fraud, on the part of these defendants, in that the proof does not show that they had any notice of Tindle's defalcation, if there were any, with the Pemiscot County Bank."

The long delay in assailing the transactions of nearly 2½ years, and the fact that the bank kept the draft and has never offered to return it to this day, and that, in reliance on the conduct of the bank, Abston, Wynne & Co. surrendered the notes they held for the amount, signed by Mrs. Sallie M. Roberts, who was amply good and had more wealth than all the other signers, and their settlement with her as to the balance on which she was surety, might establish the defense of laches or of an estoppel outside of laches; but the sole answer in this case is a general denial, and these defenses cannot be considered.

Upon the grounds already indicated, the judgment of the District Court was correct, and it is affirmed.

TWIN LAKES LAND & WATER CO. v. DOHNER.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2955.

1. APPEAL AND ERROR ⊂=994(3)—REVIEW—CREDIBILITY OF WITNESSES.
Where, in a suit to rescind a contract for the sale of land, plaintiff and his associates, who were Ohio farmers, wholly ignorant of irrigation and its problems, testified that defendant's agents represented that defendant had water enough to supply its entire territory for several years, even though there should be no rain, and the trial judge evidently regarded them as thoroughly credible, the decree could not be disturbed, notwithstanding the claimed improbability that such a representation was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904–3905½.]

2. VENDOR AND PURCHASER ⊂=33—FRAUD—CREATING FALSE IMPRESSION.
If, on a sale of land, defendant's agents, without any literal misstatement of fact, created in plaintiff's mind a false impression, and if they should have known that what they said would create such an impression, they must be deemed to have misrepresented, as though they had made an express misrepresentation.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40–43, 66.]

3. CANCELLATION OF INSTRUMENTS ⊂=24(3)—CONDITIONS PRECEDENT—NECESSITY OF RESTORING PROPERTY.
An actual return or tender of the property received, which is normally an essential prerequisite to an action at law to recover the consideration paid, is not necessary before bringing an action in equity to rescind, as plaintiff brings the controversy into court, and must undertake to perform whatever conditions the court may decide to be equitable, if it eventually declares the right of rescission.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 34–38.]

4. CANCELLATION OF INSTRUMENTS ⊂=24(3)—CONDITIONS PRECEDENT—NECESSITY OF RESTORING PROPERTY.
Pending a suit to rescind a contract for the sale of land, it is not necessary that plaintiff should abandon the land and leave the buildings to destruction, and the land to be injured by nonuse, and it is enough if defendant, on performing his part of the decree of rescission, may receive back what he parted with, subject to any equitable adjustment that may be ordered.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 34–38.]

5. CANCELLATION OF INSTRUMENTS ⊂=37(4)—PLEADING—OFFER TO RESTORE CONSIDERATION OR BENEFITS.
In a purchaser's suit to rescind a contract for the purchase of land, the bill should have expressly averred plaintiff's willingness to return the land and to accept all equitable conditions.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 72, 73.]

6. EQUITY ⊂=330(1)—PLEADING—WAIVER OF DEFECTS.
In a purchaser's suit to rescind a contract for the purchase of land, where there was no demurrer or motion to dismiss, relief could not be denied after a trial upon the merits, and the development of no obstacle

to the return of the property because the bill failed to allege plaintiff's willingness to return the property.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 660–662, 664–668, 671.]

7. VENDOR AND PURCHASER ⊂=119—RESCISSION BY PURCHASER—LACHES.
Where plaintiff was induced to buy land by various representations as to the supply of water for irrigation, a delay on his part in rescinding after the water had almost entirely failed, due to hopefulness and a hesitation to embark in litigation, did not bar rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212–214.]

8. VENDOR AND PURCHASER ⊂=43(1)—RESCISSION BY PURCHASER—DEFENSES.
Where plaintiff was induced to buy land by various representations as to the supply of water for irrigation, and after the supply of water had almost entirely failed he was induced to accept a new contract, which abated some interest and extended the payments, by misrepresentations that the obstacle to a supply of water was only temporary, he did not condone the original misrepresentations by the acceptance of such new contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 67.]

9. CANCELLATION OF INSTRUMENTS ⊂=37(1)—PLEADING—SUFFICIENCY.
In suing to rescind such contract, plaintiff should have set up the making of the second contract in continuation of the first, and should have alleged the grounds for rescinding the second as well as the first, and sought relief accordingly; but, as the changes made by the second contract were by way of concessions or extensions, the defect was not substantial.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66–68, 71; Contracts, Cent. Dig. § 1196.]

10. COURTS ⊂=274—FEDERAL COURTS—DISTRICT IN WHICH SUIT MAY BE BROUGHT.
In an action by a citizen of Ohio, residing in the Southern district, against a corporation, a citizen and resident of Colorado, the federal court for the Southern district of Ohio had jurisdiction, if defendant was rightly served within that district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814.]

11. CORPORATIONS ⊂=668(4)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.
Service of process upon the vice president and general manager of a foreign corporation was sufficient, if he was within the district upon corporate business, and not merely in his personal capacity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2610.]

12. CORPORATIONS ⊂=669—FOREIGN CORPORATIONS—APPEARANCE AS WAIVER OF OBJECTIONS TO JURISDICTION.
Where, in an action against a foreign corporation, its attorney appeared on a motion for a preliminary injunction to prevent a sale of a contract and notes, and agreed to see that no transfer of the contract and notes were made, and thereby procured an order denying the injunction, this was a general appearance, and a waiver of any objection to the jurisdiction over the person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2641, 2642.]

13. COPORATIONS ⊂=669—FOREIGN CORPORATIONS—WITHDRAWAL OF APPEARANCE.
In an action against a foreign corporation, its attorney appeared on motion for a preliminary injunction on January 29th. Thereafter it entered a special appearance and filed a motion to quash the service, supported by affidavits tending to show that the officer upon whom service

was made was decoyed within the district by fraud. Plaintiff moved to strike such motion and affidavits, on the ground that the appearance on January 29th was a general appearance. The court so held, and overruled the motion to quash. Subsequently defendant appeared specially and moved for leave to withdraw the appearance of January 29th, supported by affidavits showing that no general appearance was intended, and that prior to January 29th it had not learned, and had no opportunity to learn, the facts as to the fraud. *Held*, that the denial of this motion was within the trial court's discretion, as the claim that it did not learn of the fraud until after January 29th should have been made before the hearing upon the motion to quash, and by way of reply to plaintiff's claim that the appearance of January 29th was a waiver of objections to the service of process.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2641, 2642.]

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

Suit by Warren Dohner against the Twin Lakes Land & Water Company. From a decree for plaintiff, defendant appeals. Affirmed.

C. A. Ballreich, of Pueblo, Colo., for appellant.

S. T. McPherson, of Cincinnati, Ohio, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The appellant is a company owning a large tract of land in Colorado, and a water supply for irrigation purposes. It made a contract with the appellee to sell him a tract of this land upon deferred payments. He took possession, retained it for several years, and paid a part of the purchase price, and then he filed this bill in the court below, asking a rescission of the contract and return of the payments which he had made. He based this demand upon the claim that material facts had been misrepresented to him. The court below gave him a decree of rescission and for restitution, and the company prosecutes this appeal.

[1 2] 1. Upon the ultimate merits, the question whether there was real misrepresentation, we cannot disturb the decree of the trial court. The question was wholly one of credibility. Omitting a good many subjects within the realm of mere opinion or expectation, we find Dohner claiming that the company's agent represented that the company had in storage reserve, in certain lakes and reservoirs, water enough to supply its entire territory for a period of two or three years, even if there should be no rain, and that the land offered for sale was, therefore, absolutely certain of a sufficient supply of water at all times. Defendant's agents deny this statement, but concede that, if it was made, it was not true; indeed, they say that its very absurdity demonstrates that it could not have been made. If these negotiations had been between parties equally familiar with irrigated lands, and the troubles that develop in operating the best of them, we should hesitate to think that such a statement was made and relied upon; but Dohner was brought from Ohio to Colorado for the purpose of interesting him in such a purchase, he was wholly ignorant of irrigation and its problems, several Ohio farmers with him were equally ignorant, and it is not at all improbable that defendant's agents, without any

literal misstatement of fact, would have created in Dohner's mind the impression that they were claiming the existence of this quantity of reserve water, and should have known that what they said would create that impression, and so must be deemed to have misrepresented, in this respect, just as much as if they had used the very language charged against them. Dohner and his associates testified in open court before the trial judge; he evidently regarded them as thoroughly credible; and it cannot be doubted that they made their purchase and came away from Colorado with the understanding and belief that this representation had been made. The defendant's agents testified by deposition; but they had the right to testify orally at the trial, and they cannot complain if their deposition testimony did not convince the trial judge that Dohner and his witnesses are mistaken.

[3, 4] 2. Defendant insists that there was no sufficient rescission before or in connection with the beginning of suit. The land had been occupied by Dohner's tenant. Dohner brought this suit, and thereupon notified his tenant that this had been done, and that he (Dohner) would have nothing more to do with the land. The tenant remained in possession during the ensuing season, harvested what crops there were, and then abandoned the place. There is no proof that any portion of the crops was turned over to Dohner. The bill of complaint is silent as to possession. It does not tender back possession, or, in terms, offer to do so in connection with the desired decree of recission. It is clear enough that the case lacks that actual return or tender of the property received which is normally an essential prerequisite to an action at law to recover the consideration paid; but the same rule does not apply to an action in equity. By such an action in equity, the plaintiff brings the controversy into court, and must undertake to perform whatever conditions the court may decide to be equitable, if it eventually declares the right of rescission. Where the controversy relates to land, it is not necessary that plaintiff should abandon it pending suit and leave the buildings to destruction and the land to be injured by nonuse. It is enough, if the defendant, on performing his part of the decree of rescission, may receive back what he parted with, subject to any equitable adjustment that may be ordered. Neblett v. McFarland, 92 U. S. 101, 103, 23 L. Ed. 471; Thackrah v. Haas, 119 U. S. 499, 502, 7 Sup. Ct. 311, 30 L. Ed. 486.

[5, 6] The principle stated by this court in Mudsill Co. v. Watrous, 61 Fed. 163, 186, 9 C. C. A. 415, and in Alger v. Keith, 105 Fed. 105, 118, 44 C. C. A. 371, and by the Supreme Court in Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, does not apply at all where the vendee's later dealing with the property is not in silence and in acquiescence, but is after the commencement of a suit to rescind, and is only so far as necessary to prevent avoidable loss. The bill should have expressly averred the plaintiff's willingness to make this return and to accept all equitable conditions; but there was no demurrer or motion to dismiss, and after a trial upon the merits, and the development of no obstacle to the return of the property to the defendant, we cannot deny relief to plaintiff because his bill was insufficient in this respect.

[7-9] 3. It is insisted that Dohner, after discovery of the misrepresentation, reaffirmed the contract, or rather, made a new contract. The fact was that, during the first season, the water almost entirely failed. The defendant's agents explained this failure as due to temporary troubles in the irrigation supply, which troubles would at once be remedied, and a new contract of purchase was made, which abated some interest and extended the payments over a longer period. Dohner claims that misrepresentations, similar to the original ones, induced him to accept this new contract, and induced him to continue his efforts, and to continue payments for several years, before he finally became convinced of their falsity and determined to rescind. In his delay after the first year, we see only a hopefulness and a hesitation to embark in litigation, which are not sufficient to bar any relief to which he might otherwise be entitled. The making of the new contract in the first year stands upon different grounds. If he made that contract after he should have known of the falsity of the essential elements on which he now depends, he cannot now disaffirm; but it is not clear that he should be chargeable with this knowledge. He did know, of necessity, that the stated amount of water was not then available for use, but there was no compelling reason why he should not accept defendant's assurances that the obstacle was only temporary, and that the water was there in the reservoir lakes, and that only unexpected delay in dredging the outlet prevented obtaining the water. Under these circumstances, he cannot be charged with condoning the original misrepresentation. Here, again, the bill of complaint was informal. Dohner should have set up the making of the second contract in continuation of the first, and should have alleged the grounds for rescinding the second as well as the first, and sought relief accordingly; but we cannot consider this defect as very substantial. The changes made by the second contract were by way of concessions or extensions, and to treat it as a new contract, which could not be set aside, unless it was directly attacked, instead of being attacked as incidental to the original contract, would be too strict a reliance upon form.

[10, 11] 4. The defendant challenges the jurisdiction of the court below upon the ground that, as a corporation, it was not within the district. Plaintiff was a citizen of Ohio and a resident of the Southern district. Defendant corporation was a citizen and resident of Colorado. The court below, therefore, had jurisdiction, if the defendant was rightly served within the district. Service was made upon the vice president and general manager, and, if he was within the district upon corporate business, rather than in merely his personal capacity, there was jurisdiction. Connecticut Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Penn. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 48 L. Ed. 810. The manager claims that he was intending merely to pass through the district upon a personal and private journey from Colorado to New York, but that, by Dohner's procurement, he was decoyed to stop over upon a pretense that he could thereby do some business for his corporation, and that this false putting him in the position of doing corporate business within the district

should stand upon the same basis as decoying an individual into a foreign district.

The affidavits which were filed, in support of a motion to quash upon this ground, gave strong color to the claim. However, it appeared that the bill of complaint was filed and subpœna served on January 11th, and at the same time there was served a notice of motion for January 29th for preliminary injunction to prevent a sale of the contract and notes; that the officer who was served continued on his journey to New York, and sent these papers by mail to an attorney at Dayton, with instructions to do whatever was necessary, and to look into the question of jurisdiction; and that on the 29th this attorney appeared upon the motion for preliminary injunction, announced that he represented the defendant, and agreed to see to it that no transfer of the contract and notes was made, whereupon, and by an order reciting this appearance and agreement, the motion for injunction was denied. On March 2d this same attorney, with others, entered a special appearance and filed a motion to quash the service, supporting it by affidavits which tended to show the practice of deception in the matter of getting service. On March 5th plaintiff moved to strike from the files this motion and these affidavits, upon the ground that there had been a general appearance by defendant by reason of what happened upon the motion for preliminary injunction. On March 12th defendant's motion to quash and plaintiff's motion to strike came on to be heard, and the court denied the motion to quash, upon the ground that on January 29th there had been a general appearance which was a waiver of any question of jurisdiction over the defendant's person. The overruling of this motion to quash, and of the plea in abatement, raising the same question, is now alleged as error.

[12] We think the action of the court below right in this respect. Such an appearance as above recited, although upon a collateral matter, is a general appearance, which will be a waiver of any objection to the jurisdiction over the person. Great Lakes Co. v. Scranton Co. (C. C. A. 7) 239 Fed. 603, 605, — C. C. A. —; Central Co. v. McGeorge, 151 U. S. 129, 132, 133, 14 Sup. Ct. 286, 38 L. Ed. 98; In re Moore, 209 U. S. 490, 496, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Erie R. R. v. Kennedy (C. C. A. 6) 191 Fed. 332, 334, 112 C. C. A. 76.

[13] A few days later, defendant, further specially appearing, made a motion for leave to withdraw the appearance of January 29th. This was supported by affidavits showing that no general appearance had been intended, and tending to show that prior to January 29th the defendant had not learned, and had had no opportunity to learn, the facts which gave a right to allege deceit in the matter of the service. This motion was denied. Upon the record as it is brought here, we are considerably impressed that there should have been a fuller inquiry into the question whether defendant's waiver of January 29th had been made in ignorance of the fraud alleged, and, if so, a full inquiry into the question of fact whether there had been such a fraud; but we cannot say that there was error in refusing leave to withdraw this appearance. This action was not beyond the limits of discretion.

Although defendant alleged that it had not learned of the fraud until after January 29th, it did not make this claim until after the hearing of March 12th. The claim should have been made before going to a hearing upon the motion to quash, and by way of reply to plaintiff's claim that the appearance of January 29th was a sufficient waiver. Defendant kept silent at this time, and did not dispute the natural inference that all material facts were known to it at once and before January 29th. When the later effort was made to save this point by a belated showing, it was well within the court's discretion to conclude that a fair opportunity had gone by, and that, if defendant deliberately chose to go to a hearing upon its motion to quash, relying solely upon its legal position that the appearance of January 29th was not a waiver, it had no absolute right to a further hearing on some ground then reserved, but later urged against the binding effect of the appearance.

Other assignments of error do not call for discussion. The decree is affirmed.

LEW LOY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917. On Motion for Rehearing, June 30, 1917.)

No. 2878.

1. ALIENS ⟸23(2)—CHINESE PERSONS—RIGHT TO REMAIN.
That one, who lawfully entered as the minor son of a Chinese merchant, has since become a laborer, is not enough of itself to destroy his right to remain; the general Immigration Act (Act Feb. 20, 1907, c. 1134, 34 Stat. 898) not forbidding the residence of Chinese laborers.

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

2. ALIENS ⟸25—CHINESE PERSONS—SON OF MERCHANT—RIGHT TO ENTER.
A Chinese person having less than a year of minority remaining may, notwithstanding the fact, enter as the minor son of a Chinese merchant domiciled in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⟸25.]

3. ALIENS ⟸32(5)—CHINESE PERSONS—RIGHT TO ENTER UNITED STATES.
Under Chinese Exclusion Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1916, § 4317), a Chinese person, whose right to remain is challenged, has the burden of establishing such right to the satisfaction of the court.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(5).]

4. ALIENS ⟸32(8)—ADMISSION—CHINESE PERSONS.
While the certificate of admission issued to a Chinese person, who entered the United States as a merchant and the minor son of a merchant domiciled therein, is prima facie evidence of his right to remain, the government may show that his entry was not for the purpose of conserving the family relation and following the occupation of a merchant, but that the Chinese person entered fraudulently, with the intent of immediately becoming a laborer.

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

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5. ALIENS ⊜32(8)—CHINESE PERSONS—EVIDENCE.
That a Chinese person, securing admission as a merchant and as the minor son of a merchant, immediately becomes and continues as a laborer, is strong evidence tending to show that he entered to become a laborer.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⊜ 32(8).]

6. ALIENS ⊜32(12)—DEPORTATION PROCEEDINGS—REVIEW—FINDING.
The conclusion of the District Court in a Chinese exclusion case is entitled to great weight, as is any other finding of fact of the trial court in an equity case, particularly where much of the testimony was taken in the presence of the judges, even though the rule that the finding of the commissioner, approved by the District Court, will be reconsidered on appeal only when it is clear an incorrect conclusion has been reached, did not apply; the record disclosing no finding by the commissioner.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⊜32(12).]

7. ALIENS ⊜32(8)—CHINESE PERSONS—EXCLUSION—EVIDENCE.
In a proceeding for the deportation of a Chinese person, who entered as a merchant and the minor son of a merchant, evidence *held* to warrant finding that his entry was fraudulent, and that he entered to become a laborer.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⊜ 32(8).]

On Motion for Rehearing.

8. ALIENS ⊜32(12)—PROCEEDINGS FOR DEPORTATION OF CHINESE—ISSUES.
A Chinese person, arrested for being unlawfully in the country, is entitled to be informed of the exact charge against him, and where the attorney for the government stated at the opening of a hearing that no claim of illegal entry was made, and in consequence defendant's attorney introduced no evidence on that question, and the only issue tried was whether defendant had, after entry, lost his status as a merchant by becoming a laborer, an order of deportation cannot be sustained on the ground of a fraudulent entry.

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

Proceeding by the United States against Lew Loy. From a judgment of deportation, defendant appeals. Reversed.

L. C. Spieth, of Cleveland, Ohio, for appellant.
Joseph C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio.

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

KNAPPEN, Circuit Judge. Appeal from a judgment of deportation. Appellant is a person of Chinese parentage, and was born in China. He was admitted to the United States, through the port of San Francisco, October 15, 1910, as the "minor son of Lew Fook Shing," who then was and still is a merchant at San Francisco, dealing in Chinese and Japanese goods. Appellant's certificate of identity gives his age as 20 years, and his occupation that of "merchant, Fook Woh & Co.," doubtless meaning "Fook Wo & Co.," the firm with which the father was connected. Appellant was arrested April 30, 1914, at Cleveland, Ohio, under section 13 of the Chinese Exclusion Act of 1888 (Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [Comp. St. 1916, § 4313]),

as a Chinese person unlawfully within the United States. The commissioner found him to be a laborer, and ordered his deportation. On appeal to the District Court full hearing was had de novo, and the commissioner's order of deportation affirmed. Judge (now Mr. Justice) Clarke, who heard the case, was of opinion that while appellant was eligible to admission under the treaty between the United States and China as the minor son of a Chinese merchant lawfully domiciled here, yet that he was "admitted only nominally" as such, and did not fall within the scope of the principle recognized by the rulings of the courts which (in the interest of the family relation) have construed the section as permitting the entry of a Chinese merchant's wife and minor children,[1] and that appellant "really entered the United States as a laborer" in violation of law.

[1, 2] That appellant was, when arrested, a laborer, is persuasively established by the evidence. But we have twice held, in accordance with what we deemed the better authority, that the fact that one who lawfully entered as the minor son of a merchant has since become a laborer is not enough to destroy his right to remain. Lew Ling Chong v. United States, supra; Lam Fung Yen v. Frick, supra. The case does not fall within the principle of Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, where a Chinese woman, who had lawfully entered as the wife of a citizen of the United States, was held deportable under the general Immigration Act as an alien found as an inmate of a house of prostitution. The general Immigration Act does not forbid the residence of Chinese laborers. Nor do we think the rule under which the minor son of a Chinese merchant is admitted necessarily inapplicable in principle to one who has less than a year of minority remaining. We think no arbitrary line of demarcation, depending on time alone, can properly be drawn. If, then, appellant is deportable, it can only be because his entry was not in good faith in the interest of the relation stated, and for the purpose claimed, but was in bad faith, and in reality as, or for the purpose of immediately becoming, a laborer, in evasion of the Exclusion Act.

[3-5] By section 3 of the act of May 5, 1892, c. 60, 27 Stat. 25 (Comp. St. 1916, § 4317) the burden was on appellant to show, to the satisfaction of the court, his right to remain. Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121; Lum Kim v. United States (C. C. A. 6) 225 Fed. 31, 34, 140 C. C. A. 357. His certificate of admission was prima facie evidence of such right; but we think it was nevertheless open to the government to show that the entry was in fact not for the purpose of conserving the family relation, and following the occupation of a merchant, but for the purpose of immediately becoming a laborer, and thus in evasion of the Exclusion Act, and that the court, if so satisfied, is justified in holding that the entry was in violation of the statute, and the one so entering thus unlawfully here. We also think that the fact that a Chi-

[1] United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; Lew Ling Chong v. United States (C. C. A. 6) 222 Fed. 195, 199, 137 C. C. A. 635; Lam Fung Yen v. Frick (C. C. A. 6) 233 Fed. 393, 395, 147 C. C. A. 329.

nese person, so securing admission as a merchant and as the son of a merchant, is 20 years of age, and immediately becomes and continues as a laborer, is strong evidence tending to show that he came into the United States as a laborer. These propositions are directly sustained by United States v. Foo Duck (C. C. A. 9) 172 Fed. 856, 858, 97 C. C. A. 204.

[6] The important question is whether there is persuasive evidence that appellant's entry was with such evasive purpose. The trial judge was impressed with the completeness of the showing of appellant's entire separation from his father, and of the fact that appellant had been from the time of his arrival in the country "very certainly a common laborer." As already said, the judge found that appellant "really entered the United States as a laborer, and that his coming was in violation of the statutes of this government." This conclusion is entitled to great weight, especially as most of the testimony was taken in the presence of the judge. Lum Kim v. United States, supra. It does not appear whether the commissioner found that appellant entered the country in evasion of the act; and the case is thus not within the rule that the findings of the commissioner and District Judge will be reconsidered only when it is clear an incorrect conclusion has been reached. Chin Bak Kan v. United States, supra; Tom Hong v. United States, 193 U. S. 517, 522, 24 Sup. Ct. 517, 48 L. Ed. 772. But the case does fall within the rule applied by this court to equity hearings generally, that the conclusion of the trial judge, who saw and heard the witnesses, will be accepted, unless the evidence is found to preponderate decidedly against such conclusion.[2] The evidence does not so preponderate.

[7] Appellant has not attended school since he entered the United States. He admitted that he had never been engaged as a merchant since he came here, and had done no traveling; that he came from Oakland, Cal., directly to Cleveland, and had lived ever since (about three years) at a laundry there; and there was express and apparently credible testimony that he was actively doing laundry work for several months before the trial in the District Court. He testified before the inspector that he had been with his father at Oakland but about "one or two months" before going to Cleveland. True, he testified in the District Court that he stayed in San Francisco "about two months to learn business" before going to Cleveland; that he had earned no money in Cleveland; that at the laundry his only work was helping with the cooking and sweeping; that he spent a great deal of his time looking for a location in which to open a store; that he brought with him to Cleveland $200, which his father had given him, and that the latter sent him $80 or $90 a year while at Cleveland. But the court was not bound to believe appellant. The father testified, by deposition, that he sent appellant $80 or $90 during all the time appellant was in Cleveland, and said nothing whatever about giving him $200 before he left California. Appellant's testimony as to his stay in San Francisco is not corroborated. Both the inspector and the trial judge

[2] City of Cleveland v. Chisholm, 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela, etc., Co. v. Schinnerer, 196 Fed. 375, 379, 117 C. C. A. 193; Pugh v. Snodgrass, 209 Fed. 325, 326, 126 C. C. A. 251.

found appellant's hands heavily calloused, as of a man engaged in hard manual labor. The trial judge was justified in characterizing appellant's testimony as "unsatisfactory and evasive," and in saying that "the story that defendant has spent three or four years in idleness in a laundry in Cleveland, spending his time in searching for a place to engage in business, is too improbable to be accepted by any court."

The trial judge was, in our opinion, justified in concluding that appellant entered for the purpose of becoming a laborer. The preservation of the family relation seems to have cut but little, if any, figure; appellant lived with his father but a few months at the most, then locating at a point more than 2,000 miles distant. Indeed, while the record does not affirmatively show whether or not appellant's mother is still living, and, if so, where she is, the inference that she was and is still living in China is at least as natural as any other (so far as inference can be indulged from the testimony). The date of appellant's birth does not appear; there is nothing to show whether, when entering, he was nearer 20 than 21 years of age. But the circumstances, all combined, tend strongly to sustain the conclusion that the entry was in evasion of the act which forbids the entry of a Chinese laborer.

These conclusions must result in affirming the judgment, unless the court was precluded by what occurred on the trial from considering the fact of fraudulent or evasive entry. At the opening of the trial appellant's attorney said that he did not understand that the charge of fraudulent entry was in the case, and asked whether the government claimed that appellant "has lost his right to remain in this country because he may have performed some labor after he was permitted to and came into this country as the minor son of a Chinese merchant." The government's attorney replied that probably appellant "had a valid status when he came in; that probably is true, yet the fact that he so soon after his arrival in this country became a laborer, and has followed the work of a laborer ever since, renders him subject to deportation, inasmuch as his status is changed"; and later, "The government simply states this: That the certificate of identification which was issued to this man was issued in the regular way and manner, and that this certificate was in his possession at the time he was arrested, but that since the time he entered the United States he has become a laborer, performed labor almost continuously at a laundry, and he thereby forfeits his right to remain, and is subject to deportation"; and the judge said, in reply to a question of appellant's counsel, that he understood there was no charge that the entry was fraudulent. As the judgment of deportation can be sustained only upon a finding that the entry was fraudulent in the sense that appellant entered only nominally in the relation stated, but really for the purpose of becoming a laborer in evasion of the statute, it would be our duty to award a new trial, if the disclaimer made on the part of the government has prejudiced the defense.

It is possible that the attorney for the government had not then seen our opinion in the Lew Ling Chong Case, which, though announced before, was first published after, the trial below, and apparently was then contending that the change of status was enough to make the appellant deportable. But we find in the record no suggestion that appellant has

been in fact prejudiced by the government's disclaimer. The assignment of errors ignores that subject. Counsel have not suggested that the defense has been curtailed because of the disclaimer. On the other hand, appellant seems, so far as concerns the allegation of fraud, to rely here upon the proposition, as stated in the original brief of his counsel, that "his entry must have been secured by trick or deceit, and the only trick or deceit available to one seeking to enter as the minor son of a merchant is to falsely claim relationship as son of a resident Chinese merchant." Substantially the same proposition is found in the supplemental brief of appellant's counsel. The government's disclaimer may not unfairly be construed as meaning that appellant's sonship to a Chinese merchant domiciled here, and his eligibility as such to enter, were not questioned.

But we cannot assent to the proposition that, because appellant was eligible to enter as the minor son of a Chinese merchant in the interest of the family relation, he is not deportable, although he entered in reality as a laborer and for such purpose. Appellant's course of life since and before entering the United States seems to have been pretty fully gone into, and it seems fairly clear that appellant has not been prejudiced by the disclaimer made.

The judgment of deportation is accordingly affirmed.

On Motion for Rehearing.

PER CURIAM. [8] By petition for rehearing, appellant challenges the correctness of the conclusion, drawn from the record and announced in our former opinion, that appellant was not prejudiced in his defense by the disclaimer of charge of fraudulent entry which the government's counsel made on the trial. Reargument has been had on this point.

Appellant's counsel urges that as, under the issue stated on the trial, appellant's deportation was asked on the sole ground that by becoming a laborer he forfeited his right to remain in this country, testimony concerning appellant's family relations, and otherwise tending to show that he entered for the purpose of becoming a laborer, was immaterial, and that certain testimony presented was for that reason not objected to; that the case was tried on appellant's part in reliance upon the disclaimer and upon the incorrectness of the proposition relied on by the government as ground for deportation. Counsel assure us that, had not the issue of fraudulent entry been disclaimed, appellant could and would have presented (and if granted a retrial expects to present) competent and material evidence tending to rebut the charge of fraudulent entry, and eliminating certain considerations referred to in our opinion as tending to show an entry of that character —including, not only the deposition of appellant's father, which it is claimed would show that appellant had not, by leaving California, severed his family ties, but also other testimony tending to show good-faith entry. (It is said that appellant was not represented in the taking of his father's deposition, and that the latter was so taken by the government for the purpose of satisfying the district attorney that he might properly stipulate that appellant was the minor son of the de-

ponent, and that appellant did not see his father's testimony until the day of the trial below.)

Assuming, as we must, that the assurance of counsel is given in good faith, we are constrained to grant appellant a new trial; for, had fraudulent entry been charged, appellant would have been entitled to be so advised (Lui Hip Chin v. Plummer, 238 Fed. 763, —— C. C. A. ——), and so would prima facie be prejudiced by an order of deportation based solely on a ground not only not charged, but disclaimed.

The order of the District Court is reversed, and the record remanded to that court, with directions to award appellant a new trial.

LOUISVILLE & N. R. CO. v. BURNS.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2971.

1. APPEAL AND ERROR ⟸1039(16)—HARMLESS ERROR—RULINGS ON PLEAS IN ABATEMENT.

In view of the rule in Tennessee that a plea in abatement based on the pendency of another action must be overruled, where the former suit is dismissed after the filing of the plea, any error in overruling such a plea was cured, where, immediately upon the overruling of the plea, plaintiff's counsel stated in open court that plaintiff elected to proceed with the suit in which the plea was filed, and the court thereupon directed that the record should show that plaintiff elected to proceed with that case and to dismiss the former action, and the statutory lien in favor of the attorneys in the former suit did not prevent this action being taken.

2. CARRIERS ⟸352—LIABILITY FOR ACTS OF AGENT.

Liability of a carrier for the act of its special officer in ejecting plaintiff depends upon whether he was acting within the general scope of his employment, and it is not necessary to liability that the act done was in the proper performance of duty, nor is the fact that the act was an abuse of authority enough to relieve defendant from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1412–1414.]

3. CARRIERS ⟸381(4)—EJECTION OF PASSENGERS—EVIDENCE—AUTHORITY OF EMPLOYÉS.

In a passenger's action for wrongful ejection from an excursion train by the special officer in defendant's employ, evidence *held* sufficient to warrant a finding that the special officers on such train had authority, express or implied, to eject those seeking to ride without tickets, or to ride after their place of destination was reached, and that the officer in question was claiming to exercise such authority.

4. WITNESSES ⟸383—IMPEACHMENT—INCONSISTENT STATEMENTS.

In a passenger's action for wrongful ejection from an excursion train by a special officer in defendant's employ, it appeared that there were two and probably three officers on the train, besides a village marshal, who, though a passenger, took part in keeping order. The marshal testified that he wore a Panama hat, but the evidence did not show that none of the other officers wore Panama hats. Plaintiff testified that he did not remember what kind of a hat the officer ejecting him wore. *Held*, that evidence of statements by plaintiff that the officer in question wore a Panama hat was properly rejected, as, in the absence of testimony that

none of the officers in defendant's employ wore such a hat, the evidence was too remote to be of any value as impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224.]

5. DAMAGES ⊜167—EVIDENCE—LIFE EXPECTANCY.

In an action for injury to a farmer, 22 or 23 years old, who was previously sound in health and strength, and who suffered a compound comminuted fracture, resulting in the shortening of the leg about 2½ inches, and making it necessary to use crutches a year after the injury, tables showing his life expectancy were properly admitted, and the jury were properly told to consider his expectancy of life, though there was no testimony expressed in dollars of plaintiff's previous earning capacity, or of its proportionate impairment due to the injury, as it needs no expert testimony to show that such an injury impairs to some extent the earning capacity of a farmer, and the average jury are able to form a fairly accurate estimate of such earning capacity and its impairment, without expert testimony.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 487–489.]

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

Action by Monroe Burns against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. E. Moore, of Brownsville, Tenn., for plaintiff in error.

Ike W. Crabtree, of Memphis, Tenn., for defendant in error.

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

KNAPPEN, Circuit Judge. Burns who was plaintiff below, was a passenger for hire upon defendant's excursion train from Keeling, Tenn., to Memphis, and return, holding a round-trip ticket therefor. He brought suit in a state court, charging that as the train on the return trip had just passed Mason (Keeling being beyond Mason) he was forcibly and wrongfully ejected from the moving train by a special officer in defendant's employ, connected with the handling of the excursion, sustaining serious injuries. The case was removed to the federal court because of diversity of citizenship of the parties. Defendant pleaded in abatement the pendency of a former suit in the same cause of action in another state court of Tennessee. It also pleaded issuably to the merits; the specific defenses being that plaintiff vountarily jumped from the train, or that, if ejected therefrom the one so ejecting him was not an employé of the defendant acting within the scope of his authority. At the opening of the trial the plea in abatement was called up and overruled. At the conclusion of the trial upon the merits under the plea in bar, defendant made a motion for directed verdict in its favor, which was denied, and the case submitted to the jury. There were verdict and judgment for plaintiff.

[1] 1. *The Plea in Abatement.* Plaintiff replied to the plea that the former suit was begun without his authority and that there had been no ratification; defendant announced that it was prepared to prove the authority. It seems to be assumed here that the plea was improperly overruled. But we need not consider that question, because, immediate-

ly upon the overruling of the plea plaintiff's counsel stated in open court that:

"Plaintiff says now, if there is such a suit pending there, he now elects to proceed with this suit here."

The court announced:

"Let the record show he stated in open court that he elected to prosecute this suit, and dismiss that one."

And again:

"Let the record show * * * that counsel for plaintiff here announced that he elected to proceed with this case, and dismiss the case in Haywood county."

We think whatever error was committed by the overruling of the plea was cured. It is the settled rule in Tennessee that a plea in abatement must be overruled, where the former suit is dismissed after the filing of the plea. Walker v. Vandiver, 133 Tenn. 423, 181 S. W. 310, in which case the court rejected the rule of the common law that a plea in abatement must be sustained, if true at the time it was filed, as opposed "to the general spirit of our legislation, which seeks to have all controversies determined upon their merits, rather than upon the technicalities of the formal procedure of the common law." In Turner v. Lumbrick, 19 Tenn. (Meigs) 7–13, cited with approval in Walker v. Vandiver, a plea of a former suit pending in a court held by other justices of the peace was treated as in effect overruled upon the plaintiff's having "elected, of record, to proceed in the present action, and released the defendants for all and every other action of forcible entry and detainer, except the present." It is urged, however, that in Walker v. Vandiver the dismissal had actually been made before the plea in abatement was disposed of, and that in the present suit such dismissal has never been entered in the court in which the suit was pending. The latter fact does not appear by the record in this court. However, in Turner v. Lumbrick the only proceeding of record by way of dismissal of the former suit was, so far as shown by the opinion, made in the second suit. In any event, we cannot doubt that plaintiff was, by the action taken in the court below, forever estopped from prosecuting the former suit. It is not to be presumed that defendant would experience any difficulty in procuring such dismissal upon bringing to the attention of the state court the record of the proceeding in the federal court. As said in Turner v. Lumbrick:

"If there was another suit pending for the same cause of action, this release might have been pleaded as an effectual defense."

The statutory lien in favor of the attorneys in the former suit was not a bar to the action had below. Tompkins v. Railroad, 110 Tenn. 157, 72 S. W. 116, 61 L. R. A. 340, 100 Am. St. Rep. 795. Whether such attorneys have a lien upon the judgment in this suit we are not called upon to determine.

[2, 3] 2. *The Motion to Direct Verdict.* Plaintiff testified that there were three or four special officers upon the train, and that while plaintiff was standing on the platform of the car just before the train left Mason, one of these officers, wearing a star, ordered him to get off the train, and in spite of plaintiff's assurance that he had a ticket for Keeling again ordered plaintiff off, and immediately shoved him from the train, then in motion. This testimony was directly corroborated by another passenger on the same train, whose destination also was Keeling, who testified that he and plaintiff were standing together on the platform, when the officer said that plaintiff "didn't belong there," and asked the witness if plaintiff was not to get off at that place; that the witness assured the officer that such was not the case, and that both had tickets for Keeling; that the officer replied, "No, you get off here I know," and accordingly the witness jumped from the moving train, apparently just before plaintiff was shoved off. This testimony, so far as concerns the conversation between plaintiff and the officer and the shoving of plaintiff from the train, was substantially corroborated by a third passenger.

Defendant urges that the uncontradicted testimony shows that the special officers had or undertook to perform no duties on the train, except to assist in preserving order; that it is uncontroverted that plaintiff, when ejected from the train, was violating no rule and not misbehaving, and that the conduct of the officer was thus willful and wanton, wholly without the scope of his authority, and without the knowledge and consent of any of defendant's agents.

Defendant's liability for the act of its agent depends upon whether the latter was acting within the general scope of his employment. It is not necessary to liability that the acts done were in the proper performance of duty; nor is the fact that the act was an abuse of authority enough to relieve defendant from liability. Shadoan v. C., N. O. & T. P. Ry. Co. (C. C. A. 6) 220 Fed. 68, 72, 135 C. C. A. 636, 640. As said in that case by Judge Warrington:

"It is a familiar doctrine that the direct consequences of an agent's acts, done in the wrongful exercise of his authority and in the course of his employment, are chargeable to his master."

It was not the uncontradicted testimony that the officer's duties were limited to assisting in preserving order on the train; on the contrary, plaintiff testified, not only that the officer's occupation was "following the conductor and keeping order on the train, no loud talking and didn't allow any fussing or fighting to go on," but, as is evidently the meaning of his testimony, to see that people did not get on without tickets; and one of the other witnesses referred to testified that the officer in question had "been participating in assisting people off the train," and that he threatened to stop and put off some boys whom he thought disorderly. The defendant presented no testimony whatever respecting the duties of the special officers, except, first, that one of the officers sworn by defendant gave, on cross-examination, an affirmative answer to the question, "You were on there for the purpose of keeping order, wasn't you?" and, second, that the train conductor, in response to the

court's question, "Was there any man who was on the train, except the crew, that had been requested to help keep order, and see that quiet and proper conduct was maintained?" answered, "Yes, sir; that is what these gentlemen [meaning the officers] were carried on that train for;" and again, "I am always notified by the company as to whom to carry."

We think it was open to the jury to find, upon the record, that the special officers had authority, express or implied, to eject from the train those seeking to ride without tickets, or to ride after their place of destination was reached, and that the officer in question was claiming to exercise such authority in this case. We think that in his refusal to direct verdict for defendant the trial judge was amply supported by the decisions of this court, notably in Goodwin v. Traction Co., 175 Fed. 61, 99 C. C. A. 661, Lee Line Steamers v. Robinson, 218 Fed. 559, 134 C. C. A. 287, L. R. A. 1916C, 358, and Shadoan v. C., N. O. & T. P. Ry. Co., supra.

[4] 3. *Impeaching Testimony.* Plaintiff testified that the officer who ejected him was not in uniform (but wore a star), and that he did not remember what kind of a hat the officer wore or how otherwise he was dressed. He was not sure that he had seen the officer at the trial. Defendant complains of the exclusion of offered testimony of statements by plaintiff that the officer in question wore a Panama hat. The testimony makes it fairly certain that there were two, and probably three, officers in defendant's employ on the train besides a village marshal, who, although a passenger, took part in keeping order. The marshal testified that he wore a Panama hat, but no badge, and that he neither took part in nor knew of plaintiff's alleged experience. One other officer testified that he did not put plaintiff off, nor did he know of such occurrence. Had there been testimony that none of the officers other than the marshal wore Panama hats, the offered testimony might have had some relevancy. But while defendant's counsel, during plaintiff's cross-examination, announced his ability to make such proof, it was never definitely offered. In the absence of such testimony, the proposed evidence of impeaching statements was too remote to be of value, and was properly rejected.

[5] 4. *The Measure of Damages.* Defendant criticizes the admission of tables showing plaintiff's life expectancy, together with the instruction that in estimating damages there should be taken into account plaintiff's "earning capacity, his business, and his expectancy of life." The criticisms are not well founded. Plaintiff, who was colored, was 22 or 23 years old when the injuries were received, and the undisputed testimony is that he was previously sound in health and strength, and that he was a farmer by occupation. It is undisputed that he suffered a compound comminuted fracture of the femur, resulting in a shortening of the leg of about 2½ inches, that at the time of the trial (a year after the injury) he was still obliged to use crutches, because of the pain caused by their nonuse, that he had been unable to do any work since the injury, and that the shortening of the leg was permanent. There was no testimony, expressed in dollars, of plaintiff's previous

earning capacity, or of its proportionate impairment due to the injury. The record does not suggest that the lack of evidence in these respects was called to the trial court's attention, either in connection with the motion for directed verdict, or by request to charge, or on motion for new trial; but we think the average jury able to form, without direct testimony, a fairly accurate estimate of the earning capacity of a farmer of plaintiff's age, health, and strength. That such injury to the leg impairs to some extent the earning capacity of a farmer requires no expert testimony. The extent of such impairment is necessarily a matter of estimate only, and presumably a jury could intelligently determine that question without expert testimony. We cite in the margin several decisions more or less analogous.[1] Mortality tables have been frequently, and properly, admitted in cases of permanent injury not causing death or total disability.[2] The size of the verdict ($4,000) does not indicate that the jury had an exaggerated idea of plaintiff's loss of earning capacity.

The other criticisms of the proceedings on the trial we find it unnecessary to discuss. We have considered them all, and find nothing entitling defendant to complain.

The judgment of the District Court is affirmed.

[1] Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 181, 29 Sup. Ct. 270, 53 L. Ed. 453; Moran v. Railway Co., 74 N. H. 500, 69 Atl. 884, 124 Am. St. Rep. 994, 19 L. R. A. (N. S.) 920; B. & O. S. W. Ry. Co. v. Then, 159 Ill. 535, 539, 42 N. E. 971; Birkett v. Knickerbocker Co., 110 N. Y. 504, 508, 18 N. E. 108; Ft. Worth, etc., Ry. v. Robertson (Tex.) 16 S. W. 1093–1094, 14 L. R. A. 781; Murray v. Railway Co., 101 Mo. 236, 240, 13 S. W. 817, 20 Am. St. Rep. 601; Rosenkranz v. Railway Co., 108 Mo. 9, 16, 17, 18 S. W. 890, 32 Am. St. Rep. 588.

[2] See Vicksburg, etc., R. R. Co. v. Putnam, 118 U. S. 545, 554, 7 Sup. Ct. 1, 30 L. Ed. 257; Pierce v. Railroad Co., 173 U. S. 1, 10, 19 Sup. Ct. 335, 43 L. Ed. 591; C. & O. Ry. Co. v. Kelly, 241 U. S. 485, 491, 36 Sup. Ct. 630, 60 L. Ed. 1117; Kinney v. Folkerts, 84 Mich. 616, 624, 48 N. W. 283; Wilk v. Black, 188 Mich. 478, 484, 154 N. W. 561.

WILLIAMS et al. v. PROVIDENT LIFE & TRUST CO., OF PHILADELPHIA et al.

(Circuit Court of Appeals, Fourth Circuit. May 31, 1917.)

No. 1503.

1. QUIETING TITLE ⊂⊃16—SUIT—RIGHT TO MAINTAIN.
While equity has jurisdiction to set aside as a cloud upon title a conveyance of land void on its face, such a suit cannot be maintained by remaindermen out of possession, who showed no special or exceptional occasion for invoking the aid of equity, such as that those in possession were committing waste.
[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64, 65.]

2. QUIETING TITLE ⊂⊃16—SUIT—RIGHT TO MAINTAIN.
Acts W. Va. 1915, c. 75, provides in substance that no conveyance of real estate by a husband and wife prior to February 21, 1891, shall be held invalid or insufficient by reason of any informality or omission in the acknowledgment before a qualified officer, while a proviso excepted suits then pending and any suit begun within one year after the passage of the act. Long prior to 1891 a married woman, to whom land had been conveyed, executed a conveyance of the same in conjunction with her husband; but her acknowledgment was not sufficient under the then-existing law, and the deed carried only the husband's life estate. Shortly before the expiration of the year allowed in the act of 1915, such woman and her husband conveyed the property to plaintiffs, who thereupon instituted suit to set aside the original conveyance as a cloud on title. *Held* that, as the full consideration of the land had been paid, the fact that the act of 1915 might subsequently bar such a suit is no ground for allowing the maintenance of such action during the lifetime of the husband, whose life estate passed by virtue of the defective conveyance, for, though the earlier decisions, holding such conveyance by the wife invalid, might constitute a rule of property, such rule was changed by the above-mentioned act.
[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64, 65.]

3. REMOVAL OF CAUSES ⊂⊃116—FEDERAL COURTS—PRACTICE—EQUITABLE RIGHTS UNDER STATE STATUTES.
Where a suit to cancel a deed as a cloud on title is removed to a federal court, the federal court is bound to enforce the equitable rights conferred by a state statute or to remand the cause; but, in the absence of such statute, it is at full liberty to exercise its judgment, uncontrolled by the decisions of state tribunals.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suit by W. T. Williams and others against the Provident Life & Trust Company of Philadelphia and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Alfred G. Fox, of Bluefield, W. Va., and M. O. Litz, of Welch, W. Va. (Litz & Harman, of Welch, W. Va., and Sanders & Crockett, of Bluefield, W. Va., on the brief), for appellants.

Douglas W. Brown, of Huntington, W. Va. (Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for appellees.

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

KNAPP, Circuit Judge. In October, 1867, George Hatfield and wife conveyed to Lovicey Hatfield, the wife of Anderson Hatfield, a tract of land of about 100 acres in Logan (now Mingo) county, W. Va. By deed of December 29, 1874, Lovicey Hatfield and her husband conveyed the land to Polly Hatfield, and thereafter it passed by various mesne conveyances to Stuart Wood, who was in possession at the time of his death in March, 1914. On May 10, 1915, Lovicey Hatfield and her husband executed another deed of the land to the plaintiffs, W. T. Williams, D. D. Hatfield, and Lake Hatfield, who shortly thereafter brought this suit against the heirs and legal representatives of Wood. Their bill of complaint, filed in the state court, alleges in substance that the acknowledgment of Lovicey Hatfield to the deed of December, 1874, to Polly Hatfield was a nullity, because it did not comply with the requirements of the statute of West Virginia in that regard; that consequently this deed did not convey the title of Lovicey Hatfield to the land, but only the life estate of her husband; that all subsequent grantees, including the defendants, got merely the life estate of Anderson Hatfield, the fee remaining in his wife for the reason stated; that the deed of May 10, 1915, executed by Lovicey Hatfield and her husband, conveyed the fee of the land to plaintiffs, subject to the life estate of Anderson Hatfield which defendants acquired under the will of Stuart Wood; that Lovicey Hatfield and Anderson Hatfield are both living, and therefore plaintiffs are not now entitled to possession; that defendants claim to own the land in fee simple, although the deed to Polly Hatfield, under whom they hold, was ineffectual to pass the title of Lovicey Hatfield, because her acknowledgment of the same was wholly invalid; and that this deed, and the subsequent deeds under which defendants claim, constitute a cloud upon plaintiffs' title which a court of equity should remove.

On the ground of diverse citizenship the cause was removed to the District Court for the Southern District of West Virginia, and that court upon hearing sustained defendants' motion to dismiss the bill, because plaintiffs were not in possession of the land, or entitled to its possession during the lifetime of Anderson Hatfield.

[1] Under the decisions of the Supreme Court of Appeals of West Virginia it may be assumed that the deed of December, 1874, did not pass the legal title of Lovicey Hatfield, who then owned the land, because of her defective and invalid acknowledgment. McMullen v. Eagan, 21 W. Va. 233; Laidley v. Knight, 23 W. Va. 735. It may also be assumed, though without conceding it to be a rule of property in West Virginia, that equity has jurisdiction in certain cases to set aside as a cloud upon title a conveyance of land void upon its face. Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49; Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020. But the general rule is well settled that such a suit can be maintained only by a party in actual possession, for the reason that one out of possession has ordinarily a complete and adequate remedy at law. Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. The plaintiffs, therefore, who admit the rightful possession of defend-

ants during the lifetime of Anderson Hatfield, cannot have present relief, unless they show some special or exceptional occasion for invoking the aid of equity. Stuart v. Union Pac. R. Co., 178 Fed. 753, 103 C. C. A. 89. This, it seems to us, they wholly fail to do. On the contrary, it appears from the bill of complaint that their legal remedy will be available upon the death of Hatfield, and nothing is set up which suggests that the rights they may then assert will be impaired or lessened, or they be otherwise placed at disadvantage, by anything that may happen during the continuance of the life estate. It is not alleged, for example, that defendants are committing waste, or dealing with the property in such manner as to depreciate its value, or taking any other action which will be injurious to the remaindermen. In short, the mere fact of an outstanding life estate, which is all the plaintiffs claim in this case, is not of itself a sufficient warrant for the interposition of a federal court of equity.

[2] The real contention of plaintiffs, as we apprehend, and the only one that needs to be considered, is based upon an act of the Legislature of West Virginia, passed in February, 1915 (Acts 1915, c. 75), a little less than a year before this suit was brought, which provides in substance that no conveyance of real estate by husband and wife, prior to February 21, 1891, shall be held invalid or insufficient in law or in equity by reason of any informality or omission in the acknowledgment thereof before a qualified officer. A proviso excepts suits then pending and "any suit that may be brought within one year after the passage of this act."

The defendants argue that this statute applies only where the right to sue existed at the time or accrued within the year, and therefore does not affect the present controversy, because the plaintiffs had no right of action, legal or equitable, when this suit was commenced. It may be that the proviso should be so construed; but we pass the point without opinion, in order to decide the case upon the assumption that the statute does apply, that it will operate to defeat any action that may be brought after the life tenancy expires, and that consequently the plaintiffs will be wholly without remedy if this suit is not sustained.

Assuming that result, we are nevertheless persuaded that the bill should be dismissed for obvious lack of equity. It is not alleged that Mrs. Hatfield was misled or deceived in any way, or that she was the victim of any misrepresentation or overreaching. Neither is it alleged that she did not undertake and intend to convey her entire title and interest by the deed she executed, or that she did not receive full compensation for parting with her property. Indeed, it is not even alleged that she did not in fact acknowledge the deed, when examined by the magistrate apart from her husband, in complete and exact compliance with the statute, but merely that the certificate of the magistrate is not in the prescribed form, and therefore does not show on its face a valid acknowledgment. Yet solely upon the basis of this defective certificate, without the pretense of any other claim of right, the plaintiffs herein, who got a quitclaim deed from the Hatfields for an undisclosed consideration in May, 1915, just as the enactment of the previous February was to take effect, ask a court of equity to decree that

they own the fee of this land, which Mrs. Hatfield sold in good faith and was paid for more than 40 years ago, and that they will be entitled to its possession as soon as her husband dies. And the aid of equity is sought at this time, when a life estate prevents an action at law, because a recent statute may bar such an action when the life estate comes to an end, although the statute itself declares in effect that suits like this shall be deemed inequitable. We are constrained to reject a plea so palpably technical and unjust. And if it be claimed that former decisions of West Virginia courts have sustained similar suits, and thereby established a rule of property which this court should observe, the conclusive answer is that the statute in question has changed the rule and announced a different public policy.

[3] This also meets the suggestion that the bill should not have been dismissed by the court below, but remanded to the state court, in which the suit was brought. It is concededly the duty of a federal court, in a case like this, to enforce the equitable rights conferred by a state statute, or to remand the cause; but in the absence of such a statute a federal court of equity is at full liberty to exercise its independent judgment uncontrolled by the decisions of state tribunals. Mathews Slate Co. v. Mathews (C. C.) 148 Fed. 490; Peters v. Equitable Life (C. C.) 149 Fed. 290.

There is no occasion to extend the argument, for the facts alleged in the bill carry their own comment. The mere statement of the case demonstrates that it is devoid of merit, and furnishes ample reason for the denial of equitable relief. Whether an action at law can be maintained after the death of Anderson Hatfield we are not called upon to decide.

Affirmed.

BALTIMORE & O. S. W. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1917.)

No. 2959.

1. RAILROADS ⟸229—EQUIPMENT OF TRAINS—HAULING CARS FOR REPAIRS.
Under Act April 14, 1910, c. 160, § 4, 36 Stat. 299 (Comp. St. 1916, § 8621), providing that any carrier subject thereto, using, hauling, or permitting to be used or hauled, on its line, any car subject thereto, and not equipped as provided thereby, shall be liable to a specified penalty, provided that where any car shall have been properly equipped, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, it may be hauled from the place where the equipment was first discovered to be defective or insecure to the nearest available point for repairs, if such movement is necessary to make such repairs, the fact that a car being hauled for repairs is hauled in connection with cars in commercial use does not take such movement of the car out of the proviso.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

2. STATUTES ⟸228—CONSTRUCTION—PROVISOS.
The general rule of statutory construction is that a proviso carves special exceptions only out of a general enacting clause, and that those

who set up any such exception must establish it as being within the words as well as the reason thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310.]

3. RAILROADS ⊂=229—EQUIPMENT OF TRAINS—HAULING CARS FOR REPAIRS.
The hauling of a car having a drawbar of less than the standard height to a point where such defective equipment may be repaired is not within the proviso of Act April 14, 1910, § 4, if the car was improperly equipped before being put in use; the proviso only applying if the car was properly equipped in the first instance and the equipment became defective while being used.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

4. RAILROADS ⊂=229—EQUIPMENT OF TRAINS—HAULING CARS FOR REPAIRS—"SUCH CARRIER."
The hauling of a car having a drawbar of less than the standard height to a point where it can be repaired is not within the proviso of Act April 14, 1910, § 4, unless the equipment became defective while being used by the carrier so hauling it, and the proviso does not apply where the carrier hauling it received the car from a connecting carrier with defective equipment, since "such carrier" is not necessarily to be referred, according to strict grammatical construction, to the last antecedent, namely, "any common carrier subject to the act," when the meaning of the clause would thereby be impaired, but plainly relates to the carrier hauling the defective car for repairs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

5. RAILROADS ⊂=229—CONNECTING CARRIERS—DUTY TO RECEIVE CARS.
No duty rests upon a carrier to accept from a connecting line a car equipped in violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1916, §§ 8605–8612), as supplemented by Act April 14, 1910.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

6. RAILROADS ⊂=229—EQUIPMENT OF TRAINS—HAULING CARS FOR REPAIRS.
Where a car with defective equipment is received by a railroad from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier, and to proceed with the use of the other cars, is not a hauling of such defective car by the receiving carrier, which would subject it to the penalties of Act April 14, 1910, § 4.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action for statutory penalties by the United States against the Baltimore & Ohio Southwestern Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

George Hoadly, of Cincinnati, Ohio, for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States.

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

SANFORD, District Judge. This action was brought by the United States to recover from the Railroad Company penalties for alleged

violations of the Federal Safety Appliance Acts. The defendant answered the first cause of action alleged in the petition. A demurrer to this answer was sustained; and, the defendant not desiring to plead further, judgment was rendered against it for the statutory penalty, with costs; which judgment it now seeks to review under its writ of error.

The single question presented is whether, as a matter of law, the answer set forth a valid defense to the cause of action alleged.

The petition alleged that the defendant, a common carrier engaged in interstate commerce by railroad, had, on November 11, 1915, hauled over its line, as part of a train engaged in the movement of interstate traffic, a freight car having a draw-bar of less than the standard height.

The answer alleged that the defendant received this car on its line from a connecting line of railroad; that immediately on receipt thereof, and before it was moved or hauled, the defendant's inspectors discovered it to be defective; that at the place where it was discovered to be defective the defendant had no facilities for repairing, and it was impossible to repair it; and that thereupon the defendant hauled it to its shop, the nearest place at which it could be repaired; and that this was the same hauling which was alleged as the cause of action.

As this defective car was not being hauled alone, but in a train in connection with cars commercially used, such movement of the car, though for the purpose of repair merely, would clearly have created absolute liability for the statutory penalty under sections 5 and 6 of the original Safety Appliance Act of March 2, 1893, c. 196, 27 St. 531 (Comp. St. 1916, §§ 8609, 8610), as amended by section 1 of the Act of March 2, 1903, c. 976, 32 St. 943 (Comp. St. 1916, § 8613). See Great Northern Railway v. Otos, 239 U. S. 349, 351, 36 Sup. Ct. 124, 60 L. Ed. 322; Southern Railway v. Snyder (6th Circ.) 187 Fed. 492, 497, 109 C. C. A. 344; Erie Railroad v. United States (6th Circ.) 240 Fed. 29, 31; and Chesapeake Railway v. United States (4th Circ.) 226 Fed. 683, 686, 141 C. C. A. 439.

The defendant, however, contends that the hauling of this car to the nearest available repair point under the circumstances set forth in its answer, brings such movement within the proviso of section 4 of the Supplemental Act of April 14, 1910, c. 160, 36 St. 298, and thereby relieves it from liability.

Section 4 of this Act, which supplements the Act of March 2, 1893, as amended by the Acts of April 1, 1896, and March 2, 1903, provides:

"That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation: * * * Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest

available point where such car can be repaired, without liability for the penalties imposed * * * if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of draw bars, in revenue trains or in association with other cars that are commercially used. * * *"

Section 5 of this supplemental Act further provides:

"That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier" from any of the provisions, liabilities or requirements of the Act of 1893, as amended by the Acts of 1896 and 1903; "and, except as aforesaid," all of the provisions, requirements and liabilities of said Act of 1893, as so amended, "shall apply to this Act."

[1] The fact that this car was being hauled for repair in connection with cars in commercial use, does not, as heretofore held by this court, take such movement out of the proviso of the Act of 1910, if otherwise coming within its terms. Erie Railroad v. United States (6th Circ.) 240 Fed. supra, at page 32.

[2] We are of opinion, however, that the movement shown in the answer is, for other reasons, not within the terms of the proviso. The general rule of statutory construction is that a proviso carves special exceptions only out of a general enacting clause; and that those who set up any such exception must establish it as being within the words as well as the reason thereof. United States v. Dickson, 15 Pet. 141, 165, 10 L. Ed. 689; Ryan v. Carter, 93 U. S. 78, 83, 23 L. Ed. 807; Schlemmer v. Buffalo Railway, 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; United States v. Trinity Railway (5th Circ.) 211 Fed. 448, 453, 128 C. C. A. 120. Thus it has been held that as the proviso in question relates in terms only to the movement of a car for repair after it has been discovered to be defective, it does not relieve the carrier from liability for hauling a defective car before the defect has been discovered. Chicago Railroad v. United States (8th Circ.) 211 Fed. 12, 15, 127 C. C. A. 438; United States v. Trinity Railway (5th Circ.) 211 Fed. supra, at page 452, 128 C. C. A. 120; Chesapeake Railway v. United States (4th Circ.) 226 Fed. supra, at page 686, 141 C. C. A. 439; United States v. Chesapeake Railway (D. C.) 242 Fed. 161, per Cochran, J., Safety Appliance Decisions, No. 2980. Furthermore, section 5 of the Act of 1910 provides, "with unmistakable iteration," that, except within the limits specified in section 4, the movement of a car with defective equipment "shall in all other respects be unlawful." See Great Northern Railway v. Otos, 239 U. S. supra, at page 352, 36 Sup. Ct. 124, 60 L. Ed. 322.

The defendant's answer does not bring the movement of the car in question within the exception contained in the proviso of section 4 of the Act of 1910, in two respects:

[3] 1. It does not aver that the car had been properly equipped with a standard draw-bar in the first instance, and that such equipment had become defective while being used; and for aught that appears, the car may have been improperly equipped with a defective

draw-bar before being put in use. Plainly, however, under the specific language of the proviso, the privilege of hauling a defective car for repairs is only granted when the car had, in the first instance, been properly equipped and thereafter became defective while being used. United States v. Trinity Railway (5th Circ.) 211 Fed. supra, at page 452, 128 C. C. A. 120.

[4] 2. The answer does not aver that the equipment of the car had become defective while it was being used by the defendant upon its line of road; and, on the contrary, it is reasonably inferable from the answer that, even if it had been previously properly equipped, it had become defective before being delivered to the defendant by the connecting line of railroad, since it is averred that it was discovered to be defective immediately upon its receipt from such connecting line of railroad and before it had been used or hauled by the defendant.

Section 4 of the Act of 1910 provides, as above shown, that any common carrier subject to the Act, using or hauling any car subject to its requirements, not equipped as provided, shall be liable to a penalty; provided, that where any car shall have been properly equipped, as provided, "and such equipment shall become defective or insecure while such car was being used by such carrier upon its line of railroad," such car may be hauled for repairs from the place where such equipment was first discovered to be defective to the nearest available repair point, without penalty.

We are of opinion that the necessary effect of the clause, "and such equipment shall have become defective or insecure while such car is being used by such carrier upon its line of railroad," as used in this proviso, is to limit the right of hauling a defective car for repairs, without penalty, to the carrier upon whose line of railroad the car was being used when the equipment became defective. This was the construction given in United States v. Trinity Railroad (5th Circ.) 211 Fed. supra, at page 452, 128 C. C. A. 120, in which it was incidentally said that the defendant could not bring itself under the proviso unless the evidence showed, among other things, that the car "became defective while being used on the line of railroad of defendant." And in this connection it is to be noted that in Erie Railroad v. United States (6th Circ.) 240 Fed. supra, at page 30, it was specifically pointed out, in a foot-note to the opinion, that the record "did not require the conclusion that the cars had become defective before they came to be used by defendant on its line." The relative phrase "such carrier," as used in this clause, is not necessarily to be referred, as the defendant insists, according to strict grammatical construction, to the last antecedent, namely, any common carrier subject to the Act, when the meaning of the clause would thereby be impaired. Summerman v. Knowles, 33 N. J. Law, 202, 205. And when this phrase is read in the light of the entire context, we are of opinion that it plainly relates to the carrier hauling the defective car for repairs; and that hence, under the express limitation contained in this clause, a defective car can not be hauled for repairs, without liability for the statutory penalty, except by the carrier upon whose line it became defective while

being used. This construction is not only required by the language of the proviso, but is in strict harmony with the reason and purpose of the Safety Appliance Acts, and the intention of Congress, emphatically expressed in section 5 of the Act, that all movements of defective cars not specified in the proviso of section 4 shall be unlawful. The effect of such construction is undoubtedly to prohibit a carrier from hauling for repairs over its own line a defective car which has been delivered by a connecting carrier in interchange; and to avoid liability for hauling on its own lines a defective car thus received, it becomes necessary, as a practical matter, for a carrier to which a car subject to the provisions of the Safety Appliance Act has been delivered by a connecting carrier, to inspect it at the interchange point before accepting it, and if found to be defective, to refuse to accept it from the connecting carrier or to use or haul it upon its own line for the purpose of repairs or otherwise. Such construction, emphasizing the necessity for vigilant examination of cars at interchange points and placing the responsibility for repairs upon the carrier upon whose line they became defective, is, as we view it, in its tendency to prevent the interchange of defective cars, in direct furtherance of the remedial and humanitarian purposes of the Safety Appliance Acts. Pennsylvania Co. v. United States (6th Circ.) 241 Fed. 824, — C. C. A. —, May 8, 1917; Gray v. Louisville Railroad (D. C.) 197 Fed. 874, 876.

[5] We find nothing either in the Safety Appliance Acts or in any rule of the common law, which requires a carrier to accept from a connecting line a car equipped in violation of the Safety Appliance Act; and we are of opinion that it is both the right and duty of a carrier to refuse to accept such defective car in interchange when such acceptance would necessarily involve its own use of such car in violation of these Acts. Clearly no contrary inference can be drawn, by necessary implication from the provision of section 3 of the Act of March 2, 1893, authorizing a carrier to refuse to receive from a connecting line cars not equipped sufficiently with such power or hand brakes as would work with the brakes in use on its own cars; this being a right which the carrier would not otherwise have had, as the Act did not prohibit ipso facto the use of such cars, but merely the running of a train not containing a sufficient number of cars equipped with power or train brakes to enable the engineer to control its speed.

[6] We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof.

For these reasons, as the defendant's answer did not aver that the car in question had been properly equipped in the first instance and had

become defective while in use on the defendant's line of railroad, we conclude that it did not state a valid defense to the first cause of action alleged in the petition; that hence the court below properly sustained the demurrer thereto and rendered judgment against the defendant upon such cause of action; and its judgment will accordingly be affirmed.

WINSLOW v. STAAB et al.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 171.

1. JUDGMENT ⟸341—SETTING ASIDE—AUTHORITY DURING THE TERM.
As a general rule, all judgments or other orders of courts are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and during that period may be set aside, vacated, modified, or annulled by that court.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 667.]

2. JUDGMENT ⟸342(1)—SETTING ASIDE—AUTHORITY AFTER TERM.
It is the general rule that after the term has expired all final judgments and decrees pass beyond the control of the court, unless steps were taken during the term to set aside, modify or correct them.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 668.]

3. EQUITY ⟸430(1)—VACATING DECREES—POWER OF COURT.
As a general rule, the control of a court of equity over its decrees continues throughout the term at which they are entered; but after the expiration of the term no power ordinarily exists to make a substantial change, except by a bill of review.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1040, 1047.]

4. EQUITY ⟸430(1)—VACATING DECREES—POWER OF COURT.
Where, in a suit to set aside two alleged fraudulent conveyances by a bankrupt, a decree was entered dismissing the bill as to the earlier conveyance on defendant's representation that the equity in the property covered by the subsequent conveyance, at the time of the first conveyance, was sufficient to pay the then existing creditors, of the bankrupt, and thereafter defendant's counsel moved to set aside a decree for plaintiff as to the second conveyance on the ground that title to the property was in the bankrupt and his wife as tenants by the entirety, the court had authority to set aside the decree dismissing the bill as to the first conveyance though the term at which it was entered had expired, as it was obtained by misrepresentation.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1040, 1047.]

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

Suit by Francis A. Winslow, as trustee in bankruptcy of Frederick Staab against Amy T. Staab and others. From an order (233 Fed. 305) setting aside two decrees and ordering new trials, the defendant named appeals. Affirmed.

The facts are as follows: On May 15, 1913, Frederick H. Staab, a resident of the city of Mt. Vernon, in the state of New York, transferred to his daughter, Amy T. Staab, a piece of real estate situate on Cottage avenue in Mt. Vernon, which for convenience hereinafter is referred to as the "home property." In July of the same year Staab transferred to another daughter Effie

O. Staab, property situate on South Fourth avenue in Mt. Vernon, and which for convenience hereinafter is referred to as the "business property." In the year following, in June, 1914, Staab was duly adjudicated a bankrupt in the District Court of the United States for the Southern District of New York.

After the first meeting of creditors had been called and the trustee elected, a bill in equity was filed in the District Court for the Southern District of New York, for the purpose of setting aside and declaring fraudulent as against creditors the transfers of the properties to which reference has heretofore been made. The two actions were tried as one. The defendants offered no evidence, but rested upon the testimony and exhibits presented by the trustee. The bill, which sought to set aside the transfer of the home property to Amy T. Staab, was dismissed, for the sole reason that it was represented that there was sufficient equity in the business property existing at the time the home property was transferred to pay the then existing creditors of the bankrupt, and a decree dismissing the bill was entered on December 29, 1915. As respects the bill relating to the business property the District Judge reserved his opinion until March 29, 1916. In the opinion which he then filed he concluded that the conveyance was in fact fraudulently made, without adequate consideration, and should be set aside as prayed, and a decree to that effect was accordingly entered.

The solicitor for the appellant then moved for an order setting aside this decree for the reason, as he alleged, that he had then learned for the first time that the title to the business property was in the bankrupt and his wife, Thusnelda Staab, as tenants by the entirety, and not in the bankrupt as owner in fee. This fact it was claimed the solicitor and his clients had suddenly discovered a few days before the making of the motion, five months after the conclusion of the trial, which had ended on November, 1915. When this motion was heard, the counsel for the trustee pointed out that, inasmuch as both of these actions were tried as one, and inasmuch as the sole reason for dismissing the complaint in regard to the home property was based upon the fact that it was represented to the judge by the solicitor for the bankrupt and his daughters that there was sufficient equity in the business property to pay the then existing creditors, and that as it suddenly appeared now that this was not the fact, if the decree was to be set aside as to the business property, justice required that the decree should also be set aside which dismissed the bill as to the home property.

The District Judge acquiesced in the above view, and set aside the two decrees, and ordered new trials. From this Amy T. Staab has appealed.

Milo J. White, of Mt. Vernon, N. Y., for appellant.

Yankauer & Davidson, of New York City (I. Maurice Wormser, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question presented is whether a court of equity has the power to set aside a decree after the term has expired, where the decree was obtained by a misrepresentation made to the court at the time the decree was obtained. In this case the trial judge has set aside a decree after the expiration of the term and has ordered a new trial.

[1, 2] The general rule is undoubted. It is that all judgments, decrees, or other orders of courts are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and during that period they may be set aside, vacated, modified, or annulled by that court. But after the term has expired all final judgments and decrees pass beyond its control, unless steps were taken during the term to set aside, modify, or correct them. If errors exist, they must then be corrected by writ of error or appeal

in a court authorized by law to review the decision. Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013 (1886). There are certain exceptions to the general rule. These are pointed out in an opinion by Mr. Justice Hughes in United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129 (1914). In that opinion the court confined its attention to the power of courts of common law to alter or set aside a final judgment after the term, stating that "we are not here concerned with the special grounds upon which courts of equity afford relief."

[3] But we are now concerned with the powers of a court of equity over decrees, and the general rule in such cases is that the control of the court over its decrees continues throughout the term at which they are entered. Henderson v. Carbondale Coal, etc., Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332 (1891); Doss v. Tyack, 14 How. (55 U. S.) 297, 14 L. Ed. 428 (1852). But after the expiration of the term no power ordinarily exists in the court to make a substantial change, except by bill of review. Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467 (1818); State v. Bank of Commerce, 96 Tenn. 591, 36 S. W. 719. The technical rule of the English courts is that it is the enrollment of the decree which places it beyond the control of the court. Daniell's Chancery Practice, 682. This, however, is usually worked out by treating the decree as enrolled at the end of the term. See 16 Cyc. 474. After enrollment it has been held that a decree can be amended to insert matter inadvertently omitted. Jarman v Wiswall, 24 N. J. Eq. 68; Sprague v. Jones, 9 Paige (N. Y.) 395; Oliver Finnie Grocery Co. v. Bodenheimer, 77 Miss. 415, 27 South. 613. And so it has been held that the enrollment itself may be vacated for irregularity in obtaining it. Barry v. Barry, 1 Md. Ch. 20; Pickett v. Loggon, 5 Vesey, Jr., 702. It has been held that a decree may be amended after enrollment and may be vacated by consent. Allen v. Allen, 48 S. C. 566, 26 S. E. 786. And it has also been decided that it may be vacated for false representation in inducing the judge to sign it. U. S. ex rel. Fisher v. Williams, 67 Fed. 384, 14 C. C. A. 440 (1895). In U. S. ex rel. Fisher v. Williams the Circuit Court of Appeals in the Eighth Circuit held that a federal Circuit Court had power to set aside after as well as before the end of the term a final decree which the judge had been induced to enter by false representations as to its character and which he did not intend to enter. The court in that case said:

"It may be conceded that if the decree had been expressed in terms which were known to the judge when he entered it, and he had merely misconceived the import or legal effect of the language employed, then the mistake would have been one of law—an error of judgment—such as no court can correct, on a mere motion, after the lapse of the term, by modifying the erroneous judgment, or by setting the same aside. But such was not the case. The respondent did not read the proposed decree. He relied on the statement of counsel who had prepared it that it was an interlocutory order, and on that representation it was allowed to be spread upon the records of the court. The judge acted under a mistake of fact; his judgment was not invoked, and was not exercised, with respect to any of the terms or provisions of the alleged decree, and for that reason it was not, in any proper sense, a judicial act. We think, therefore, that on the state of facts disclosed by the return the respondent did not exceed his powers in vacating the final decree at the October term, 1893, when his attention was called to the character of that

decree. We are of the opinion that when, by a mistake of the judge, induced by erroneous statements of counsel, a decree has been entered of record, which the judge did not examine or approve, and did intend to enter, such decree may be set aside, on motion, after as well as before the expiration of the term. We can conceive of no reason why the parties to a suit, or the court, for that matter, should be bound to any greater extent by a decree of that kind than by a judgment or decree erroneously entered in consequence of a mistake of the clerk as to the character of a judgment directed to be entered. In both cases the record is affected with the same vice, in that it is made to bear witness to judicial action that was never in fact taken. It is well settled that the record of a court may be corrected at any time, from memoranda made by the judge, or even by the personal recollection of the judge, when, through a misprision of the clerk, it fails to speak the truth, or to speak the whole truth. Bank v. Perry (decided by this court at the present term) 66 Fed. 887 [14 C. C. A. 273]. And we are not aware of any substantial reason why the same rule should not be applied to the correction of errors in a record that were occasioned by a mistake of the court or judge, when they are of the character described in the case at bar. We are unwilling to concede that a litigant must resort to an original bill, or to a bill of review, for the purpose of avoiding a decree which a court was induced to spread of record on the last day of the term, without reading it, by reason of an erroneous statement made by counsel as to the character of the decree."

In the instant case the judge knew the contents of the decree he signed and the legal effect of the language employed. But he was induced to sign it by a misrepresentation of fact made to him by counsel, and if the fact had not been so represented he would never have entered the decree. We cannot see why he should be bound by such a decree to any greater extent than he would have been bound if the contents of the decree had been misrepresented to him.

The case of White v. Tommey, 4 H. L. C. 313, decided in the House of Lords in 1853 throws light upon the question now under consideration. The facts were as follows: A decree in chancery was enrolled in 1835, and a petition for leave to appeal against it was presented in 1839 and refused; the time for appealing having expired. A bill of review was filed in 1844, and a demurrer to that bill was allowed. The order allowing the demurrer was appealed against in 1846 and the appeal dismissed. In 1847 there was a general dismissal of the appeal. In 1848 there was a petition to appeal against the original decree and in the petition it was stated "that it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and therefore that their lordships had not made any declaration with respect to it," and that the said decree had never been adjudicated upon by their lordships. Accordingly leave was given to include in the appeal the decree of 1835. The appeal was heard ex parte, and in June, 1850, the decree was reversed. The House of Lords held that, as this reversal had been obtained by suppression and misrepresentation, the order should be discharged which gave leave to appeal against the decree of 1835 and the order which had reversed that decree. The Lord Chancellor, after stating the facts, said:

"Now comes the important question—what ought your lordships to do in this state of things? It was pressed very strongly on the part of Tommey by his counsel, that your lordships in truth have no jurisdiction, that after a matter has once been heard and adjudicated upon in this ultimate court of appeal, there is an end of it, that there must be an end somewhere, and that if it can be said that the trustees can be heard now to come, and call in question

the decree of 1850, what is to prevent Mr. Tommey coming afterwards, in 1860, and praying your lordships to reconsider it again, and so toties quoties to the very end of time? That is undoubtedly an argument entitled to the greatest weight. * * * Several authorities were referred to, in which it had been stated by Lord Eldon and other learned judges that a case once decided here between A. and B. is, as against A. and B., conclusively and forever decided, and that nothing but an act of Parliament can afterwards alter the decision. I think that is so; but then it appears to me that the matter was finally settled against Mr. Tommey either in 1839 or in 1847, and that brings me to observe upon the qualification which is introduced by Lord Eldon on this subject, which has a material bearing upon the present case. Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition: That if one party has, by any misrepresentation—I will not put it so high as to say by fraud, for I do not wish to use harsh terms—but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the House into an error, has led it to suppose that something is going on irregularly, all the commonest principles of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud or the machinery for effecting that which, if not done per incuriam, would have been a fraud. * * * What is the relief, then, which your Lordships in your wisdom ought to think fit to grant to the parties? Evidently to put them in precisely the same position as that in which they were before that erroneous order was made (behind their backs), giving leave to Tommey to present the appeal which has led to all the difficulty. * * * I shall move your Lordships to discharge those orders, and to direct that the Court of Chancery in Ireland should deal with the case remitted back to it by the order of 1850 in such a way as may be just, having regard to the fact that the several orders aforesaid have been discharged."

The effect of fraud inducing the signing of one paper believing it to be another is to make the paper signed absolutely void. Where, however, a paper is signed with full knowledge of its contents, and the fraud relates to a misrepresentation of extrinsic facts which induced the signing, the instrument signed is not void, but voidable. In Fisher v. Simon the fraud related to the contents of the decree, and that made it not voidable, but void. While in the case in the House of Lords the misrepresentation was not as to the contents of the orders, but as to the extrinsic facts which led to the making of the orders which had been entered, and which the House set aside. The power to vacate and set aside was held to exist in both cases. As the Lord Chancellor declared:

"All the commonest principles of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud, or the machinery for effecting that which, if not done per incuriam, would have been a fraud."

Courts of equity have interfered even to restrain proceedings at law whenever through fraud, accident, or mistake one of the parties in a suit at law has obtained, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice. That jurisdiction it has exercised at any stage of the proceedings. It has in the exercise of that jurisdiction issued injunctions to stay trial, and after verdict to stay judgment, and after judgment to stay execution, and after execution to stay the money in the hands of the sheriff, if it was a case of fieri facias, or to stay the delivery of posses-

sion. See Bispham's Equity (8th Ed.) § 407, and cases there cited. And in Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870 (1891), the Supreme Court states the law as follows:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.'"

[4] A court which can protect against a judgment obtained at law by fraud, accident, or mistake is not powerless to relieve from a decree so obtained. The only question is whether the trustee is to file a bill to set the decree aside, or whether the court has the power to set it aside without the filing of a bill. We think the court has inherent power under the circumstances disclosed by this record to take the action that was taken in this case. The counsel who innocently made the misrepresentation was before the court asking to have the decree set aside in one of the actions (the two actions had been tried together being corelated) and basing his application on the former misrepresentation which he had made and which induced the decree in the other action. The District Judge thereupon set aside the decree in both actions and ordered new trials. In doing so he did not exceed his right.

We are asked not only to affirm the order, but also to direct that a decree be entered in favor of the trustee, setting aside the transfer by the bankrupt to his daughter Amy. We think the proper relief is simply to affirm the decree the District Judge has entered.

Decree affirmed.

THE ALABAMA.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1917.)

No. 3004.

1. ADMIRALTY ⟸34—SUIT AGAINST VESSEL—LACHES.

A party having a cause of action against a ship should not be penalized for undertaking to settle his claim amicably, and a libelant will not be held barred by laches, where at the only time the vessel came within the jurisdiction, prior to the one when the libel was filed, which was known, or could have been known by the exercise of reasonable diligence, by him or his counsel, they were awaiting an answer to a letter presenting his claim, but the vessel left port the next day without answering.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 316–321.]

2. SHIPPING ⟸86(2)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

Evidence considered, and *held* to sustain the allegations of a libel that respondent ship, which he was assisting to load as a longshoreman, had no ladder in No. 1 hold, where he and others were directed to work, but that it was necessary to go down by stepping on shifting boards placed there by the ship, one of which turned, causing him to fall and receive

injuries; and such evidence *held* to entitle him to recover on the ground of the negligence of the ship in failing to provide a ladder.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 356, 357.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Frank Howard against the steamship Alabama, as to which Holdt & Isaachsen were claimants, and others. Decree for respondents, and libelant appeals. Reversed.

Richard B. Montgomery, of New Orleans, La., for appellant.

William Grant and William B. Grant, both of New Orleans, La., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Appellant, Frank Howard, libeled the steamship Alabama for personal injuries. The libel charges that libelant was engaged as a stevedore in loading the steamship at New Orleans; that he started to go down into hatch No. 1, to prepare for work therein; that there was no ladder descending into this hatch, but there was a handhold just below the deck, and below the handhold uneven ends of boards, jutting out from the partition running lengthwise through the middle of the ship; that this was the usual and customary way held out by the owners and masters of the vessel for stevedores to go into the hold, and the one which they had to use. It is further alleged that on this morning, when libelant started to go down into the hatch for the first time, the protruding planks, without any fault or negligence on his part, twisted and gave way, the libelant falling to the bottom of the hold, some 20 feet, breaking his arm and being otherwise injured and bruised.

[1] The accident occurred August 8, 1906. The libel was filed December 17, 1913. Notwithstanding the long period intervening, libelant is not chargeable with laches. Immediately after the accident he was taken to the Charity Hospital. As soon as he could get out, in October, 1906, he employed an attorney. The attorney, understanding that the ship belonged to, or had been chartered by, the United Fruit Company, wrote a letter to the ship, care of that company. Not receiving a reply, and having learned that the vessel would be in the port of New Orleans on November 13, 1906, he again wrote, notifying the ship of the claim, and asking for a settlement. The vessel came into port on that day, and did not leave until the next day. No reply to this letter was received. After the accident the vessel arrived at the port of New Orleans and departed as follows: Arrived September 30, 1906, departed October 2d; arrived October 16th, departed October 17th; arrived November 13th, departed November 14th. In the years 1907, 1908, 1909, and 1910 she was not in port. On May 6, 1911, she arrived and departed on May 8th; May 24, 1911, she arrived, and departed on May 25th. She was not in New Orleans in 1912. She arrived in port on December 16, 1913, and she was libeled on December 17, 1913. The dates are from the journal of the Alabama. The records of the treasurer's department at New Orleans show the arrival and departure of the vessel; October 1, 1906; Octo-

ber 16, 1906; May 6, 1911, and May 24, 1911. The publication in the Times-Democrat of the arrival September 30, 1906, was October 1, 1906, the day of the departure. There was no publication of the arrival October 16, 1906. The arrival of November 13, 1906, was published the same day. The arrival of May 6, 1911, and departure May 8, 1911, were not published in the Times-Democrat. The arrival of May 24, 1911, was published only once, on May 24th. Of the arrivals after November 13, 1906, until December 16, 1913, neither libelant nor his attorney had knowledge until after the departures.

The libel could have been filed November 13, 1906. Instead of taking this action, libelant's attorney wrote a letter, setting up the facts as they have been proved. There was no subsequent opportunity until the ship was libeled in 1913. A party with a cause of action against a ship should not be penalized for undertaking to settle his claim amicably. It is suggested that the delay has been detrimental to respondents in the matter of procuring witnesses. Doubtless the necessary facts could have been easily ascertained, and the necessary witnesses easily procured, at the time the vessel received the letter stating the claim. A little regard at that time for the rights of others, and a little courtesy to one representing those rights, would probably have been profitable.

[2] Under the facts as developed, libelant is entitled to recover, if hold No. 1 was not equipped with a ladder, and if his allegations as to the character of the equipment provided by the ship for descending into the hold are true. The trial judge refers to the testimony of libelant and two other stevedores, to the effect that the hatch was not equipped with the usual ladder, and says:

"As against this is the testimony of Eaton, who was foreman of the longshoremen at the time the accident occurred; and he says that the hatch was equipped with a ladder, and that he used it several times in going in and out of the hold."

And it is suggested that:

"Under the circumstances, particularly as it agrees with the probabilities of the case, the positive testimony of Eaton that the hatch was equipped with a ladder is sufficient to offset the testimony of the other witnesses to the contrary."

Excerpts from the testimony of the witnesses should carry conviction of the truth of libelant's allegations as to this matter. Libelant testified as follows:

"The day before that we had worked in No. 2 [hold]. We filled the lower hold, and we were ordered to No. 1 hatch, and I went down to change my clothes for work, and, in going down, the hatch had no ladders, but only had one handhold, and then you had to go down on the shifting boards, and the shifting boards gave way with me, and I lost my balance and down I went. Q. You say there was no ladder in that hold? A. There was no ladder in that hatch at all. You had to work your way down on the shifting boards. Q. What do you call the shifting boards? A. Just like there was two stanchions here, and the boards were in between, you know. Q. The boards were in between the two stanchions? A. Yes, sir. Now the same was in No. 2, in the lower hold, but they were stationary; they didn't give; they stayed right there, and I went down all right, but never being in No. 1 before, I thought it was all right too, but when I started down it gave way with me,

and I lost my balance and down I went. Q. Was there any other way to go down into that hatch? A. That was the only way you could go down into the ship in that hatch. * * * Q. Did everybody go down that way? A. That was the only way to go down. * * * Q. Now, who ordered you to go down into that hold that day? A. The foreman, Jack Eaton; he was Mr. Legeai's foreman at that time—Jack Eaton. Q. Was there any other way to go down into the bottom of that ship? A. There was no other way, but that way. There was no other way to go down in No. 1 hold, but the way I went; that was the only way to go down in the ship. Q. What means of getting down were there in hatch No. 2? A. Hatch No. 2 had ladders on the upper deck, but in the lower hold you had to go down on shifting boards, the same way; but they were stationary, they did not give with you, and I went down there all right. They had ladders in No. 2 on the upper deck, but in the lower hold they had no ladders at all in No. 2. Q. But in No. 1 hatch they had no ladders at all on either deck? A. No, sir; there were no ladders at all; there was only a handhold, and you had to work your way down on shifting boards."

Cross-examined by Mr. Grant, libelant was asked the question:

"Had you ever been down a ladder like this before? A. There was no ladder there. * * * Q. Did they have a ladder on the upper deck in No. 1? A. No, sir. Q. How did the rest of these men go down? A. They went right down the same way I did."

Edward Gaither testified:

"Q. What means did they have for the workmen to get down in No. 1 hatch? A. They didn't have any at all, hardly but one step. Q. What do you mean by one step? A. The one you first put your foot on as you go over the hatch. Q. And after that? A. After you go down on that piece—get your foot on that piece—you hold to the combing of the hatch, that is, the top of the hatch, and then you would feel your way down with your foot for the running board. * * * Q. What do you call the running board? A. It is the boards that run right on through; and I suppose where he put his foot on turned with him, and that made him fall. Q. Do the running boards extend out in the hold? A. Yes, sir; they extend far enough for you to put your foot on them. Some of them do and some of them do not. Q. Was there any other way provided for the men to go down in that hatch? A. No, sir; there was no other way. * * *"

The testimony of Octave Lucien was given April 25, 1916:

"Q. What happened at that time? A. Well, Frank, he was going down in the ship at hatch No. 1, and he was going down on a batten, slats that run across—going down on the slats, and the whole slats gave way with him, and he dropped on right down in the hold and broke his arm. Q. Where were you at that time? A. I was standing right at the combing, waiting to go down myself. * * * Q. Was there any other way of going down that ship except in the way he went down? A. No, sir; there was no way at all. * * * Q. Was there any other way of getting down in the hold of that ship? A. I did not see any other way, but to go down on those boards."

These witnesses testified that the foreman was Jack Eaton, and that he was dead. They also testified that they had worked the previous day in hold No. 2, and that no loading up to that time had been done in hold No. 1. The only testimony which in any way conflicted with the testimony of the three stevedores was that of Henry W. Eaton, who testified on November 30, 1914, more than eight years after the accident:

"Q. Were you working out on the river front at that time? A. Yes, sir. Q. What was your business out there? A. I think I was foreman for Mr.

Legeai. I had been foreman, off and on, for Mr. Legeai; but at that time I think I was the regular foreman. Q. For Mr. Legeai? A. Yes, sir. Q. Are you a brother of Jack Eaton? A. Yes, sir. Q. Mr. Legeai was the stevedore who had the contract for unloading this ship, was he not? A. He was loading at the time, but I was not foreman of the Alabama. My brother was foreman at that time of the Alabama. * * * Q. Are you familiar with the Alabama? A. Yes, sir. Q. Do you know whether she has any long ladders to go down in this hold or not? A. Yes, sir. Q. Did she have at that time? A. Yes, sir. Q. Were there means of entrance into the holds besides this ladder? A. No, sir; if they had I did not see it. Every time I went down or up, I went up and down the ladders."

Cross-examined:

"Q. How often did you work on the Alabama? A. I worked on her pretty often when she was lying here. Q. How often? A. It is so long ago that I could not say, but nearly every other trip she came in. Q. Every other trip she came in? A. Very near that. Q. Can you specify any one time that you worked on her. You do not recollect? A. No, sir, I could not without getting the pay roll or something like that; but I do not think you can get that, it has been so long ago."

Eaton was not the foreman in charge of the loading of the Alabama at the time of the accident. When he was asked, "Do you know whether she had any ladder to go down in this hold or not?" and answered, "Yes, sir," no question had been asked indicating any particular hold. The general answers of acquiescence, given by him eight years after the accident occurred, amount to little more than a statement to the effect that ships usually have ladders which go down into the holds, and that, no doubt, that was the case with reference to the Alabama.

The three stevedores testified definitely with reference to a definite time, and with reference to a definite hold. The circumstances of the serious accident which they saw, and which Eaton did not see, were such as to make a permanent mental impression. Their statements have all the indicia of truth. They are entirely in accord with the statement written by the attorney for the libelant at the time of the accident. Notwithstanding the long delay in bringing the libel, if there was a ladder in hold No. 1 of the Alabama, it ought not to have been difficult to secure testimony to that effect, more convincing than Eaton's answer, "Yes, sir," to the questions of appellees' attorney.

The question as to whether the planks or battens which caused the accident were part of the equipment of the ship, and had been put in place by those in charge of the ship, or by the persons doing the loading, is answered by the testimony of Frank Howard:

"* * * Q. Who put these boards in between the stanchions? A. I don't know; they came there that way. They were put in there by the ship's crew, or some of the men; they came that way. Q. You do not know who put them there? A. No, sir; our men did not put them there. I know that our men did not have anything to do with them at all. We did not have anything to do with them at all. * * * Q. Do you know what those boards were used for in the ship? A. I do not know, any more than I think they were put there to keep the cargo from shifting. Q. They were there when you all went to work? A. Yes, sir. Q. Did your foreman put them there? A. No, sir. Q. Did your stevedore put them there? A. No, sir; I see them in all these freight ships, but these other freight ships have a ladder, but this ship didn't have any, I see those shifting boards in all those freight ships."

Edward Gaither testified as follows:

"* * * Q. Did you work on the Alabama before that time? A. Yes, sir; many times. Q. Did she have any other way to go down that you know of? A. Not in No. 1; never did. * * *"

That the accident occurred as alleged is not seriously questioned; that the libelant was injured as alleged is amply proved; that there was no ladder to go down into the hold is satisfactorily established by the specific testimony of three witnesses, against the generalization of the fourth; that the planks, the turning of which caused the accident, were part of the equipment of the ship, and were put in place by those in charge of the ship, is not put in issue, except by a general denial, and is fully established by the only testimony there is upon the subject. Libelant used all reasonable diligence in the institution of the suit; he has established the fact of his injury, and that the injury was the result of the failure of the ship to perform its duty with reference to providing him a safe place in which to work. The judgment should have been for appellant.

Libelant was a strong, healthy, experienced longshoreman. He states that his arm was broken and that he was "all stove up." This testimony is doubtless confirmed by the statement of the attending physician, who treated him "for a fracture of the humerus of the middle third," and other injuries "which procrastinated the ailment." Libelant was in bed more than 40 days. He resumed work after 90 days, but could not then do the heavy, well-paid labor to which he had been accustomed.

Seven hundred and fifty dollars will not more than compensate him for his suffering and loss of time, and judgment will be entered for him against appellees for that amount, and for all costs.

PENNSYLVANIA CO. v. WHITE.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2904.

1. RAILROADS ⟸351(18)—CROSSING ACCIDENTS—INSTRUCTIONS—EFFECT OF OPEN GATES.

An instruction that, when gates at a railway crossing are up, and the operator of the gates known to be present, they constitute an implied notice that no train is approaching, and that a traveler may safely cross, and therefore all the care that he is obliged to exercise is such care as men of ordinary prudence, approaching a railroad crossing, and seeing the gates up, and seeing the gateman at his post of duty, would customarily exercise under such conditions does not relieve such traveler from all duty to exercise care in his own behalf, but leaves it to the jury to determine whether he was guilty of contributory negligence, under all the circumstances, especially where paragraphs of the charge, immediately following, required plaintiff to use his powers of looking and listening as men of ordinary prudence, exercising ordinary care, would do.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1210.]

2. DAMAGES ⟸49—PERSONAL INJURIES—MENTAL SUFFERING.

In the case of a merely negligent omission of duty, not malicious or intentional, recovery cannot ordinarily be had for mental suffering, not connected with or accompanied by personal injury, or direct interference with plaintiff's person.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

3. DAMAGES ⟸52—PERSONAL INJURIES—FRIGHT.

When defendant's negligence causes physical injuries to plaintiff's person, damages resulting from incidental fright may be recovered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

4. DAMAGES ⟸216(10)—INSTRUCTIONS—PERSONAL INJURIES—FRIGHT.

In an action for injury sustained in a crossing accident, the evidence showed, without dispute, that plaintiff was either thrown from the wagon in which he was riding by a collision, or jumped therefrom immediately before the collision, that he either alighted on his hands and knees, or on his feet and went down on his knees, that one of his hands was more or less bruised and cut, and that immediately following the fall, or after he had gone a short distance and lain down, he was assisted, weeping, into a factory near the crossing. Except for testimony that he said, after the accident, he was not hurt, it was also undisputed that for a time, at least, one of his knees was lame, and he was unable to do his usual, work. *Held*, that the refusal of an instruction that plaintiff was not entitled to damages for mere fright, and that for him to recover he must show some real and actual injury, aside from fright alone, was not error, as the jury would not have been justified in finding that plaintiff suffered no physical injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 555.]

5. DAMAGES ⟸52—PERSONAL INJURIES—FRIGHT.

Though plaintiff jumped from the wagon in which he was riding when a collision with a railway train was immediately impending, and his sole physical injury resulting from an attempt to escape from actual danger, damages were recoverable for impairment of his health, occasioned by the consequent fright.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

6. DAMAGES ⊜52—PERSONAL INJURIES—FRIGHT.
The rule permitting recovery for fright does not require that the direct physical injury be permanent or severe.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255.]

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

Action by Otis S. White, guardian of Merle J. White, against the Pennsylvania Company. Judgment for plaintiff and defendant brings error. Affirmed.

W. L. Day, of Cleveland, Ohio, for plaintiff in error.
L. P. Metzger, of Salem, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. Suit was brought on behalf of Merle J. White, whom we shall call plaintiff, to recover for injuries received under these circumstances: Plaintiff, who was about 19 years old, was driving a horse attached to a delivery wagon. As he approached defendant's tracks in Salem, Ohio, the gates on each side of the track were up, and White saw the watchman in his shanty near the gates. While he was driving across the tracks the gates were closed on each side, thus effectively hemming the horse, wagon, and driver between the gates. While in this predicament the wagon was struck by defendant's railway engine, the horse killed, and both the wagon and horse thrown a great distance. Plaintiff was either thrown by the impact of the engine with the wagon, or practically at the instant before the impact jumped, alighting on his hands and knees upon the brick pavement, 14 or 15 feet beyond the gate. Verdict and judgment were rendered for plaintiff. But two alleged errors are relied upon for reversal.

[1] 1. Defendant contended that the accident was due to plaintiff's negligence. In the course of the charge to the jury the trial judge used this language:

"When guard gates at a street crossing are up, and the man to operate them is known to be present, they constitute an implied notice that no train is approaching and that the traveler may safely cross; and therefore all the care that he was obliged to exercise under these conditions was such care as men of ordinary prudence, approaching a railroad crossing, and seeing the gates up, and seeing the gateman, whose duty it was to lower them when trains approach, was at his post of duty, would customarily exercise under such conditions."

It is recognized by decisions of this court that the open gate is in the nature of or analogous to an invitation to the traveler to cross, but that it is still incumbent upon him to exercise his senses of sight and hearing for his protection as soon as, and as far as, a man of ordinary prudence would do under similar circumstances. Blount v. Gd. Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526; Erie R. R. Co. v. Schultz, 183 Fed. 673, 675, 106 C. C. A. 23. The instruction in question is complained of as relieving the plaintiff from all duty to exercise care in his own behalf, and as placing the entire duty of care on defend-

ant. We are unable to accept this construction of the charge. We think it apparent, from even so much of it as we have quoted, that the court left to the jury the question whether, under all the circumstances, plaintiff was guilty of negligence contributing to the accident. Reference to other paragraphs of the charge immediately following the paragraph quoted relieves the question of all doubt.[1] There was no error in the instruction.

[2] 2. Defendant contends that there was evidence that plaintiff sustained no real injury aside from fright, and complains of the refusal of the following request to charge:

"I will say to you as a matter of law that the plaintiff is not entitled to recover damages for mere fright. In order for him to recover, he must show some real and actual injury, aside from fright alone."

It is the general rule that recovery cannot ordinarily be had in case of merely negligent omission of duty (that is to say, not malicious or intentional) for mental suffering not connected with or accompanied by physical injury or direct interference with the plaintiff's person, as illustrated by several cases relied on by defendant and cited in the margin.[2] In neither of these cases was plaintiff's person invaded.

[3] There is not wanting respectable authority that recovery may be had for injuries proximately occasioned by fright or shock due to defendant's actionable negligence, although not attended by direct physi-

[1] The paragraph of the charge above quoted was followed by these paragraphs:

"He was not authorized to shut his eyes or close his ears, so that he might not see or hear an approaching train, but he was obliged to use his powers of looking and listening as men of ordinary prudence, exercising ordinary care, would exercise them in looking and listening for trains, under such conditions as were before him, with the gates up and the gateman at his post.

"If you find from a preponderance of the evidence that the conduct of Merle White in looking and listening, or in failing to look and listen, for approaching trains, was such as men of ordinary prudence would have exercised, when approaching a railroad track and seeing the gates up and the gateman at his post of duty, then he was not guilty of contributory negligence in this case, and the plaintiff, his father, would be entitled to recover for such damages as his son suffered in the accident.

"But if you find that a man of ordinary prudence under these conditions, with confessedly an unobstructed view of the railroad tracks for a considerable distance in the direction from which the train came, would, notwithstanding the fact that the gates were up and the gateman at his post, have seen or heard the approaching train in time to have avoided injury, then there can be no recovery in this case, and your verdict should be in favor of the defendant, the railroad company."

[2] Rowan v. Western Union Telegraph Co. (C. C.) 149 Fed. 550, denying liability for mental anguish occasioned by negligent failure of the telegraph company to deliver a death message, by reason of which plaintiff was prevented from attending his sister's funeral; Kyle v. Chicago, R. I. & P. Ry. Co., 182 Fed. 613, 105 C. C. A. 151, denying a right of recovery for mental anguish due to the inability of plaintiff, through the carrier's negligence, to reach the bedside of a relative before death; Tiller v. St. Louis & San Francisco R. R. Co. (C. C.) 189 Fed. 994, rejecting liability for injuries caused by fright due to the negligent setting of a fire which threatened plaintiff's dwelling; Miller v. Railroad Co., 78 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699, denying damages for fright and shock caused by witnessing defendant's derailed street car collide with plaintiff's dwelling.

cal invasion of the person. Stutz v. C. &. N. W. Ry. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159. And see Miller v. Railroad Co., supra, 78 Ohio St., at page 324, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699. But the rule is well established that when a defendant's negligence causes physical injury to the plaintiff's person, damages resulting from incidental fright may be recovered. Traction Co. v. Lambertson, 59 N. J. Law, 297, 36 Atl. 100; Warren v. Boston & Maine R. R. Co., 163 Mass. 484, 40 N. E. 895; Denver & R. G. R. R. Co. v. Roller (C. C. A. 9) 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; and see Pankopf v. Hinkley, supra.

[4, 5] There was testimony tending to show that plaintiff received actual physical injuries continuing to a greater or less extent up to the time of the trial (which was about a year and one-half after the accident) and tending to show more or less permanent impairment of health, particularly by way of a general nervous condition, manifested by halting and stammering speech, impaired ability to sleep, and loss of flesh. Defendant's testimony tended to show that plaintiff was not seriously injured, and that at least before the trial he had entirely recovered from the results of the accident; and if there was testimony reasonably tending to show that plaintiff received not even a temporary physical injury, the refusal of defendant's request would present important and perhaps serious questions.[8] But we think the testimony was such that the jury could not, without perverseness, fail to find that plaintiff received some physical injury as the result of the accident. There was express and uncontroverted testimony that plaintiff, after a long flight through the air, either alighted upon his hands and knees upon the brick pavement, or, as expressed by one of defendant's witnesses, alighted upon his feet and "went down on" one of his knees; that one of his hands was more or less bruised and cut; that he was helped up from the ground, either immediately following the fall, or after he had gone a short distance and lain down, and was assisted, weeping, into a factory near the crossing. It was undisputed (unless by the testimony of defendant's conductor, to the effect that while in the factory, immediately following the accident, in reply to the conductor's inquiry whether he was injured plaintiff said, "No, I am not hurt") that for a time at least one of plaintiff's knees was lame and that for a time he was unable to do his usual labor. Whether he jumped from the wagon just before the collision, or was thrown by the impact of the engine, is not important, for the testimony, in its aspect most favorable to defendant, makes it clear that plaintiff left the wagon but a few seconds, at the most, before the collision and because collision was immediately impending. Even if the sole physical injury resulted from an attempt to escape from actual danger, damages are recoverable for impairment of health occasioned by the consequent fright. Traction Co. v. Lambertson, supra, 59 N. J. Law, at page 302, 36 Atl. 100; Bu-

[8] In the charge to the jury no mention is made of the subject of fright or damage therefrom. The elements of damage referred to were only compensation for past and future pain and suffering, and for past and future impairment of earning capacity.

chanan v. West New Jersey R. R. Co., 52 N. J. Law, 265, 19 Atl. 254; Armour & Co. v. Kollmeyer (C. C. A. 8) 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110. In fact, had plaintiff not jumped, serious (perhaps fatal) injury was inevitable. Indeed, plaintiff could scarcely either have jumped or been thrown the distance stated, alighting as he did, without more or less immediate shock (perhaps only temporary) to his physical and nervous system. In the Lambertson Case, supra, it was held that an actual injury was done to the plaintiff personally, entitling to recovery for damages for fright, where the wagon in which he was riding was, while crossing a railroad track, struck by defendant's car and carried along by it for some distance before it was stopped. In the Warren Case, supra, the wagon in which plaintiff was riding, while caught between gates under conditions similar to those existing here, was struck by the train and plaintiff was thrown or jumped out. It was said (163 Mass. p. 487, 40 N. E. 896):

"It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock."

In Pankopf v. Hinkley, supra, recovery was permitted for severe fright or shock (resulting in miscarriage) due to the fact that an automobile was negligently steered into the horses attached to the carriage in which plaintiff was riding, whereby the carriage was pulled with such force and violence as to cause the fright and shock referred to.

[6] The rule permitting recovery for fright does not require that the direct physical injuries be permanent or severe. We think it plain that plaintiff had, under the evidence, and regardless of the fright, a right of action entitling him to some degree of recovery, provided, as the jury must have found, defendant was negligent and plaintiff free from negligence with respect to the accident. It is elementary that it is not error to refuse an instruction, although correctly stating an abstract proposition of law, if inapplicable to the facts of the case. We think the requested instruction was inapplicable. In the Warren and Roller Cases, supra, refusals of requests similar to that under consideration here were held not error.

We find no error in the respects complained of, and the judgment of the District Court is affirmed.

WATSON et al. v. ADAMS.

SIMPSON et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 19, 1917.)

Nos. 2925, 2926.

1. BANKRUPTCY ⇐302(1)—PREFERENCES—SUITS BY TRUSTEE—PLEADING.

In a suit to set aside a deed by a bankrupt as preferential, the omission from the petition of any statement that the recipients were chargeable with notice that a preference would result is fatal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456.]

2. BANKRUPTCY ⟸175—FRAUDULENT CONVEYANCES—PREFERENCES.
A transfer by a bankrupt merely because it is preferential under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1916, § 9644), is not also fraudulent under section 67e, providing that all conveyances, etc., by a bankrupt within four months prior to the filing of the petition, with intent to hinder, delay, or defraud creditors, shall be null and void.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248.]

3. BANKRUPTCY ⟸178(2)—FRAUDULENT CONVEYANCE BY BANKRUPT—PAYMENT OF DEBT.
Where the existence and good faith of a debt against a bankrupt in favor of his mother and sister were not questioned, and property conveyed to them and credited on the indebtedness was fairly worth the amount at which it was taken over, and the grantees' only offense was that they accepted partial payment of an honest debt when offered, the conveyance was not fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 269, 270.]

4. BANKRUPTCY ⟸166(1)—PREFERENTIAL TRANSFERS—KNOWLEDGE OF GRANTEE.
A bankrupt's mother and sister, to whom he conveyed land to be applied on a debt, lived apart from him and had no knowledge of other transfers of practically all of his property, nor any reason to think him insolvent. Interest on the debt had been regularly paid, and he told them he would rather give them some property and get rid of his interest burden. They desired to own some land, looked into the value of that conveyed and agreed on a price which was its fair value. *Held* that the facts did not show knowledge on their part that they would be paid while other creditors would not be.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251.]

5. BANKRUPTCY ⟸181—FRAUDULENT TRANSFERS—PAYMENT OF DEBT BARRED BY LIMITATIONS.
There was nothing inherently fraudulent in a bankrupt recognizing and paying a debt honestly due his wife, though barred by limitations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274.]

6. BANKRUPTCY ⟸175—FRAUDULENT CONVEYANCES—PREFERENCES.
Though there is nothing fraudulent merely in the giving of a preference which remains subject to attack under the Bankruptcy Act, yet when the preferential transaction is so manipulated, or carried along into later steps so as to attempt to defeat the recovery of the preference by the trustee, the parties come within the condemnation of Bankr. Act, § 67e (Comp. St. 1916, § 9651), as to fraudulent conveyances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248.]

7. BANKRUPTCY ⟸166(1)—PREFERENTIAL TRANSFERS—KNOWLEDGE OF GRANTEE.
Where a bankrupt's wife, receiving a preferential payment from him, knew of and participated in a series of nearly simultaneous transactions, by which he was divesting himself of practically all of his property for the payment of a part of his debts, and she knew that he was leaving a large part unpaid and unsecured, the preferential payment was voidable as against her and the money recoverable from her, if it remained in her hands.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251.]

8. BANKRUPTCY ⟸186(1), 303(1)—PREFERENTIAL TRANSFERS—RECOVERY OF PROPERTY—BURDEN OF PROOF.
Property transferred by a preferential conveyance by a bankrupt may be recovered from any one not a purchaser in good faith and for value,

and the burden rests upon the person claiming to be such purchaser to show that he paid value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 319, 458, 459.]

9. BANKRUPTCY ⟸303(3)—PREFERENTIAL TRANSFERS—RECOVERY OF PROPERTY—EVIDENCE.

A bankrupt's wife, upon receiving from the bankrupt a preferential payment of $3,000, loaned $2,000 to her son on his note, and almost immediately took from S. a deed to 40 acres of timber land, giving S. therefor the remaining $1,000 of money, the son's note for $2,000, and a mortgage on the land for $1,000. There was no evidence as to the value of the land, and none of the parties had ever seen it, or seemed to have any definite information about it. *Held*, that S. did not sustain the burden of showing the payment of value; there being no sufficient reason to think that the land was worth anything more than the amount of the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462.]

10. APPEAL AND ERROR ⟸1047(1)—HARMLESS ERROR—BASING DECREE ON EVIDENCE IN ANOTHER CASE.

A trustee in bankruptcy brought a suit against the bankrupt's mother and sister to recover land conveyed to them by the bankrupt, and another suit against S. to recover a preferential payment to the bankrupt's wife, paid by her to S. in exchange for land, and the two cases were tried together. *Held* that, where it appeared that S. was not a purchaser in good faith, she was not prejudiced because the decree against her was based in part on testimony offered and received in the other suit on the question of whether the transfer to the wife was preferential and fraudulent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150–4152.]

Appeals from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Two suits by Paul L. Adams, as trustee of Joseph M. Hamilton, bankrupt, against Margaret Watson, individually and as administratrix of Elizabeth Hamilton, and others, and against Wilbur E. Simpson and others. From a decree for plaintiff in each case, defendants appeal. Decree in the first case reversed, with instructions, and decree in second case affirmed conditionally.

Joseph M. Hamilton was adjudicated bankrupt upon a petition filed against him January 19, 1913. On January 1, 1912, he had given to his wife, Rebecca, a note for $7,000, said to represent an existing debt, and had deeded to her their home property at a stated price of $3,000 (leaving $4,000 unpaid). This deed was not recorded until within four months before the filing of the petition. October 25, 1912, he deeded three parcels of land to his mother and sister (Elizabeth Hamilton and Margaret Watson) for a recited consideration of $3,000, and they gave him credit for this amount upon his notes to them. At about the same date he and his wife joined in a mortgage for $3,000 upon the "Boyle place"—apparently the greater share of its value. This mortgage was for a permanent loan, and the amount was given to her and applied upon the $4,000 (balance) debt from him to her. This $3,000, and its proceeds, were turned over by her to Linnie G. Simpson (wife of Wilbur E.) in exchange for Missouri property.

To restore all this property to the estate, the trustee in bankruptcy, Adams, brought three suits in the court below; though informal, these have been treated as plenary suits in equity. One was against the wife, Rebecca, to set aside the deed to the home. This relief was granted, and she has not appealed. The second was against the mother and sister. The conveyance to them was vacated, and their appeal is No. 2925. The third was against Mr.

and Mrs. Hamilton and Mr. and Mrs. Simpson, to reach the proceeds of the $3,000 in the hands of the Simpsons. No. 2926 is their appeal from a decree giving the relief sought. There is one record common to both appeals (except as later stated).

B. W. Gearheart, of Columbus, Ohio, for appellants.

Albert O. Barnes, of Cadiz, Ohio, for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). [1] The petition against the mother and sister directly alleges that the conveyance was made by Hamilton with intent to hinder, delay, and defraud his creditors, but does not say that the grantees participated in this intent. It then proceeds to allege that the deed was within the four months period and constituted a preference, but omits any statement that the recipients were chargeable with notice that a preference would result—a fatal omission on this theory. Carey v. Donohue (C. C. A. 6) 209 Fed. 328, 126 C. C. A. 254. However, we pass by any question of pleading and come to the merits.

[2, 3] The distinction between a fraudulent conveyance, voidable under section 67e, and a preference, denounced by section 60b has been often stated, most lately and most clearly in the Van Iderstine Case, 227 U. S. 575, 582, 33 Sup. Ct. 343, 57 L. Ed. 652. At least since that decision, it cannot be doubted that a conveyance which is a preference under section 60b, is not, therefore, and merely therefore, fraudulent under section 67e. Conceivably, there may be other elements of intent which will give it also the latter character; but the intent to prefer reached by one section is not, ipso facto, the intent to defraud reached by the other. The record here is barren of evidence indicating this distinct and characteristic intent to commit a fraud by the deed to the mother and sister. The existence and good faith of their debt against Hamilton are not questioned. That the property conveyed was fairly worth just about the amount at which it was taken over is practically conceded. Their only offense is that they accepted partial payment of an honest debt when it was offered, and this is not fraud.

[4] Upon the matter of preference, the only question is whether they had the condemnatory knowledge; everything else is clear. Here the trustee has not met the burden of proof resting upon him. Interest had been regularly paid; Hamilton told them he would rather give them some property and get rid of his interest burden; they had a sentimental desire to own some land; they looked into the value and agreed on a price; and the deal was made. They did not live in the family with him, but apart; they had no knowledge of his other transfers, nor any reason to think him insolvent; and the inference that they knew (had reasonable cause, etc.) they would get their pay, while others would fare worse, rests only on suspicion—an insufficient foundation. The decree in No. 2925 must be reversed, and the court below instructed to dismiss the petition.

[5] In the other case, No. 2926, the petition, which was treated as

a bill of complaint, is subject to the same infirmities as in No. 2925, but they may be passed by. We should hesitate to find that the turning over of the $3,000 to Mrs. Hamilton was with intent to defraud creditors, as distinguished from an intent to prefer one legitimate creditor over others, if that were the controlling question. While the giving of the note to her was the revival of an indebtedness long barred by the statute of limitations, yet, if it honestly existed, there was nothing inherently fraudulent in recognizing it and paying it; but we think it unnecessary to determine this specific branch of the case.

[6-8] In spite of the recognized distinction to which we have referred between transactions which are merely preferences and those which are intended to hinder, delay, and defraud, it is pointed out in Dean v. Davis, 242 U. S. 438, 444, 37 Sup. Ct. 130, 61 L. Ed. 419, that what begins as a preference may end as a fraud. Treating this, the latest decision of the Supreme Court, as not intended to modify or limit the holding of the Van Iderstine Case, we think the principle must be that while there is nothing fraudulent merely in the giving of a preference which is and remains subject to effective attack and neutralization, if as a preference it violates the Bankruptcy Law, yet, when the preferential transaction is so manipulated, or when it is carried along into such later steps, as to attempt to defeat the recovery of the preference by the trustee, it results that the parties are engaged in an attempt to defeat the intended operation of the Bankruptcy Law itself, and they have placed themselves within the condemnation of section 67e. This payment to Mrs. Hamilton was at least preferential. There is no room to doubt that she knew of, and, indeed, participated in, the series of nearly simultaneous transactions by which Mr. Hamilton was divesting himself of practically all his property for the payment of part of his debts, and that she knew he was leaving a large part unpaid and unsecured. It follows that the preferential payment was voidable as against her and the money could have been recovered from her, if it had remained in her hands; and it follows, also, that any attempt by her to put it beyond the reach of a possible action by a possible trustee was voidable, as being in hindrance and defeat of that portion of the Bankruptcy Law which contemplated that the trustee should recover such preferences. It follows, too, upon familiar principles, that property transferred by a conveyance of this character can be recovered from any one who is not a purchaser in good faith and for value, and that the burden rests upon the person claiming to be such purchaser to show that he paid value.

[9] At once, upon receipt of the $3,000, Mrs. Hamilton loaned $2,000 to her son, taking his note; and almost immediately (after a transaction immaterial because abandoned) she took from Mrs. Simpson a deed to 40 acres of timber land in Missouri, and gave Mrs. Simpson her remaining $1,000 of money, the $2,000 note against the son and a mortgage back on the Missouri land for $1,000. There was no evidence about the value of this land. Neither Mr. or Mrs. Simpson nor Mr. or Mrs. Hamilton had ever seen it, and no one of them seemed to have any definite information about it. We do not need to go so far as to say that we cannot believe the transaction was in good

faith; it is enough to say that there is no sufficient reason to think that the land was worth a dollar more than the amount of the mortgage given back upon it, and that, since the burden was upon the Simpsons to show that they paid value, they cannot complain if it is held that they have not established this position.

[10] The Simpsons complain because the decree against them is based, in part, upon testimony which had been offered and received in No. 2925, but not in No. 2926. The cases were tried together, and there is some confusion on this subject; but we do not see anything materially prejudicial to the Simpsons. The testimony in question concerned the dealings between Mr. and Mrs. Hamilton and supported the conclusion that the transfer of the money to her was preferential, and, in the sense above explained, fraudulent. Since we find that the Simpsons cannot be considered good faith purchasers, they are not so vitally concerned in the perfection of the case against Mrs. Hamilton that we ought to reverse the case for the error—if error there was—in not requiring this same testimony to be taken over again in the second case.

In view of the conclusions we have expressed, it becomes immaterial to consider other questions discussed in the briefs.

The decree below, in this case, No. 2926, is affirmed, with costs.

Although not raised by counsel, the question obtrudes itself whether the values of Mrs. Hamilton's dower and homestead rights have been properly preserved to her. See Re Lingafalter (C. C. A. 6) 181 Fed. 24, 104 C. C. A. 38, 32 L. R. A. (N. S.) 103. In two conveyances, we infer that she released her dower, and, in the third instance, it would merge. All seem to have been part of the transaction by which she was getting payments made to her; but now these payments are in effect taken away from her. The affirmance is, therefore, with the condition that the court below permit such modification in this respect as Mrs. Hamilton's rights may require, if, indeed, she has any equity to compensation which she has not lost by her conduct in the matter or by nonclaim.

KALEIALII et al. v. SULLIVAN et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1917.)

No. 2818.

1. DEEDS ⊂=124(1)—ESTATES CREATED—FEE SIMPLE.

A deed to the grantor's daughters, after stating that it was an absolute conveyance and reciting that it was made to provide for the daughters, so as to "prevent unavoidable convenience" and for their care and maintenance, and that it was the grantor's desire that they might be "benefited with the proceeds arising therefrom, together with the rents to their children and assigns, as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs," provided that the grantor thereby made, sold, conveyed, released, and forever quitclaimed to the daughters property therein described, and that appurtenances, rights, and privileges, as well as the proceeds thereof, should belong to the daughters and their repre-

sentatives and heirs and assigns forever. It further provided that the daughters until their death "shall leave these lands and rights appertaining to whomsoever they may demise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and acknowledgment thereof," then the land should revert to the grantor and his heirs. "and the benefit shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents, provided that, if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor." *Held* that, where both daughters had children and there was no claim that the contingency as to a dishonest devise had occurred, the daughters took a fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 423, 424.]

2. DEEDS ⟸93—CONSTRUCTION—INTENTION.
A deed is to be construed according to the intention of the parties as manifested by the entire instrument, even though it may not comport with the language of a particular part.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232.]

3. DEEDS ⟸96—CONSTRUCTION—RECITALS.
Where a deed contained recitals as to the property of the conveyance, the words used in the recitals, though not a necessary part of the deed, might be considered in ascertaining the intention of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256–260.]

4. DEEDS ⟸123—CONSTRUCTION—"CHILDREN."
The rule of the common law is that in a conveyance by deed, the word "children" is not the equivalent of heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 347–374, 413–435.

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

5. DEEDS ⟸36—REQUISITES AND SUFFICIENCY—WORDS OF CONVEYANCE.
Where a deed provided that the grantor did thereby sell, give, convey, release, effectuate, and forever quitclaim to the grantees, the formal word "grant" was not necessary, as the words used plainly manifested an intent that the estate should pass by the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 55, 56.]

6. DEEDS ⟸90—CONSTRUCTION—AMBIGUITY.
Where, under a deed, the grant itself was clear, that construction of a clause which harmonized with the grant and was in conformity with the operative part of the deed should be given such clause.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234–237, 247, 248.]

7. DEEDS ⟸90—CONSTRUCTION—DECLARATIONS AS TO CHARACTER OF INSTRUMENT.
A statement in a deed that it was an absolute conveyance of land was not to be wholly ignored in construing the deed; it being a part of the instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234–237, 247, 248.]

8. DEEDS ⟸123—CONSTRUCTION—ESTATES CREATED—"ABSOLUTE CONVEYANCE."
An "absolute conveyance" of land ordinarily means a transfer of an unrestricted or unconditional estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345–374, 413–435.

For other definitions, see Words and Phrases, Second Series, Absolute Conveyance.]

In Error to the Supreme Court of the Territory of Hawaii.

Action by Mary Kaleialii and others against Henrietta Sullivan and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

This is an action brought to quiet title to certain real estate in Hawaii, all the parties claiming title from a common source, a deed from Alexander Adams, Jr., dated September 15, 1858, and running to the daughters of the grantor, Peke and Maria. The deed was in the Hawaiian language, but a translation of the material parts is as follows:

"This deed is an absolute conveyance of land, made this 15th day of September in the year of our Lord one thousand eight hundred and fifty-eight, between Alexander Adams, Jr., of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters, of the same place, of the second part.

"Witnesseth, that the above-named Alexander Adams, Jr., of his own volition, in order to provide for his daughters, Peke and Maria, so as to prevent unavoidable convenience and for the care of their person with things necessary as well as their maintenance; and whereas, the said Alexander Adams, Jr., because of his own desire for the aforesaid daughters, that they may be benefited with the proceeds arising therefrom, together with the rents to their children and assigns, as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands:

"Now, therefore, this deed showeth that the above-mentioned Alexander Adams, Jr., in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above-mentioned second part, which has been received, in witness of the making, sale, giving, conveying, releasing, effectuating, and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate, and forever quitclaim to the parties of the second part hereinabove mentioned all those certain pieces of land situated at Olomana, Honolulu, and the house lot situated in the town of Honolulu, along Hotel street (L. C. A. 5049B) to Keoki no Malule, deeded to me on the 3d day of August, 1854, royal patent 1918, acknowledged on the 11th day of April, 1855, and also grant 2349 and 2530, signed on the 8th of April, 1857, and on the 14th day of September, 1858, and the house lot sold to me by deed from Alexander Adams, signed on the 22d day of June, 1850, and acknowledged by A. Bates on the 22d day of August, 1850, the descriptions of which are as follows: * * * To have, together with the things thereupon, the houses and appurtenances, rights, and privileges, as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things, together with the interests and rights appertaining to the party of the first part, shall belong to Peke and Maria, and to their representatives and heirs and assigns forever.

"And the above-mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may demise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert, together with all appurtenances, to Alexander Adams, Jr., of the first part, and to his heirs, and the benefits shall only be theirs, providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents, provided that, if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them. The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation, as well as to all the contents of this deed, and do hereby bind and do both consent to and with the party of the first part hereinabove mentioned to ratify and certify and to

bond and execute to the truth of this deed, as well as to all the conditions herein mentioned.

"In witness whereof, I hereby sign with my hand and seal this day and the year first above written. Alexander Adams, Jr."

Peke afterwards conveyed all her interest to her sister and cograntee, Maria. Thereafter Maria conveyed to Robertson and Bolte, trustees, and they conveyed to Sullivan and Bulkley, and their heirs and assigns forever, who and whose assigns have been in possession until the present time. Bulkley is one of the defendants herein, and the other defendants are the successors in interest of Sullivan. Maria died in 1894 leaving children; Peke died in 1914, leaving two children—Mary Kaleialii, born in 1859, one of the plaintiffs herein, and Robert N. Boyd, born in 1863, who died in 1914, leaving four children, Rebecca L. Miles, Annie K. Boyd, Robert N. Boyd, and Victor K. Boyd, the other plaintiffs herein. The Supreme Court of the territory of Hawaii held that the deed gave to each of the daughters a fee simple in an undivided half of the land described therein, and it is to review that decision that the defendants below sued out writ of error to this court.

Andrews & Pittman and Frank Andrade, all of Honolulu, T. H., for plaintiffs in error.

Holmes & Olson and Frear, Prosser, Anderson & Marx, all of Honolulu, T. H. (E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., of counsel), for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The controlling question in the litigation is the construction of the deed from Alexander Adams, Jr., to his daughters, Peke and Maria. The plaintiffs in error contend that the proper construction is that Adams created in each one of his daughters an estate for the life of each one of them, with a remainder over to their children, if any such children should survive the mother or mothers. Defendants in error contend that the deed gave Peke and Maria each a fee simple in half of the land, and that Peke's interest passed to Maria, and that the fee simple in both halves passed from Maria, through Robertson and Bolte, to the defendants in error.

[2, 3] The true principle is to construe the deed according to the intention of the parties as manifested by the entire instrument, even though it may not comport with the language of a particular part of it. The recitals in the deed under examination, and which may be useful to aid us in arriving at the intent, are a kind of explanation by the grantor. The first purpose disclosed by them is "to provide for" the daughters, so as to prevent inconvenience to them, and also to provide the care of their persons with necessary things, and to provide also for their maintenance. The words used in the recitals are not a necessary part of the deed, but, being in the instrument, they afford a clue to the intention of the maker. Washburn on Real Property, § 2351. The second clause of the recital explains the wish of the father that his daughters may be benefited in the way there mentioned; that is, with the proceeds arising from the lands, together with the rentals, "to their children and their assigns, as well as the payments to be made for the real estate * * * to the end of their lives and forever to their heirs, independent of all restraint and interference of

their husbands or those they may have hereafter, providing no conveyance is made to their husbands." These words specially pertain to two things—one, rentals to come from the lands; and another, proceeds to come from payments to be made for the lands conveyed by the deed. Rentals might accrue while the real estate was rented and unsold by the grantees, but payments for the lands conveyed could only come, should those in whom the right to convey was vested thereafter sell and convey their title and ownership. And as the present conveyance was to the daughters, Peke and Maria, they alone could convey title to create proceeds.

[4] It is argued by defendants in error that by the words "to their children and assigns" those two classes are placed on an equality, and that inasmuch as there could be no assigns, except those to whom the daughters might convey, a reasonable construction is that by "children and assigns" are meant the heirs of the body of the grantor, Adams, and the assigns of the grantees. No cases are cited, however, to justify a construction which regards children as equivalent to heirs. The rule of the common law is that in a conveyance by deed the word "children" is not the equivalent of "heirs." Adams v. Ross, 30 N. J. Law, 505, 82 Am. Dec. 237; 4 Kent's Comm. 6. In construing wills the rule is much more liberal. But, notwithstanding the general common-law rule relating to the administration of the law of real estate, it is to be said that some confusion has been created in the deed under examination by the use of the word "heirs" in the additional language included in the premises or recitals, that the daughters are to take "to the end of their lives and forever to their heirs," independent of all restraint of their husbands. Considering the whole clause, there is room for contention that these latter words made an estate of inheritance, and that by them technical use of the word "children" was qualified.

[5] But we may concede that the preliminary parts of the deed are not sufficiently clear to tell us that a fee simple was intended to be conveyed, and with this concession in mind let us proceed to the operative words of grant as of special importance:

"This deed showeth that * * * Alexander Adams, Jr., * * * in consideration of the statements * * * and of two dollars paid, * * * which has been received, * * * by this deed do make, sell, give, convey, release, effectuate, and forever quitclaim to the parties of the second part hereinabove mentioned all those certain pieces of land. * * *" etc.

Here, too, there is somewhat clumsy use of words and sentences, but that makes no difference, for the words, sell, give, convey, release, effectuate, and forever quitclaim are sufficient to show the clear intent of Adams to grant his interest or estate in the lands described in the deed. We are not losing thought that the word "grant" is omitted. But as the other words so plainly manifest that Adams intended that his estate should pass by the deed the formal word grant was not necessary. Shove v. Pincke, 5 T. R. 124; Lynch v. Livingston, 8 Barb. (N. Y.) 463–485; Washburn on Real Property, § 2285.

Next taking up the habendum clause, and we have these words:

"To have together with the things thereupon * * * rights and privileges * * * either in law or equity, to receive from said lands * * *

together with the interest and rights appertaining to the party of the first part shall belong to Peke and Maria and to their representatives and heirs and assigns forever."

In this part of the deed there are no words of limitation of the estate or extent of ownership which the daughters were to have in the lands conveyed, nor any declaration to what uses the daughters shall have the property granted.

We may therefore pass on to the next part of the deed wherein the grantor declares that until the death of the daughters they shall leave the lands and rights appurtenant to whomsoever they may devise if it "be done in truth and honesty"; but if not made "in accordance with the above such as the conveyance and acknowledgment thereof," then and in that event the lands should "revert" to Adams and his heirs, and the benefits shall only be the daughters, if the daughters have no children, but if they have children then all the rights shall "descend to them in the manner enjoyed by their parents," provided, if one of the daughters should die without issue living, all the "rights" theretofore mentioned in the deed should "descend" to the survivor. Now, by separating these somewhat intricate matters, we have these qualifying clauses: (1) The daughters until death had the right to leave the lands and rights appertaining to any one they pleased to devise them to, provided they should devise honestly as by deed and acknowlment. (2) Should they not devise honestly as by deed and acknowledgment, then reversion of the premises to the father and to his heirs would follow, and the daughters would have the benefits only provided they had no children. (3) But if the daughters had children all the rights should descend to the children in the manner enjoyed by their parents. (4) Should either daughter die without issue, all the rights mentioned in the preceding parts of the deed should descend to the survivor of the daughters.

This situation is the result: Until death of the daughters they could devise honestly to whomsoever they pleased. Should there be a devise dishonestly made, the lands and appurtenances would revert to the father. The contingency upon which reversion could arise was a dishonest devise by the daughters. But no issue on that point is presented. An estate for life only would have been somewhat incompatible with the lands reverting to the grantor and his heirs. Another contingency was the daughters having no children; but, as there were children, that contingency never arose, and all the rights were to descend to the children as such rights were enjoyed by the parents of such children. If one daughter should die childless, all rights by the deed conveyed should descend to the surviving daughter. We cannot gather that, if one of the daughters should die, with issue, the land would go to her children in remainder not by descent. The granting clause conveyed an estate in fee, and inasmuch as the grantor in subdivision 3 of the clause just hereinbefore referred to declares that, if his daughters have children, all the rights shall descend to them in the manner as enjoyed by their parents, it follows that, unless there was disposition of

the fee by will or deed by the parents, the children took in fee simple by descent.

[6] It is not easy to reconcile that part of clause 2 above stated wherein the reversion is provided for with clause 3. However, we are not called upon to enter upon an elaborate discussion of inconsistencies between the two sentences, because the grant itself is clear, and, as section 3 harmonizes with the grant, the construction which must prevail is that which is in conformity with the operative part of the deed. Huntington v. Havens, 5 Johns. Ch (N. Y.) 23; Lamb v. Medsker, 35 Ind. App. 662, 74 N. E. 1012; Dunbar v. Aldrich, 79 Miss. 698, 31 South. 341; Pritchett v. Jackson, 103 Md. 696, 63 Atl. 965; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Green et al. v. Sutton, 50 Mo. 186; Nightingale et al., Assignees, v. Hidden, 7 R. I. 115; Edwards v. Beall, 75 Ind. 402; Adams v. Ross, 30 N. J. Law, 505, 82 Am. Dec. 237; Young v. Smith, 1 Equity Cases, Law Reports, 180; Simerson, v. Simerson, 20 Hawaii, 57; Nahaolelua v. Heen, 20 Hawaii, 372; Lucas v. Lucas, 20 Hawaii, 433.

[7, 8] In thus reaching the conclusion that the deed conveyed an estate in fee simple to Peke and Maria, we have given no attention to the opening words of declaration in the instrument that the deed is an "absolute conveyance of land," because we thought it a safer rule of construction to get at the intent of the grantor by relying upon the grant and habendum clauses and recitals, rather than upon the preliminary statement of the grantor. This declaration of the grantor is, however, not to be wholly ignored for it is part of the instrument. And when we regard the declaratory words used, they but add support to the opinion we have reached, for an absolute conveyance of land ordinarily means the transfer of an unrestricted or unconditional estate. Water Power Co. v Street Railway Co., 172 U. S. 475, 19 Sup. Ct. 247, 43 L. Ed. 521; 2 Chitty's Blackstone, 104; Fuller v. Missroon, 35 S. C. 314, 14 S. E. 714; Converse v. Kellogg, 7 Barb. (N. Y.) 590, 597.

The judgment is affirmed.

In re BROWN et al.

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

No. 1244.

1. RECEIVERS ⇐58—DISAPPROVAL OF APPOINTMENT OF RECEIVER—JURISDICTION.

Judicial Code (Act March 3, 1911, c. 231) § 56, 36 Stat. 1102 (Comp. St. 1916, § 1038), provides that where, in any suit in which a receiver shall be appointed, the subject of the suit lies within different states, the receiver shall, upon giving bond, be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit, subject, however, to the disapproval of the appointment within 30 days thereafter by the Circuit Court of Appeals, or by a Circuit Judge, and that the disapproval of such appointment shall divest such receiver of jurisdiction over all such property, except that portion lying within the state in which the suit is brought. Section 129 (Comp.

St. 1916, § 1121) authorizes an appeal to the Circuit Court of Appeals from any decree appointing a receiver. *Held*, that section 56 does not authorize a Circuit Judge or the Circuit Court of Appeals in an original proceeding to disapprove the appointment of the receiver, but only to disapprove his assumption of jurisdiction and control of property outside of the district in which he is appointed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97–102.]

2. RECEIVERS ⟸58—DISAPPROVAL OF ORDER—TIME FOR PROCEEDINGS.

An original proceeding to have the Circuit Court of Appeals or a Circuit Judge disapprove an order under which a receiver appointed by the District Court is exercising control over property outside the district in which he was appointed, under Judicial Code, § 56, will be dismissed, where the order of disapproval was not obtained within 30 days from the time the original decree was granted.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97–102.]

Bingham, Circuit Judge, dissenting in part.

Original proceeding by Edward F. Brown and others for disapproval of an order appointing a receiver, which proceeding was ordered filed in the Circuit Court of Appeals by the Circuit Judge to which the application was presented. On motions to dismiss petition. Petition dismissed.

Conrad W. Crooker, of Boston, Mass., for petitioners.

Boyd B. Jones, of Boston, Mass., for respondent Intercontinental Rubber Co.

George L. Mayberry, of Boston, Mass., for respondent Boston & M. R. R.

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

ALDRICH, District Judge. This is an original proceeding addressed to Hon. George H. Bingham, United States Circuit Judge for the First Circuit, asking, under the authority of section 56 of the Judicial Code, that he disapprove of an order of the District Court of Massachusetts appointing a temporary receiver of the Boston & Maine Railroad, upon the ground that the District Court was induced to make the appointment by alleged misrepresentations in respect to the financial condition of the railroad, as well as by omissions of material statements in respect to its financial condition. After certain preliminary proceedings, it was ordered by Judge Bingham that the application be filed in the Circuit Court of Appeals for the First Circuit, that a hearing thereon might be had by such court.

[1] The parties here have raised questions as to time, and questions as to whether the relief should have been sought through a motion in the original proceeding, rather than by a complaint like this. But we prefer to deal with the single question whether section 56 of the Judicial Code was intended to confer upon a Circuit Judge, or upon Circuit Courts of Appeals, authority, not upon appeal, but by original proceeding, to go into the merits of the question of the legality of the appointment of a receiver by a District Court, or whether such section was intended merely to give a Circuit Judge or Circuit Courts of Appeals, under an original proceeding, authority to

disapprove of the assumption of jurisdiction and control by the receiver of property outside of the district in which he was appointed, without any order of court in the outside district.

We think section 56 was intended merely to confer upon a Circuit Judge, or upon Circuit Courts of Appeals, authority to disapprove of the automatic phase, so to speak, of section 56, which makes the order operate outside the district, and that if it should be found the receiver appointed in one district, where the property lies in different states in the same judicial circuit, should not control the property in districts or states outside of the district in which he was appointed, a Circuit Judge or the Circuit Court of Appeals might declare against it.

Section 129 of the Judicial Code provides for an appeal to the Circuit Court of Appeals from any decree appointing a receiver. Thus it is open, in that way, to any proper party who is aggrieved by the appointment of a receiver to raise the question as to the propriety or legality of the appointment.

It is important to note that the appeal is to the full Circuit Court of Appeals as such. It does not stand to reason that Congress would accumulate remedies against receivership appointments by conferring upon a single Circuit Judge authority to go into the merits of the question of the original appointment, when it had already provided for an appeal direct from the decree or order of appointment to the full Circuit Court of Appeals. It is plain that Congress intended that the substantive question whether there should be a receivership should be reviewed upon appeal, if reviewed at all, by the Circuit Court of Appeals, and not by a single Circuit Judge.

Direct appeal from the original order would seem to be the natural and intended remedy of an aggrieved party against the appointment of a receiver. By reference to documents and communications submitted to Senators, members of the House and committees of Congress, as shown by the Congressional Record, Sixty-First Congress, Third Session, December 14, 1910 (see, also, Judicial Code, § 56, note), with reference to a pending bill to abolish the Circuit Courts, it will be seen that the thought was expressed that the abolishment of the Circuit Courts would leave a situation which would present conflicts and difficulties resulting from the exercise of jurisdiction by the different District Courts within the circuits appointing independent receivers over the same properties.

It is obvious that Congress, under section 56, intended to relieve that supposed difficulty by making the original appointment of a given District Court operative under the same receiver in other districts or states, upon giving bond, subject to disapproval by Circuit Judges or Circuit Courts of Appeals; not disapproval of the original receivership appointment, but of the exercise of jurisdiction by the same receiver outside of the district in which he was appointed. This theory finds cogent support in that sentence of section 56 which declares that the disapproval of such appointment within 30 days shall divest such receiver of jurisdiction over all such property, except that portion thereof lying or being within the state in which the suit is brought. Thus it is clearly shown that Congress did not intend that the disap-

proval of the Circuit Judge or of the Circuit Court of Appeals under a proceeding like the one before us should touch the question as to the propriety of the original receivership appointment.

This proceeding is neither aptly nor in substance for a disapproval of the exercise of jurisdiction of the receiver outside of the district in which he was appointed, but one to disapprove of the original order of receivership. The exact prayer is that "your honor [the Circuit Judge] disapprove the aforesaid order appointing a receiver for the defendant, Boston & Maine Railroad"; thus expressly praying in this proceeding, under section 56, for an entire disapproval of the decree of receivership in the Massachusetts district.

As the remedy to that end rests in the right of appeal from the original order, under section 129 of the Judicial Code, we think the Circuit Court of Appeals, in an original proceeding like this presented to a Circuit Judge, and by him referred to the Circuit Court of Appeals, has no jurisdiction to inquire into the merits of the original order. Its only authority under section 56 is to inquire into the question whether the original receiver should exercise jurisdiction over property outside of the district in which he was appointed.

It does not seem a possible view that Congress, having provided for an appeal from an original order through section 129, could have intended under section 56 to provide for an outside collateral trial of the merits of such order, either for the purpose of sweeping disapproval on the merits, or for purposes of outside disapproval on the merits of the original order, because, if such were the construction, under the circumstances of the express reservation in section 56, which leaves the order operative in the district where it was granted, you would still have a receivership operative in the original district, on the ground that the order was valid and not appealed from, and inoperative in the outside districts under a collateral finding that the original appointment was fraudulently obtained.

We accept the view that this petition for disapproval is based upon the theory that the disapproval, if it results at all, is to result from a finding in this proceeding that the appointment in Massachusetts was procured by fraud, and we are compelled to accept this view because no other ground is suggested. If the statute should be construed as contemplating outside disapproval upon such ground, a disapproval might follow, and as a result there would be the anomalous, if not grotesque, legal situation of an outside collateral disapproval on the ground of fraud in the original decree, which would mean no receivership in the outside districts, while, under the express provision of section 56, the Massachusetts end of the receivership would be operative. Such would be an unworkable situation, and one presenting a diversity of management which would be disastrous to a corporation whose property, the subject of the suit, lies within different states in the same judicial circuit.

There might be business relations which would justify disapproval of outside jurisdiction and control by the original receiver, or personal, prudential, and perhaps other reasons, not going to the merits of the question whether there should be a receivership, why the same receiver should not act in all the outside districts, and reasons which

might become the ground, not for inquiring into the legality of the original receivership decree, but grounds for disapproval of its outside operativeness.

While the scope or the extent of the territorial operativeness of a receivership appointment under section 56 in one district of a circuit, where the property lies within different states in the same judicial circuit, is made subject to the disapproval of a Circuit Judge and of Circuit Courts of Appeals, it is clear that the plain, adequate, and sole intended review of the legality of the receivership decree is by appeal by the aggrieved party under section 129 of the Judicial Code direct from the court making the order to the Circuit Court of Appeals for the circuit.

The petition is dismissed, with costs.

BROWN, District Judge. For the reasons stated in the opinion of Judge ALDRICH, in which I concur, and for the further reason that the time has elapsed within which, under section 56 of the Judicial Code, an order of disapproval might have been made, I am of the opinion that the motions to dismiss for lack of jurisdiction must be granted.

Though my Associates assign different grounds for a dismissal, there is no inconsistency in such grounds; and I am of the opinion that each is right in his conclusion that this court is without jurisdiction, and in the reasons assigned therefor.

BINGHAM, Circuit Judge. [2] I am unable to agree with the opinion of Judge ALDRICH as to the construction placed upon the petition or the grounds there stated for its dismissal. It seems to me, however, that the authority conferred upon a Circuit Judge or Circuit Court of Appeals on a petition to disapprove, brought under section 56 of the Judicial Code, is of a summary nature, necessitating the use of affidavits and the adoption of such methods as will facilitate a speedy determination of the questions presented, and that, as an order of disapproval was not obtained in this case within 30 days from the time the original decree was granted, as required by section 56, the motions to dismiss the petition should be granted.

HERMAN H. HETTLER LUMBER CO. v. OLDS.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1917.)

No. 2898.

1. DAMAGES ⊂⊃68—ACTION ON CONTRACT—CONSTRUCTION OF STATUTE.
How. Ann. St. Mich. 1912, § 2874, which provides that "in all actions founded on contracts express or implied, whenever in the execution thereof any amount in money shall be liquidated or ascertained in favor of either party; by verdict, report of referees, award of arbitrators, or by any other mode of assessment according to law, it shall be lawful * * * to allow and receive interest upon such amount * * * until payment thereof, or until judgment shall be thereupon rendered, and * * * the interest on such amount shall be added thereto and includ-

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

ed in the judgment," does not authorize the jury, in an action to recover an unliquidated amount claimed to be due on contract, to add interest to the sum they find to have been due, and include the same in their verdict, but applies only to a case where the amount due has been definitely liquidated, and authorizes the allowance of interest from that time until it is carried into judgment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143.]

2. DAMAGES ⇐68—BREACH OF CONTRACT—INTEREST.

Under the law of Michigan, as settled by decision in harmony with the general American rule, in the absence of statute, where a sum certain is found to be due on a contract, interest in the nature of damages is recoverable from the the time when the money should have been paid.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143.]

3. DAMAGES ⇐68—BREACH OF CONTRACT—INTEREST.

Plaintiff contracted to sell lumber to defendant, to be paid for on delivery at certain prices according to grade; the quantity and grade to be determined by a firm of inspectors named. One delivery defendant refused to pay for at the contract price, on the ground that such a gross mistake was made in the inspection as to effect a fraud. On this issue the jury found in favor of plaintiff, and under the instructions of the court returned a verdict for the contract price, with interest. *Held* that, under such finding, the action of the inspectors was binding on the parties, and that interest was properly allowed on the full contract price.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Millard D. Olds against the Herman H. Hettler Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jerome N. Frank, of Chicago, Ill., for plaintiff in error.

C. S. Reilley, of Cheboygan, Mich., for defendant in error.

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

KILLITS, District Judge. March 9, 1907, the defendant in error (whom we will hereafter call the plaintiff) entered into a written contract (memorandum of sale) with the plaintiff in error (hereafter called the defendant) whereby the latter agreed to buy of the former certain lumber to be delivered to defendant on the dock at Cheboygan, Mich., at his demand, and to be paid for "cash, less 1½ per cent. when shipped." Prior to the delivery of this lumber, it was agreed that the firm of W. L. Martin & Co. should inspect the same, and it appears to have been the custom of the business that the inspection of a mutually selected inspector should be conclusive upon the parties, in the absence of fraud or mistake so gross as to be in fact equivalent to fraud. The controversy in the present case arises over a shipment of certain lumber delivered on board the steamer of defendant October 25, 1907; the gross amount due plaintiff for this shipment, according to the inspection of Martin & Co., being $8,324.82.

Defendant contended that the inspection by Martin & Co. proceeded upon so gross a mistake as to effect a fraud, and this case has been before this court hitherto upon that subject. 221 Fed. 612, 137 C. C. A. 336. The issue made upon the allegation of gross mistake was sub-

mitted to a jury, and was resolved in favor of plaintiff in a second trial, concluded October 14, 1915, with a verdict finding the amount due to have been the amount of the Martin inspection ($8,324.82), with interest—in all, $11,636.08. There was no dispute at any time that if the inspection of Martin & Co. were reasonably acceptable, the amount due plaintiff would have been $8,324.82 as of the date of shipment, October 25, 1907, less discount of 1½ per cent., should defendant pay cash according to the terms of the memorandum. The whole controversy, therefore, between the parties, rested upon the contention of defendant that the inspection was accompanied by mistakes so gross as to work a fraud upon it.

The precise question before this court is whether, under the law of Michigan, plaintiff should have been allowed interest on the amount, as found due by the jury, from the date of shipment, October 25, 1907, to date of verdict, October 14, 1915, such interest to be computed as part of the judgment; the trial court having directed the jury to "allow interest at the rate of 5 per cent. per annum from the 1st day of November, 1907, to the date of the verdict."

It is claimed on behalf of the defendant that interest cannot be allowed in Michigan, unless provision is made by statute therefor specially applicable to a case of this character, and Kermott v. Ayer, 11 Mich. 181, and Tousey v. Moore, 79 Mich. 564, 44 N. W. 958, are cited. In each case, there is repeated without discussion this statement, "Interest in Michigan is purely statutory." The later case cites the former, and it appears from a consideration of the latter that the court made this statement as applicable to an attempt to recover in Michigan on a Canadian contract a rate of interest prevalent in Canada; the contract being silent as to interest. The full remark of the court is:

"Interest in Michigan is purely statutory, and we think no presumption can exist that any country has adopted our local statutes."

And the whole case leads to the conclusion that the court means to say, simply, that the rate of interest is to be determined only by the terms of the statute of Michigan. We are referred to two statutes of Michigan as having more or less bearing upon the issue before us. One (section 2869, Howell's Statutes, Second Edition) certainly is applicable, for it provides that, in the absence of special stipulation between the parties, "the interest of money shall be at the rate of five dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time."

[1] Plaintiff contends that the court below was justified in its instruction to the jury to allow interest by virtue of the provisions of section 2874, Howell's Statutes,[1] but defendant's counsel insist that

[1] "In all actions founded on contracts express or implied, whenever in the execution thereof any amount in money shall be liquidated or ascertained in favor of either party, by verdict, report of referees, award of arbitrators, or by any other mode of assessment according to law, it shall be lawful, unless such verdict, report, award, or assessment shall be set aside, to allow and receive interest upon such amount so ascertained or liquidated, until payment thereof, or until judgment shall be thereupon rendered; and in making up and recording such judgment, the interest on such amount shall be added thereto, and included in the judgment."

this statute has nothing whatever to do with the case. In this we believe defendant's counsel to be right. A careful examination, it seems to us, shows that the statute provides only for the application of interest upon an amount ascertained by verdict, or arbitration, or otherwise, and thereby definitely liquidated, using that term in the sense of a final determination of the amount due, until the ascertained sum is carried into judgment, or paid prior to judgment, and that it does not provide for the addition by a jury of interest to the amount the jury finds due, with a view of rendering a verdict upon the aggregate amount of principal and interest. The preceding section (2873, Howell's) provides that judgments shall bear interest until paid or collected; section 2874 seems designed to meet instances where an interval may have occurred between liquidation by special means, such as described in the statute, and the making up of a judgment thereon. We conclude that Michigan has no statute directly upon the subject of interest on a claim of the character here involved, except section 2869, which provides a legal rate.

[2] But so holding with counsel for the defendant by no means disposes of the case adversely to the plaintiff, for we find, in considering the authorities in Michigan, that the practice there is, in harmony with the general practice in the United States, to consider interest as always allowable as damages for withholding payment of a sum certain after the same is due. 22 Cyc. tit. Interest, pp. 1469, 1471, 1473, 1474, et seq. In Beardslee v. Horton, 3 Mich. 560, the court says:

"When credit is given for a specified or indefinite time, interest is not allowable in the absence of a special agreement to pay interest; but after the expiration of the time in the one instance, and a demand in the other, interest is allowed. The right to recover interest in this case is supported by the authorities cited by plaintiff, viz.: Pease v. Barber, 3 Caines [N. Y.] 266; Ried v. Rensselaer Glass Factory, 3 Cow. [N. Y.] 423."

In McCreery v. Green, 38 Mich. 172, the court says, on page 185:

"It is a general rule here that a failure to pay money promised when by law it ought to be paid authorizes the allowance of interest in the nature of damages for the improper detention of the sum so promised."

See, also, Eaton v. Truesdail, 40 Mich. 1; Lucas v. Wattles, 49 Mich. 380, 13 N. W. 782; Boyce v. Boyce, 124 Mich. 696, 83 N. W. 1013; Pomeroy v. Noud, 145 Mich. 38, 108 N. W. 498.

The facts of none of these cases can be brought within the provisions of section 2874. The decisions are explicable only upon the theory that the practice in Michigan is consistent with that in jurisdictions where, in the absence of statute, interest is recoverable as damages. The American rule on this subject was early laid down, after careful consideration of the cases then extant on the subject, in the case cited with approval and followed by Johnson, J., in the Beardslee Case, namely, Ried v. Rensselaer Glass Factory, 3 Cow. (N. Y.) 393, 419–423, affirmed by the Court of Errors in 5 Cow. (N. Y.) 587. It is obvious, from a consideration of the appropriate title in any textbook or encyclopedia of law, that the rule is still in full force where not directly modified by statute. This court would be temerarious indeed to assume, in face of the four decisions of that state, above cit-

ed, which follow, even if they do not specifically cite, Beardslee v. Horton, that the rule is not in operation in Michigan, for we are not able to see in the authorities from Michigan cited by defendant any inconsistency with the conclusion we deduce from the Beardslee, McCreery, Eaton, Lucas, Boyce, and Pomeroy decisions, for the reason that, between the two classes of cases, there is a controlling distinction in the character of the facts.

People ex rel., etc., v. Treasurer of the County of Wexford, 37 Mich. 351, cited by defendant, was an action in mandamus growing out of a dispute over the division of township funds following the making of two townships from one. The county treasurer was required to pay certain sums in his official possession to the treasurer of the new township. It was held that there was no claim for interest in the application for the writ, there being no demand for damages because the money was withheld; therefore, because it was not usual in mandamus "to advance beyond the application in according relief to the relator," there was no justification in including interest in the order, and it was further held that, because the litigants were substantially municipal bodies, it would be uncommon to require payment of interest, unless some statute or some contract relation pointed clearly to the justice of the requirement.

In Coburn v. Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198, the action was upon a tort—a situation which is clearly distinguishable from the case before us. The rule is not applicable to cases in which, as of torts, both the right of recovery and the amount of damages are alike uncertain until a verdict is had. In Nelson v. Stewart, 174 Mich. 137, 140 N. W. 544, interest was disallowed in part, undoubtedly, as we read the case, because prior to a certain time the right of the plaintiff to demand anything of the defendants was in the clouds. Plaintiff was claiming that defendants overreached him, and employed counsel to recover money and property alleged to belong to him and in the possession of defendants. July 18, 1908, the parties effected a settlement of their dispute; defendants paying to plaintiff $2,000 and agreeing to pay further sums. The Supreme Court refused to allow interest prior to that date upon the amount then by defendants agreed to be due. It is easily seen why the court should have considered plaintiff's claim to have been, prior to that date, unliquidated in the broad sense of that term of elastic meaning, and therefore not subject to interest.

A consideration of all these cases leads us to believe that the court did not mean, by the expression in Kermott v. Ayer, supra, "that interest in Michigan is purely statutory," to say that interest should not be allowed in any case not within the provisions of some specific statute. We find, therefore, no error in the court's instruction to the jury.

[3] It remains now to consider whether the verdict is excessive in any degree. Defendant first complains that, because it was entitled to a cash discount of 1½ per cent., there is at the outset an irrefutable error against it in computation in the sum of $38.17, because, had it sought to take advantage of the discount provision, it need have paid the plaintiff, at the time of delivery, $8,199.95 in full settlement of the account, instead of the sum of $8,324.82 which the jury, accepting in full the Martin inspection, decided was then due, and that upon the dif-

ference between these two sums, $124.87, interest should not have been computed against it, which alleged erroneous interest it figures amounted to $38.17. It seems to us that it is sufficient answer to this contention to call attention to the fact that, by the court's specific instruction, interest was not computed from the date of shipment, at which time, or within a few days thereafter, defendant had the privilege to discount the bill for cash, but from a date (November 1, 1907) six days after shipment, before which day surely defendant's privilege to take the discount had been exhausted.

When the lumber arrived in Chicago, it received an inspection there which resulted in the determination by defendant that the true amount due from it to plaintiff was $6,556.21, or $1,768.61 less than the amount due by the Martin inspection and approved by the jury's verdict. Defendant's counsel argue that at any rate, if the instruction of the court on the subject of interest may have been generally correct, its application to the facts led to an excessive verdict, because the difference between the Martin and Chicago inspections, involving the sum of $1,768.61, raised a reasonable dispute, the merits of which were not ascertainable until satisfied by action of the jury, and that therefore $709.64, the interest at 5 per cent. upon this amount, should be deducted from the verdict.

The answer to this contention is found in a consideration that plaintiff's claim arose upon an express contract, which he had executed, and which provided for payment at a time certain for the sum due him. The parties to this contract agreed upon all the elements of liquidation of the amount to be due at that certain time; that result was to be reached by applying certain prices to the amounts of the different grades of lumber, and the determination of the quantities referable to the several prices, to be paid according to quality, was by agreement left to an inspecting firm. The inspector, therefore, occupied a position tantamount to that of an arbiter or referee. The contention which the jury was asked to pass upon was whether the award should not be impeached, and be set aside, and a corrected amount discovered. The finding of Martin & Co. having been determined by the jury to have been at least not impeachable, not only a rank injustice, it seems to us, would have ensued, had the plaintiff not been permitted to recover his damages for the withholding of a sum found to have been due him on delivery by the very agency upon which both parties agreed, but the principle established in the practice of Michigan, and followed in the cases we have cited, would have been violated.

We are of opinion, therefore, that the action of the trial court in charging upon the subject of interest was proper, and that the application of that instruction by the jury produced a just verdict.

CRESCENT MFG. CO. v. WILSON, State Commissioner of Agriculture.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 186.

1. COURTS ⊂⊃101—INJUNCTION ⊂⊃143(1)—TEMPORARY INJUNCTION—NOTICE—NUMBER OF JUDGES.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162) § 266, as amended by Act March 4, 1913, c. 160, 37 Stat. 1013 (Comp. St. 1916, § 1243), provides that no interlocutory injunction suspending or restraining the enforcement of any statute of a state, by restraining the action of any officer in the enforcement or execution thereof, or of an order made by an administrative board or commission acting under the statutes of the state, shall be granted on the ground of the unconstitutionality of such statute, unless the application shall be heard and determined by three judges, and that, whenever such application is presented to a justice or a judge, he shall immediately call to his assistance two other judges, and that such application shall not be heard or determined before five days' notice of the hearing has been given the Governor and Attorney General of the state, and such other persons as may be defendants. *Held*, that the District Judge had no jurisdiction of an application for an interlocutory injunction restraining a state commissioner of agriculture from preventing the sale within the state of a food product, on the ground that the statute under which he was acting was unconstitutional, where he did not call in two other judges to hear the application, nor give notice of the hearing to the Governor and Attorney General.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629; Injunction, Cent. Dig. § 315.]

2. COURTS ⊂⊃405(6)—CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Where the jurisdiction of the federal court rests, not solely upon the constitutionality of an act, but also upon diversity of citizenship, the Circuit Court of Appeals has jurisdiction.

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

Suit by the Crescent Manufacturing Company against Charles S. Wilson, as Commissioner of Agriculture of the State of New York. From an order (233 Fed. 282) denying an interlocutory injunction, complainant appeals. Appeal dismissed.

The petitioner is a corporation organized under the laws of the state of Washington. It is engaged in the manufacture and sale of various food products, and among others of a proprietary food product sold under the name of "Mapleine." It seeks an interlocutory injunction against defendant, restraining him from interfering with the sale of the petitioner's product in the state of New York.

Charles A. Riddle, of Seattle, Wash., and William T. Byrne, of Albany, N. Y., for appellant.

Egburt E. Woodbury, Atty. Gen. of State of New York, and Charles M. Stern, Deputy Atty. Gen. of State of New York, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The question presented to the court below was whether the commissioner of agriculture of the state of New York should be restrained from carrying out and enforcing a threatened course of action having for its object the prevention of sales within the state of mapleine after its importation into New York from the state of Washington; mapleine being a food product manufactured and sold in the latter state and extensively transported in interstate commerce. Stated in another way, the question was whether the New York Agricultural Law (chapter 494, Laws of 1914), entitled "An act to amend the Agricultural Law, in relation to adulterated or misbranded food," is unconstitutional, as being in conflict with the provisions of section 8 of article 1 of the Constitution of the United States, as constituting an undue interference with interstate commerce. The District Judge held the New York law constitutional, as not being in conflict with federal law. From this decision an appeal has been taken. The case has been argued in this court, and we shall have to dispose of it upon a point not raised in argument.

[1] It appears that the District Judge was without jurisdiction to hear and determine the application for the interlocutory injunction. A court of the United States composed of one judge only is without power to hear and determine such an application. Judicial Code, § 266, as amended by Act March 4, 1913, c. 160 (Compiled Statutes of United States Annotated, § 1243), reads as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and the other two may be either Circuit or District Judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a Justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a Justice of the Supreme Court, or a Circuit Judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any Justice of the Supreme Court, or any Circuit or District Judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before

the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith."

Under the provision above cited it was not within the power of a single justice or judge to pass on the question whether the New York law violated the Constitution of the United States. When application for the injunction was presented to the District Judge it was incumbent upon him to call to his assistance two other judges, one of whom should be a Justice of the Supreme Court or a Circuit Judge, to hear and determine the application. And it was also his duty to give notice of the hearing to the Governor and Attorney General, as well as to such other persons as may be defendants in the suit. This course was not pursued, but the District Judge proceeded to hear and determine the question sitting alone.

This case is not unlike that of Ex parte Metropolitan Water Company of West Virginia, 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575 (1911). In that case a single District Judge denied an application for an injunction on the ground that a statute of the state of Kansas was constitutional. The Supreme Court held that in so doing he acted without jurisdiction and that his order was void. After the District Judge rendered his decision in the above case of the Metropolitan Water Company application was made for a writ of mandamus, and the Supreme Court said that it necessarily followed that mandamus is the proper remedy, "since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute."

[2] Before concluding this opinion it may be well to call attention to a matter relating to the jurisdiction of this court in questions involving the validity of a law alleged to violate the Constitution of the United States. The section of the statutes set forth at the beginning of this opinion provides that an appeal in the cases therein referred to may be taken direct to the Supreme Court of the United States from the order granting or denying after notice and hearing an interlocutory injunction. And section 128 of the Judicial Code (section 1120 of U. S. Compiled Statutes Annotated, 1916), provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the District Courts in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court. It might be thought, therefore, that this court is by virtue of the provisions cited without jurisdiction of such cases as the cause of action is one arising under the Constitution of the United States. But the rule is that where the jurisdiction of the court rests not solely upon the constitutionality of the act but also upon diversity of citizenship the Circuit Court of Appeals has jurisdiction. See Union & Planters' Bank v. Memphis, 189 U. S. 71, 23

Sup. Ct 604, 47 L. Ed. 712 (1903), and Carolina Glass Co. v. South Carolina, 240 U. S 305, 36 Sup. Ct. 293, 60 L. Ed. 658 (1916)

In the instant case diversity of citizenship exists, the complainant being a citizen of the state of Washington. In the instant case as no application for a mandamus has been made, and as no provision has been made for an appeal from an order of a single judge denying an interlocutory injunction in such a case this court must order the appeal dismissed.

It is so ordered.

In re WESTER.

WESTER v. C. B. SMITH & CO. et al.

(Circuit Court of Appeals, Third Circuit. June 4, 1917.)

No. 2241.

1. BANKRUPTCY ⟸93—RIGHT TO JURY TRIAL—DELAY IN DEMANDING.
Where an alleged bankrupt failed to demand a jury trial in his answer denying the acts of bankruptcy and insolvency, the court did not abuse its discretion in refusing a separate demand on the next court day but one.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 140.]

2. BANKRUPTCY ⟸175—SECURITY FOR COSTS—RIGHT TO REQUIRE.
An alleged bankrupt, who files an answer denying insolvency and the alleged acts of bankruptcy, cannot be required by the bankruptcy court to deposit the costs of a reference, and thus bear a part at least of the cost of presenting the case against him, under penalty of having his answer stricken, and there is no justification for such action in General Order in Bankruptcy No. 10 (89 Fed. vi, 32 C. C. A. xiii), providing that, before incurring any expense, 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, as the hearing of the creditor's charges is not undertaken in the bankrupt's behalf or at his request.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885.]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab and J. Warren Davis, Judges.

Involuntary bankruptcy proceeding by C. B. Smith & Co. and others against Albert C. Wester. On petition to revise orders refusing a jury trial and striking out the bankrupt's answer. First order affirmed, second order reversed, and answer reinstated.

Terry Parker, of East Orange, N. J., for appellant.

Stein, Stein & Hannoch and Herbert J. Hannoch, all of Newark, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This is a petition to revise two orders of the District Court, one refusing a jury trial, and the other striking out the bankrupt's answer and adjudging him bankrupt by default. The facts are as follows:

The original petition was filed July 18, 1916, asserting a fraudulent transfer and concealment of property, and an unlawful preference. On June 8 the bankrupt, who was a retail druggist in Englewood, N. J., went to the Mexican border as a soldier, and left his business in other hands. Soon afterwards, his cousin, Ernest Wester, who held a chattel mortgage on part of the stock and fixtures, foreclosed the mortgage and bought in the whole stock for a small sum, taking possession thereof and going on with the business. These proceedings under the mortgage constitute the preference complained of. On July 19 the petitioning creditors asked for a receiver, but none was appointed; the court thinking it sufficient to make an order that Ernest should not dispose of the assets, except in the ordinary course of business, and should keep the money so received in a separate fund and account. Albert Wester did not return to New Jersey until some time in the fall when the subpœna in bankruptcy and other papers were served upon him while in camp at Sea Girt. He moved to dismiss the petition as insufficient, but before his motion was heard the petitioning creditors asked leave to file an amended petition, and were granted leave on December 4. This new petition was much like the original, except that it amplified the charges concerning the mortgage and asserted that Albert and Ernest had together planned the foreclosure proceedings in order to defraud the creditors.

[1] The bankrupt answered both petitions on December 29, denying insolvency, and denying also the acts of bankruptcy. He did not then ask for a jury trial, and an order was immediately entered directing the referee to hear the issues as special master. The bankrupt asserts that the failure to demand a jury trial in the answer was due to an oversight, but in any event he did file a separate demand on January 2, the next court day but one, December 31 and January 1 being holidays. His motion was heard on January 15, and was denied on the ground that it came too late; this denial presenting the first matter for review. We need say little in reply to the bankrupt's argument; unquestionably he had failed to obey the letter of the act, and on this record we are unable to say that the court's refusal to allow his demand was an abuse of discretion. The order of January 15 must therefore be affirmed.

[2] The remaining question is more serious. On December 30 the master notified the bankrupt to deposit $100 as indemnity under rule 16 of the District Court, afterwards reducing the amount to $50. The hearing was fixed for January 23, and on that day the bankrupt appeared with his counsel, prepared to hear the evidence against him and to offer his own evidence in answer, but was met on the threshold by a renewed demand for a deposit of $50. No similar demand was made on the petitioning creditors. The bankrupt refused the deposit, stating his reasons in writing and insisting that, as the petitioning creditors had the burden of proof, they should bear the expense of the reference in the first instance. The master refused to proceed, and reported the matter to the court, recommending that the bankrupt's answer be dismissed. On February 5 the report was confirmed, the answer was stricken out, and an order of adjudication was entered. This presents the second subject for review.

The master's demand was based on rule 16 of the District Court, which (with omissions not now important) provides as follows:

"(a) The issue raised by petitions and answers in involuntary cases, where jury trial is not demanded, shall be referred to the referee as a special master, and he shall be entitled to receive for his services" a certain per diem with stenographer's fees. "Such sum shall be chargeable in the first instance to the party opposing the adjudication, and indemnity may be demanded by the referee before proceeding with the hearing In case the petition in an involuntary proceeding be dismissed with costs, such sum may be taxed against the petitioning creditors. * * *

"(c) In other cases, when matters are referred to the referee as a special master to take testimony and report his finding, requiring services not devolving upon him by virtue of his office as referee, he shall receive a like compensation, which shall be chargeable in the first instance to the party bringing on the reference, and shall be paid by the party ultimately defeated in such reference."

It will be observed that the bankrupt is not named in section (a), and if we had been called upon to construe the section in the first instance we should have been inclined to hold that its language would be satisfied by applying it to those persons only (such as other creditors) that are not parties to the petition, but might intervene to oppose the adjudication. Interveners of this class voluntarily enter the litigation and propose an issue, and may be, and often are, properly regarded as undertaking to prove the affirmative thereof. But the bankrupt himself is in a different class; he is the unwilling defendant in a lawsuit, and is charged with insolvency and unlawful acts, and if these be proved his property will be taken and divided among his creditors. He has therefore the elementary right of any defendant to deny the case against him, and to do nothing more until this shall be established by the necessary evidence. His adversaries have begun the suit and have made the charge, and if the charge be denied they must bear the burden of proof. As a necessary incident to this task, the petitioning creditors must assume the initial cost of producing the evidence, although of course they may afterward have a just claim to be repaid. But section (a), if applied (as it has been applied) to the involuntary bankrupt himself, reverses the situation, and compels him to advance the money to help out the cost of establishing his adversaries' case, and denies him an opportunity even to present his defense unless he first bear at least a part of the pecuniary burden of presenting the case against him. In our opinion this is a serious obstruction to the fundamental right of a defendant to be heard, which includes, of course, both the right to learn the case against him and to estimate its weight, and also the right to offer affirmative evidence in his own defense. The matter seems to us so clear that we shall not discuss it further (see 11 Cyc. 575, B, and notes), except to say that General Order No. 10 lends no support to rule 16; for that order only permits indemnity to be required "from the bankrupt or other person *in whose behalf the duty is to be performed*"; and in the case before us the duty to be performed, namely, the hearing of the creditors' charges, was not undertaken in the bankrupt's behalf or at his request. He denied the charges and thereafter stood upon his right, and could not be adjudicated until the charges had been proved. He was not in default, for

he had filed an answer whose sufficiency was not questioned and had thereby made a hearing necessary (although not by a jury), and he only became in default after the answer had been stricken out. And this was done, not because the answer was inadequate—as it was in Young v. Brande Bros., 162 Fed. 663, 89 C. C. A. 1, 455, 20 Am. Bankr R 612—but as a penalty for his refusal to contribute to the expense of the creditors' case.

It is sought to uphold the rule on the ground that, if a bankrupt be allowed to oppose an adjudication without taking the risk of spending money, he will often do so merely for delay, or in order to cast the pecuniary burden of proving the petition either on the creditors or on the estate. No doubt this may sometimes be the result, but a similar result may follow in every other litigation, and its possibility cannot take away a defendant's well-established right to be heard, with all that a hearing implies, and we cannot regard it as a sufficient reason for denying that right, unless we are prepared to do violence to one of the first principles of our legal system. We do not decide that an involuntary bankrupt may not be required to give indemnity before he offers his defense, but merely that he cannot be compelled to advance the money to pay or contribute to the expense of the petitioning creditors' case under the penalty of having a valid answer stricken out and of being adjudicated a bankrupt.

The order of January 15 is affirmed, but the order of February 5 is reversed, and the bankrupt's answer reinstated. The case is remanded for further proceedings not inconsistent with this opinion; the costs in this court to be paid by the petitioning creditors.

FLUCKEY et al. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2944.

1. RAILROADS ⟸328(4)—CROSSING ACCIDENTS—DUTY TO LOOK AND LISTEN—OBSTRUCTED CROSSINGS.

When an automobile reached a point 40 feet from a railroad crossing, buildings and standing cars had so far ceased to obstruct the driver's view that he could see 120 feet along the track upon which a car was approaching. It was broad daylight, there was neither smoke nor dust, and there was no other moving train, nor anything to distract the driver's attention. He was familiar with the crossing, and knew that by reason of the obstructions it was dangerous, and must be approached cautiously. *Held*, that it was his clear duty to look as soon as he could see, and to have his machine under such control that, if necessary, he could stop before getting into the danger zone, and in driving upon the track in front of an approaching car, which could have been seen, he failed to exercise the care of a reasonably prudent man.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1061.]

2. RAILROADS ⟸339(2)—CROSSING ACCIDENTS—WANTON OR WILLFUL NEGLIGENCE.

Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be

really willful or so highly reckless as to constitute the equivalent of willfulness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1085.]

3. RAILROADS ⟸339(2)—CROSSING ACCIDENTS—WANTON OR WILLFUL NEGLIGENCE.

Though it is the rule in Tennessee that the violation of a city ordinance, by a railway company contributing to a collision, is negligence per se, and not merely evidence of negligence, the simultaneous violation of three ordinances does not, regardless of the character of the ordinances or the nature of the violations, indicate a degree of indifference or recklessness having the same effect to avoid contributory negligence as deliberate willfulness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1085.]

4. RAILROADS ⟸339(2)—CROSSING ACCIDENTS—WANTON OR WILLFUL NEGLIGENCE.

Plaintiff's automobile was struck by a railway motor car traveling 12 miles an hour, in violation of an ordinance limiting the speed of railway cars or trains to 6 miles an hour, at a crossing where there were neither gates nor a flagman, as required by an ordinance at all crossings within the city limits. In violation of another ordinance a car was standing within 150 feet of the crossing. There had been no municipal determination that the particular crossing needed gates or a flagman, and the conditions at the crossing did not indicate an imperative necessity therefor, nor did any former accidents or complaints appear. The standing car had no causal connection with the injury, as it did not obstruct the view after a building was passed. The speed of the car was less than that permitted by ordinances in the case of street cars. *Held*, that the concurrent violation of the three ordinances did not amount to wantonness, avoiding the effect of plaintiff's contributory negligence, especially where it appeared that the motorman was vigilant, was using his whistle and his bell seasonably, and that he saw the automobile and put on his brakes at the earliest possible instant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1085.]

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

Action by Mrs. Basset Fluckey administratrix, and others, against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Fitzhugh, of Memphis, Tenn., for plaintiffs in error.
Caruthers Ewing, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Mr. and Mrs. Fluckey, in an automobile which he was driving northerly along a street in Memphis, undertook to cross the tracks of the Southern Railway Company. A gasoline motor car, operated by the railway in interurban service was approaching from the west. There was a collision, in which Mr. Fluckey was killed and his wife hurt. She brought this suit in the court below to recover damages, and, after a trial, the court directed a verdict for the defendant, upon the ground of contributory negligence. She brings the case here on error, claiming that the queston of contributory negligence was for the jury, and that the negligence of the railway company

was so gross and willful that contributory negligence, even if established, should not bar recovery.

[1] Upon the first question, it is unnecessary to go into great detail. We are satisfied that the court below was right. When the automobile reached a point 40 feet from the rail, the buildings and the standing cars on the driver's left had so far ceased to obstruct his view that he could see 120 feet along the straight track upon which the car was approaching, and at that moment the car was not more than 100 feet from the point of collision. It was broad daylight, there was neither smoke nor dust to obscure the view, there was no other moving train to drown the noise of the approaching car, nor was there anything to distract the driver's attention. It is not to be disputed that, if the driver had looked at the first instant when looking would do any good, he would have seen the car coming. He was familiar with the crossing, and knew that, by reason of the obstructions, it was a dangerous crossing and must be approached cautiously. His clear duty was not only to look as soon as he could see, but to have his machine under such control that, if necessary, he could stop before getting into the danger zone. In this respect, the case is to be distinguished from that of one driving horses, where to undertake to stop so near the rail may involve danger. Flannelly v. D. & H. R. R., 225 U. S. 597, 604, 32 Sup. Ct. 783, 56 L. Ed. 1221, 44 L. R. A. (N. S.) 154; N. Y. C. R. R. v. Maidment (C. C. A. 3) 168 Fed. 21, 23, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; Brommer v Pa. R. R. (C. C. A. 3) 179 Fed. 577, 580, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; Chase v. N. Y. C. R. R., 208 Mass. 137, 94 N. E. 377 Under these undisputed facts, there can be no tenable basis for a finding that Mr Fluckey exercised that degree of care which would be observed by a reasonably prudent man in such a situation.

The case involves no question of imputing to a passenger the negligence of a driver, because Mrs. Fluckey testifies that she had assumed the duty of looking out for danger at this crossing and was undertaking to give any warnings that might be necessary. In this respect, as well as upon the general subject, the facts of this case bear very close analogy to those passed upon by this court in Erie R. R. v. Hurlbert, 221 Fed. 907, 137 C. C. A. 477.

[2] Whether or not the gross and wanton negligence of the defendant will always be a sufficient avoidance of the plaintiff's contributory negligence, it must at least be either really willful, or so highly reckless as to constitute the equivalent of willfulness. Lacey v. Louisville R. R. (C. C. A. 5) 152 Fed. 134, 81 C. C. A. 352; Atchison Ry. v. Baker, 79 Kan. 183, 98 Pac. 804, 21 L. R. A. (N. S.) 427, note; Iowa Ry. v. Walker (C. C. A. 8) 203 Fed. 685, 121 C. C. A. 579. The plaintiff here does not claim any evidence tending to show an intention on the part of the motorman to injure the plaintiff nor any actual willfulness. She seeks to build up a constructive willfulness through the cumulative effect of the violation of city ordinances. One ordinance required gates or flagmen at all railroad crossings within the corporate limits; this crossing had neither. Another forbade that railroad cars should be left standing within 150 feet of the highway crossing, so that they would obstruct the view down the track; a car was here standing

within that distance. A third ordinance (as we assume for the purpose of this opinion) limited to 6 miles per hour the rate of speed of all trains or cars within the city limits; this motor car was moving at a higher speed.

It has been decided by the highest court of Tennessee that the violation of a city ordinance in a manner contributing to a collision of this kind is not merely evidence of negligence, but is negligence per se. Ry. v. Haynes, 112 Tenn. 712, 81 S W. 374. Whether this holding is so far a matter of statutory construction that it binds this court, or whether it pertains rather to a question of general law, we need not decide; for present purposes, we accept it as the correct rule. No one claims, however, that the violation of a single ordinance is even evidence of wanton or willful negligence; and, indeed, no reason is suggested upon which such a claim could have been based.

[3] Plaintiff's position is that the simultaneous violation of three city ordinances indicates a degree of indifference or recklessness which should have the same effect as deliberate willfulness. We cannot think that this inference is permissible, merely from this basis and regardless of the character of the ordinance or the nature of the violation. If the breaking of one ordinance is not of itself at all indicative of willfulness, the multiplication of such instances cannot create a basis of inference otherwise nonexistent. An analogy may be suggested to cases where each of several facts may be of itself no proof of fraudulent intent, but where the association of all these facts may tend to raise the inference of fraud. The analogy is not very close. In matters of fraud, the question of intent is involved, and facts separately innocent may tend to color the intent; but in cases like the present, the intent to run over a traveler upon the highway has no connection with the intent not to observe the ordinances, and the utmost that can be established by the breach of several ordinances is a general indifference to the observance of municipal regulations. Between this inference and the other one, there is no bridge; and the case is one for the application of the arithmetical rule that the addition of nothing to nothing cannot make something.

[4] A review of all the cases cited by plaintiffs develops that in each one wanton or willful negligence was inferred from the character of defendant's acts, and not primarily merely from the ordinance violations; and when we turn aside from the theory that the breach of three ordinances in gross inherently tends to show wantonness, and consider the nature and effect of the breaches here involved, we get the same result. There had been no municipal determination that this particular crossing needed gates or a flagman; the ordinance was equally imperative as to every crossing in the city; and we must take notice of the vast number of such crossings within the corporate limits of every large city, where the degree of need for this precaution is not extreme. There is no evidence of a practice to run trains here at high speed, nor of such conditions that a careful traveler may not protect himself, nor of such dense traffic and distracting surroundings as to indicate imperative necessity for a guard. Neither do there appear former accidents or complaints, or anything fairly supporting the inference that the fail-

ure to provide gates or a flagman was gross or wanton or willful negligence.

To keep cars standing on side tracks back 150 feet away from a crossing is a measure of extreme prudence, and cannot be said to be demanded by ordinary and reasonable care in all cases—if, indeed, it is, usually. We are clear that the mere breaking of this rule does not of itself indicate any extreme negligence; and whatever violation there was in the present case was practically, if not wholly, without causal connection with the injury, since the standing car in question did not project beyond the line of vision between the edge of the building on the corner and the point 120 feet down the track.

Running a train of cars or a single car at a reckless and dangerous speed over an unguarded and obstructed crossing, might, under some circumstances, indicate wantonness. That is not before us; but, in this case, the ordinance limit was 6 miles an hour, the same ordinances permit street cars on the city streets to run 20 miles an hour, and this car was not exceeding 12 miles an hour. That speed for an interurban car is not, in truth, of itself, reckless or wanton negligence; and even if an ordinance limiting such speed to 6 miles an hour is valid, and even if running at 12 miles an hour is per se negligence, we are confident that is the utmost inference which should be drawn merely from the speed.

We must not be understood as intimating that a concurrent violation of two or more city ordinances might not tend to show gross negligence; but we think this conclusion would come, not as a matter of arithmetic merely, but as a result of the character of the ordinances and the nature of the violations in a given case, considered either separately or compositely; and we might well add that, in the present case, not only was no act involved inherently indicating wantonness or willfulness, but the evidence is substantially undisputed that the motorman was vigilant, was using his whistle and his bell seasonably, and saw the automobile and put on his brakes at the earliest possible instant. The case is not one where the railroad was "kicking" a car across a highway without warning of any nature, nor does it involve any other act of such grossly careless nature.

The District Court was right in declining to submit these questions to the jury. The judgment is affirmed.

THE GEORGE HAWLEY et al.

(Circuit Court of Appeals, Fifth Circuit. April 27, 1917.)

No. 2946.

SALVAGE ⇐27—AMOUNT OF COMPENSATION—RESCUE OF SINKING VESSEL.

A steamship, which had just completed loading with cross-ties at a wharf in New Orleans, listed, permitting the water to enter the portholes on one side, causing the stern of the vessel to sink until it rested on the bottom. The master was absent, but the wharf watchman called to two tugs owned by libelant, which were passing, and they promptly came to the assistance of the sinking ship. After 3½ days of almost continuous work by the two tugs, with some assistance from others, the vessel was floated without serious injury to it or its cargo. One of the tugs remained alongside for six days more, furnishing steam for pumping, etc. There was no great danger involved in the work, but it was promptly and efficiently done. The tugs were worth about $75,000 and $40,000, respectively, and the salved vessel and cargo $215,000. *Held*, that a salvage award of $10,000 to the tugs and crews was too small, being but little more than the actual value of the service rendered, and that it should be increased to $17,500.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by the Bisso Towboat Company and others against the steamship George Hawley, of which the Boston-Virginia Transportation Company was claimant, and others. Decree for libelant, from which the Towboat Company appeals. Modified.

John D. Grace, of New Orleans, La., for appellant.

Henry P. Dart, Benjamin W. Kernan, and Henry P. Dart, Jr., all of New Orleans, La. (Stimson, Stockton, Livermore & Palmer and John F. Volk, all of Boston, Mass., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This is an appeal by libelants from a decree rendered in their favor against the steamship George Hawley and its cargo, the claimants thereof, and their surety on a release bond. The complaint against the decree is because of the alleged insufficiency of the amount awarded. The total amount awarded by the decree to the libelants who were before the court when the decree was rendered, the claims of other libelants having been settled, was $10,000. Of this amount the sum of $479.17 was awarded to the officers and crew of the towboat Independent, $233.30 to the officers and crew of the towboat El Toro, $15 to George Ruppert, $49.95 to J. W. Tyler, and the balance, $9,222.58, to the Bisso Towboat Company, owner of the towboats El Toro and Independent.

At about 6:45 o'clock in the evening of Friday, February 28, 1913, while the George Hawley was lying at the Valence street wharf in the port of New Orleans, loaded with cross-ties, and ready to start on a voyage, it listed to starboard, which was towards the wharf, with the result that water poured through portholes on the starboard side,

which had been left open for ventilation, and the stern end of the ship sank until it reached the bottom of the river; its bow remaining afloat. The master of the vessel was not present at the time, having gone into the city to sign the bills of lading for the cargo. The watchman at the wharf saw what had occurred to the ship, telephoned to the office of the Bisso Towboat Company that a ship was sinking at the Valence street wharf, and suggested that a tug or tugs be sent right away. An officer of the Towboat Company replied that two of its tugs were on their way with tows, and ought to be just about there at that time. In a few minutes the watchman saw the tug Independent as it was passing in the river and hailed it. That tug promptly went to the assistance of the Hawley. A little later the tug El Toro did the same. From that time until the morning of Tuesday, March 4th, both the tugs were engaged in rescuing the Hawley, except that each of them was away and doing something else during part of Saturday, March 1st. On the following Tuesday morning the Hawley was again afloat. The vessel and cargo were saved without very serious loss to either. The Independent remained alongside until the morning of March 10th. On March 4th, 5th, and 6th it furnished steam to the Hawley for pumping, etc., required to restore the vessel and cargo to such condition that its officers and crew could resume control and operate it with its own power.

The appraised value of the Hawley was $195,000, and of its cargo $20,650—a total of $215,650. It had about 300 tons of coal in its bunkers, worth over $600. The El Toro cost its owner about $75,000, and the Independent was bought for about $40,000. Each of them was well equipped for rendering salvage services, and was kept constantly ready to render such service when required. There were other vessels in the port of New Orleans capable of rendering the service which the two tugs mentioned rendered.

The evidence in the case does not leave it open to question that a meritorious salvage service was rendered by the two tugs mentioned and their owner, officers, and crews, which was participated in by other parties, who have been settled with. The amount awarded for the part of that service which was rendered by the appellants should be enough to cover an adequate compensation for the labor and expense which the enterprise required of them, and also a reward allowed as a bounty in pursuance of the public policy of encouraging voluntary exertions for the saving of imperiled ships and their contents; the amount of such reward depending upon the special facts and merits of the service rendered. The Craster Hall, 213 Fed. 436, 130 C. C. A. 72. The evidence was such that it well would have supported an award of $7,000 or more for the service rendered by the two tugs, if they had been employed under a contract providing for the payment of what the service was reasonably worth, whether it was successful or not. This being so, a result of the decree as it was rendered is that it may be regarded as awarding about $2,200 as a reward to the owner of the tugs for the services they rendered. Our conclusion is that such an amount is greatly less than a suitable reward, in addition to adequate compensation, for the services rendered by the two tugs. It is true that it was accidental that the two tugs happened to be near by when the mishap

occurred to the Hawley, and were able to go to its rescue probably sooner than the master of the vessel, if he had been present at the time, could have procured other aid if he had promptly sought it. But this does not detract from the merit of the service voluntarily and promptly rendered by the two tugs, and with successful results.

The amount to be allowed as a reward for rendering that service cannot properly be as great as it should have been if the service had been rendered in rough weather and near a dangerous coast, instead of in fair weather and in a safe harbor, or if the evidence had clearly shown, which it did not, that the bottom of the river at the place where the partly sunken vessel came in contact with it was so sloping or declivitous as to make it liable that such a heavy object resting upon it would slip off into deeper water, thereby greatly enhancing the peril of both the rescued and rescuing vessels. The evidence does not convince us that the work of saving the ship and its cargo, conducted as it was with adequate care and skill, exposed the rescuing vessels, or either of them, to any very serious hazards, or their officers and crews to unusual hardships or grave perils. At any rate, the salvage work was done without serious injury to either the vessels or the men engaged in it, and the result of it was that the Hawley and its cargo were rescued without any very serious damage which was attributable to what was done in saving them. In view of the value of what was saved and of the vessels which participated in the salvage service, of the time, labor, and expense involved in that service, of the risk of getting nothing in return in the event of the failure of the enterprise, and of all the attending circumstances, our conclusion is that the total amount to be awarded to the appellants should be $17,500, instead of $10,000, the amount awarded by the decree appealed from, and that the additional amount here awarded should be allotted to the Bisso Towboat Company, the owner of the two tugs, the Independent and the El Toro. The part of the amount awarded by the decree of the District Court which was allotted to the officers and crews of the two tugs were sums equal to three times the amount of their wages during the time they were employed in behalf of the Hawley. It is not made to appear that there was such inadequacy in these allowances as to call for a change of this feature of the decree.

The decree appealed from will be here modified, as above indicated, and, as so modified, is affirmed, with costs against the appellees.

MARSHALL v. NEVINS.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1917.)

No. 2892.

1. BANKRUPTCY ⟸304—PREFERENCES—ACTIONS—QUESTIONS OF FACT.
In a suit by a trustee in bankruptcy to set aside an alleged preferential transfer by the bankrupt to his mother-in-law, evidence *held* to make a question of fact as to whether the grantee had reasonable ground to believe that the transfer to her would effect a preference, and was intended to effect a preference, and to support the trial court's finding upholding the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463.]

2. BANKRUPTCY ⟸303(1)—PREFERENCES—ACTIONS—BURDEN OF PROOF.
In a suit by a trustee in bankruptcy to set aside an alleged preferential transfer, the burden of proof is on the trustee to prove that the transferee had reasonable ground to believe that the transfer would, and was intended to, effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459.]

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

Suit by J. W. Marshall, trustee, etc., of N. H. Hickman, bankrupt, against Elizabeth Nevins. From a judgment for defendant, plaintiff appeals. Affirmed.

Lloyd S. Ackerman, of San Francisco, Cal., for appellant.

W. F. Sullivan, of San Francisco, Cal., and H. C. Lucas, of Oakland, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Marshall, as trustee of the estate of Hickman, bankrupt, brought suit under section 60, subd. "b" of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. 1916, § 9644), as amended in 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. 842), to set aside the transfer of an interest in the schooner William Olsen to Elizabeth Nevins. Hickman was adjudged an involuntary bankrupt on February 2, 1916, and the transfer involved was made by Hickman to Mrs. Nevins on December 7, 1915, within four months before the adjudication in bankruptcy. The District Court decided in favor of Mrs. Nevins, and the trustee appeals.

[1] The sole issue in the case is: Did Mrs. Nevins know or have reasonable cause to believe, at the time of the transfer to her, that the transfer or its enforcement would effect a preference? It is unnecessary to set forth the evidence at length, and we shall only refer to some essential facts. Hickman in 1897 married the daughter of Mrs. Nevins. From the time of his marriage, up to the time that he was forced into bankruptcy, he was in various business enterprises, but, for the most part, was unsuccessful, and since 1906 has been practically insolvent. Mrs. Nevins, his mother-in-law, was an elderly woman with some means, and at various times from 1905 on she lent money to Hickman. In February, 1912, Hickman gave a note to Mrs. Nevins to

cover the amount which was due by him to her for money loaned to him up to February 15, 1908. However, after the note was given, she lent him additional sums. He never paid principal or interest, except $968.96 paid in February, 1912, which was the amount of interest then due on his debt to Mrs. Nevins; interest being computed at the rate of 5 per cent. per annum. The Bay Shore Drayage Company, a corporation of which Hickman was president, and in which Mrs. Hickman, his wife, was the chief stockholder, was also indebted to Mrs. Nevins in the sum of $2,725 loaned to the company by Mrs. Nevins at her daughter's request. In 1914 and 1915 some judgments were obtained against Hickman by certain of his creditors, and there is testimony tending to show that Hickman for a year or so prior to 1915 was reputed to be insolvent. The trustee also introduced in evidence a certain agreement, dated January 21, 1915, between Mrs. Nevins and Hickman and the Bay Shore Drayage Company and one O. H. Greenewald, reciting that Hickman owed Mrs. Nevins certain amounts, and that, in consideration of advances by Greenewald to Hickman to carry on the business of the Drayage Company, Mrs. Nevins would consent to the payment of Greenewald by the Drayage Company in preference to the payment of the debt of the Drayage Company to Mrs. Nevins, and the Drayage Company agreed that it would pay the debt due to Greenewald in preference to the debt due Mrs. Nevins, and Mrs. Nevins agreed to defer collection of her debt against Hickman until the debt of Greenewald should be paid.

Greenewald testified that he explained to Mrs. Hickman in November, 1915, that her husband owed him some money for advances to the Bay Shore Drayage Company, and that he wanted settlement and asked her to discuss the matter with her mother, Mrs. Nevins, that Mrs. Hickman agreed to do this, and that afterwards Hickman told him that Mrs. Hickman had been to Vallejo to see Mrs. Nevins about the matter. Greenewald also says that he asked Hickman to transfer his interest in the schooner as security for his indebtedness to him, but that Hickman would not do so, and in December transferred the interest to his mother-in-law, Mrs. Nevins. Mrs. Nevins testified that she never knew anything of Hickman's business affairs, and never had the slightest reason to suspect that he was insolvent, until she read that he was adjudicated a bankrupt; that at the time her son-in-law, Hickman, transferred his interest in the schooner to her, he owed her about $10,000 borrowed money; that she did not know that he was insolvent, or intended to make a preference in her favor, or that the transfer would effect a preference. She said that during many years she had lent money to her daughter and to her son-in-law, to be paid back to her as they might see proper; that she never discussed business with Hickman, and that there was never anything in the style of living of her daughter and son-in-law which led her to believe that Hickman was in failing circumstances; that she had perfect confidence in her son-in-law, and that the requests which he made for loans were always brought to her through her daughter, Mrs. Hickman. She explained her participation in the contract with the Drayage Company by saying that she signed it at the instance of her daughter, who told her that Mr. Greenewald was going to assist Mr. Hickman, and that by signing the

paper Mr. Greenewald would get back his money before others, but that no suspicion was created in her mind by this transaction, and that she never knew of the transfer to her of Hickman's interest in the schooner until Hickman himself told her in December, 1915, that he had transferred it to her to pay his debt to her. She said that she never asked him to do it, and that after the transfer to her she had appointed Hickman as her agent in connection with the ship.

The opinion of the District Judge was that the evidence showed that Mrs. Nevins trusted her son-in-law and daughter absolutely, and had no reason to suspect that her son-in-law was insolvent, and did not believe that he was, at the time of the transfer to her.

[2] We are of the opinion that, while the circumstances might have led to the conclusion that Mrs. Nevins had reasonable ground to believe that the transfer by Hickman to her would effect a preference, and was intended to effect a preference, still whether such reasonable cause for belief existed was a question of fact, with the burden of proof upon the trustee. The Supreme Court, in Pyle v. Texas Transport & Terminal Co., 238 U S. 90, 35 Sup. Ct. 667, 59 L. Ed. 1215, has very recently said:

"By the statute's very words, in order to set aside such a transfer and recover the property, it must appear that 'the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.' Whether such 'reasonable cause to believe' existed is a question of fact, and the burden of proof is upon the trustee." Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Wright v. Sampter (D. C.) 152 Fed. 196.

Appellant makes the point that the appellee, Mrs. Nevins, must be charged with any knowledge of her daughter, upon the theory that the daughter was the agent of her mother. But there is no substantial proof to the effect that Mrs. Hickman was the agent of her mother, in that any knowledge which Mrs. Hickman may have had concerning her husband's affairs was to be imputed to Mrs. Nevins.

An accurate judgment upon the whole case called for a very careful estimate of the testimony of Mrs. Nevins. If she was perfectly truthful in her statements of the confidence she placed in her son-in-law, and of her ignorance of his real financial situation, and of any purpose to prefer her over other creditors, the conclusion of the lower court ought not to be overthrown. The advantage of having heard and seen the witness must have greatly aided in turning the case one way or the other. It being clear that there was no misunderstanding of the law, we are not satisfied that the learned court drew erroneous conclusions of fact from the testimony.

Affirmed.

In re CALLAHAN.

In re WILSON.

(Circuit Court of Appeals, First Circuit. May 8, 1917.)

No. 1261.

BANKRUPTCY ⊂=123—ELECTION OF TRUSTEE—RIGHT TO VOTE—PROXIES.

Where the District Court specifically found that proxies solicited by P. were solicited by B., a creditor, thereby necessarily finding that P. was B.'s agent, and not the agent of the bankrupt, and there was no finding that they were procured in the interest of the bankrupt, or that the holders of the proxies were in any way subject to the bankrupt's control or direction, the proxies were properly voted, though the referee had disapproved B.'s election as trustee on the ground that there was some sort of an arrangement between him and the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 303, 308, 311.]

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy; Jas. M. Morton, Jr., Judge.

In the matter of Frank E. Wilson, bankrupt. On petition to revise by Vaughn Callahan. Decree affirmed.

A. K. Cohen, of Boston, Mass. (Herman A. Mintz, of Boston, Mass., on the brief), for petitioner.

William T. Atwood, of Boston, Mass., for respondent.

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

BINGHAM, Circuit Judge. This is a petition to revise in matter of law the action of the District Court and of the referee in bankruptcy approving the election of Guy A. Ham as trustee of the estate of the bankrupt Wilson. The contentions of the petitioner are that the court erred in ruling: (1) That Ham received the vote of a majority in number and amount of creditors whose claims were proved and allowed and who were entitled to vote for trustee; (2) that Bridge, a creditor, was entitled to vote for trustee; (3) that creditors whose claims were solicited by one Peters were entitled to vote for trustee; and (4) that Cohen did not receive the vote of a majority of creditors whose claims were proved and allowed, and who were entitled to vote for trustee.

At the first meeting of creditors two elections were had. At the first, Bridge received the votes of 45 creditors whose claims amounted to $53,701.72, and Cohen the votes of 9 creditors whose claims amounted to $15,140.91. The referee disapproved this election, finding that Bridge was not a proper person to act as trustee because of "some sort of an arrangement" between him and the bankrupt, and ordered a new election. Upon the second election, Ham received the votes of 41 creditors whose claims amounted to $50,599, and Cohen the votes of 9 creditors whose claims amounted to $15,140.91. The claims of 36 creditors amounting to $6,008, which were solicited by Peters, and the claim of Bridge for $35,706, were included in the vote for Ham. Ob-

jections were taken to Bridge being permitted to vote his claim, and to his attorneys, Lincoln & Hemenway, voting the claims of the 36 creditors solicited by Peters. The referee overruled the objections and entered an order confirming the appointment of Ham.

On a petition to review the order of the referee the matter was certified to the judge of the District Court, who confirmed the order, and the case is here on the present petition.

In support of her contentions the petitioner relies largely on the case of In re McGill, 106 Fed. 57, 45 C. C. A. 218, decided by the Circuit Court of Appeals for the Sixth Circuit, January 8, 1901, which is the only decision by a Circuit Court of Appeals that has been called to our attention. In that case it appeared that at the first meeting of creditors, one Neydon, having presented to the referee "241 special letters of attorney, executed by creditors whose claims had been allowed, aggregating in amount $73,860.13, was present at said meeting, and pursuant to these letters offered to vote for Mr. Walter Zinn, to be trustee, the number and amount aforesaid of the claims of creditors represented by the proxies held by said Mr. Neydon; whereupon the said votes, and each of them, so offered by him, were by other creditors present or duly represented objected to and challenged, on the ground that said letters of attorney, and all the votes offered to be cast pursuant thereto, were obtained by the interference of the bankrupt"; that the referee, having heard the evidence, which disclosed that the bankrupts, Reinhard & Co., were bankers, and had been instrumental in sending out letters from their bank to creditors and procuring proxies for the purpose of controlling the election of the trustee, made the following findings of fact:

"I find that the object of the letters sent to creditors by Reinhard & Co. was to have the creditors call at the bank, and obtain their powers of attorney for the purpose of voting by proxy for Mr. Zinn as trustee, and that Mr. Neydon and Mr. Fairbanks were the agents of the Reinhards for the purpose of carrying this object into effect; that the Reinhards had accomplished the object, which, by their letter, was intended to be accomplished, by obtaining the powers of attorney; and that it was the intention of the Reinhards to control the first meeting in the election of a trustee by means of these proxies; and that Mr. Neydon, in offering to vote said proxies, was acting as the agent of the Reinhards, in furtherance of the common design. I further find that, by solicitation, influence, and interference of the Reinhards themselves, and through their agents, Mr. Neydon and Mr. Fairbanks, these proxies had been obtained; and that, * * * while Mr. Neydon was ostensibly the agent of the creditors whose powers of attorney he held, he was in fact the agent of the Reinhards for the purpose of electing a trustee in their interest, and his object in offering to vote under authority of these letters of attorney was to choose a trustee, not for the benefit of the creditors, but in the interests of his real principals, the Reinhards, by whom he was employed."

Having found these facts, the referee sustained the objection and made an order denying Neydon any right to vote the claims on the proxies. On a petition to review the findings and rulings of the referee, the District Court approved and confirmed them; and, on a petition to revise in matter of law, the decision of the District Court was affirmed by the Court of Appeals. It was held: (1) That a referee to whom a case is sent presides at the first meeting of creditors in the place of a judge, and is required to "determine who are entitled

to participate in the meeting as creditors," that a "creditor may include a duly authorized proxy"; that "when the creditor presents his claim the referee has * * * authority * * * to inquire, for the purpose of the meeting, into the claim presented, and to determine that such person is or is not a creditor"; that "when the creditor does not appear in person, but undertakes to qualify another to represent him, * * * the referee may * * * inquire into his status to determine whether he is a duly authorized and lawful attorney in fact"; that "it is a valid objection that one offering to qualify is shown to be the representative of the bankrupt acting under a power of attorney, nominally executed by the creditors, but in fact procured by the bankrupt in his interest, in order to vote his choice for trustee"; and (2) that the authority of the referee to determine the qualifications of the voter is not inconsistent with the right given him to "disapprove the choice of the creditors" after a vote has been taken.

The legal basis for the above conclusions, as stated by the court, was that "it is the policy of the law to secure a trustee who is the selection of the creditors and not of the bankrupt"; and that, while proxies for voting claims appear to confer authority to act in the interest of the creditors, the circumstances attending their procurement may be such as to show that they were in fact procured for the purpose of being voted in the interest of the bankrupt, in which case they should be rejected.

In the case before us, it is not found that the proxies, for voting the 36 claims to which the petitioner objects, were procured by the bankrupt, with the purpose of voting them in his interest; and the order of the referee and the decree of the District Court allowing them to be voted negative such a conclusion, and involve a finding that they were in fact procured in the interest of the creditors. The District Court found specifically that the claims were solicited by the creditor Bridge, which necessarily means that Peters was the agent of Bridge in soliciting them, and the evidence reported warranted the conclusion. There is no finding that Lincoln & Hemenway, who held the proxies and voted the claims, were in any way subject to the control or direction of the bankrupt.

The correctness of the conclusion of the referee that Bridge was not a proper person to act as trustee is not before us, and we regard it as unimportant in view of the findings above stated.

No question is raised as to the propriety of Ham's acting as trustee, provided the powers of attorney from the 36 creditors to Lincoln & Hemenway were duly authorized, and, as it does not appear that they were procured to be voted or were voted in the interest of the bankrupt, the decree of the District Court must be affirmed.

This renders it unnecessary to consider the right of Bridge to vote his own claim; but nothing has been suggested, and we are unable to see, from the findings of the referee, wherein anything transpired that should have prevented him from doing so.

The decree of the District Court is affirmed, with costs in this court to the trustee.

CHIARELLO BROS. CO. et al. v. PEDERSEN.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 235.

1. SHIPPING ⊜86(2)—INJURIES IN LOADING—PARTIES LIABLE—EVIDENCE.
In an action by an employé of a derrick and wrecking company, which was hoisting lumber by means of a steam derrick from a pier to a lighter, for injuries sustained when the lighter capsized, a letter written by one of the defendants to the lumber company, confirming an understanding as to doing the stevedoring of the lumber company's ships, was improperly admitted to show that such defendant was engaged in the loading of the lumber, where it appeared that on the occasion of the injury the lumber company was doing its own stevedoring by means of plaintiff's employer, as the letter was only a general offer to do stevedoring.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 356, 357.]

2. EVIDENCE ⊜215(3)—ADMISSIBILITY—LETTERS.
A letter from such defendant to the lumber company, requesting an opportunity to do all of the lumber company's stevedoring and lighterage, was properly admitted for the sole purpose of showing that such defendant was engaged in both stevedoring and lightering.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 756, 757.]

3. APPEAL AND ERROR ⊜1056(2)—PRINCIPAL AND AGENT ⊜159(2)—LIABILITY OF AGENT—HARMLESS ERROR.
Where the vice president of a company operating a lighter upon which lumber was being loaded, over the protest of the master of the lighter, who objected that it would be unsafe to take any more lumber, ordered him to take it, and the lighter was capsized by a large package of lumber hoisted aboard, such company was liable for an injury to an employé of another company, even though the lighter belonged to a third party, and it was operating it as agent for her, and the exclusion of evidence to show that it was only an agent was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Principal and Agent, Cent. Dig. §§ 606–612.]

4. APPEAL AND ERROR ⊜1173(1)—REVERSAL AS TO ONE OR MORE COPARTIES.
Where defendants were charged severally, judgment may be affirmed as to those properly held liable, and reversed as to any not properly held.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562–4567, 4569, 4656.]

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

Action by Harry Pedersen against the Chiarello Brothers Company and others. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed and new trial directed in part.

A. H. Stephens, of New York City (E. Clyde Sherwood and Robert B. Cumming, both of New York City, of counsel), for plaintiff in error Chiarello Bros. Co.

Kelly & Hewitt, of New York City, for plaintiff in error Long Leaf Pine Co., Inc.

E. J. McCrossin, of New York City (Vine H. Smith, of New York City, of counsel), for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. October 26, 1915, the Merritt & Chapman Derrick & Wrecking Company, employed by the Long Leaf Pine Company, Incorporated, were engaged in hoisting packages of lumber belonging to the lumber company by means of their steam derrick Congress from a pier to the lighter, Only Sister, lying alongside the derrick. After three tiers of lumber had been loaded, the fourth tier was started by hoisting aboard a very large package, which caused the lighter to capsize, throwing the cargo and one Pedersen, an employé of the Merritt Company, who was working on the lighter, overboard, causing him most serious injuries. Pedersen brought this action to recover damages against the Long Leaf Pine Company, Chiarello Bros. Company and Dick Chiarello & Bros., Incorporated. The jury rendered a verdict in favor of the plaintiff for $15,000 against the three defendants as equally liable, and each defendant has sued out a separate writ of error.

[1] To show that Dick Chiarello & Bros., Incorporated, were engaged in the loading, the plaintiff offered in evidence the following letter, which the court admitted over the objection and exception of that company. It is as follows:

"Dick Chiarello & Brothers, Inc., General Stevedores.

"New York, Sept. 8, 1915.

"Long Leaf Lumber Co., 8 West 40th St., New York City—Gentlemen: Confirming our understanding with you for the stevedoring of your ship or ships, our charge will be one (1) dollar per M ft. of lumber, daytime. You are to supply all steam and power, and men necessary to run same, for the hoisting of your lumber out of the ship and onto deck, and moved to place where needed, and onto lighters when necessary. No lumber is to be shifted by hand. We are to furnish all the necessary men on board ship, on dock, and on lighters. All of our men are insured, and are also under the Workmen's Compensation Commission of the state of New York. Trusting that we may be favored with this business, and awaiting a favorable reply, we are

"Yours very truly, Dick Chiarello & Bros., Inc.,

"Dick Chiarello, Pres."

We think this was error. The letter was a general offer to do stevedoring, whereas the Long Leaf Pine Company was doing its own stevedoring on this occasion by means of the Merritt & Chapman Company, and all that either of the Chiarello companies could have done was the lightering; that is, the transportation of the lumber to destination after it was loaded on the lighter.

[2] The plaintiff also offered in evidence another letter, dated March 26, 1915, from Dick Chiarello & Bros., Incorporated, to the Long Leaf Pine Company, requesting an opportunity to do all that company's stevedoring and lighterage, which was admitted over the objection and exceptions of that company, for the sole purpose of showing that Dick Chiarello & Bros., Incorporated, was engaged in both stevedoring and lightering. We see no error in this. The proof is clear that the lighter Only Sister was being operated by Chiarello Bros. Company, which was doing nothing but lighterage on this occasion.

[3] Samsen, the master of the lighter, objected to taking any more lumber after the three tiers had gone aboard, on the ground that it

would be unsafe to do so; but Wild, an employé of the Long Leaf Pine Company, insisted that a fourth tier should be carried, and Gus Chiarello, who was vice president of Chiarello Bros. Company, ordered the master to take it, which he did under protest.

Chiarello Bros. Company offered proof that the lighter belonged to Mrs. Ottavano and that they were only operating it as agents for her. The court excluded a great deal of this evidence, but we think Chiarello Bros. Company were not prejudiced thereby, because they would be liable to the plaintiff, even if they were only agents, for requiring the master of the lighter to do a dangerous thing which caused the plaintiff injury.

The Long Leaf Pine Company claims that its clerk, Wild, was on the ground only to select the particular packages of lumber to go aboard the lighter, and that any orders which he gave to her master as to the loading were beyond the scope of his employment. The court rightly found that there was evidence to the contrary sufficient to submit the question to the jury. The court instructed the jury that they were to find whether the plaintiff's injuries were caused by negligence, and, if they were, then by the negligence of which of the defendants. The jury found each defendant liable.

[4] We think there was no evidence to show that Dick Chiarello & Bros., Incorporated, had anything whatever to do with the transaction, and that a verdict should have been directed for it, but that there was sufficient evidence to sustain the verdict against the other two defendants. Inasmuch as the defendants were charged severally, the judgment may be affirmed as to those properly held liable, and reversed as to any not properly held. Bullis v. Montgomery, 50 N. Y. 352; St. John v. Andrews Inst., 192 N. Y. 382, 386, 85 N. E. 143.

The judgment is affirmed as to the Long Leaf Pine Company and Chiarello Bros. Company, with costs, but reversed as to Dick Chiarello Bros., Incorporated, with costs, and a new trial directed as to it.

MARSH v. LESEMAN et al.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 184.

1. BANKRUPTCY ⇐165(4)—PREFERENCES—EXCHANGE OF SECURITIES.
   A bankrupt conveyed land to L., his brother-in-law, as security for a debt, by a deed which was not recorded. Within four months before bankruptcy he conveyed the land to a third party in exchange for other land, which he thereupon conveyed to L. upon surrender of the unrecorded deed and the notes representing the indebtedness. *Held*, that there was no preference, but merely an exchange of valid securities.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 266.]

2. EVIDENCE ⇐178(4, 8)—SECONDARY EVIDENCE—DESTRUCTION OR LOSS OF WRITING.
   Parol testimony as to the contents of a deed and notes was properly admitted, where there was testimony that the deed and notes had been destroyed.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 584, 589.]

3. COURTS ⇐376—FEDERAL COURTS—STATE LAWS—RULES OF EVIDENCE.
Tax Law (Consol. Laws N. Y. c. 60) § 258, providing that no mortgage of real property subject to the taxes imposed by that law shall be received in evidence in any action or proceeding, applies only to actions in the New York courts, and not to actions in the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 984.]

4. BANKRUPTCY ⇐161(1)—PREFERENCES—FAILURE TO RECORD TRANSFER.
Under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (Comp. St. 1916, § 9644), providing that certain transfers within four months before the filing of the petition shall constitute preferences, and that, where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if by law such recording or registering is required, and Real Property Law (Consol. Laws, N. Y. c. 50) § 291, making unrecorded deeds void as against subsequent purchasers in good faith and for value, whose conveyance is first recorded, an unrecorded deed, executed as security for a debt more than four months before bankruptcy, was not a voidable preference; the trustee in bankruptcy not being a subsequent purchaser in good faith, for value, and not representing any such person.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261, 262, 287.]

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

Action by William F. Marsh, as trustee in bankruptcy of Henry D. Drewes, against Louis D. Leseman and others. From a decree for defendants, complainant appeals. Affirmed.

William A. Young, of New York City, for plaintiff.

N. S. Nelson, of New York City, and A. G. Schaffner, of Brooklyn, N. Y., for defendants.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The plaintiff, as trustee in bankruptcy of Henry D. Drewes, brought this suit in equity to set aside a conveyance by him and wife to the defendant Louis D. Leseman of certain real estate at Richmond Hill, Long Island, dated January 19, 1915, on the ground that it was a preference under section 60b of the Bankruptcy Act; Drewes being then insolvent, Leseman having reasonable cause to believe that he was insolvent, and that the conveyance would effect a preference, and Drewes having been adjudicated a bankrupt within four months, on a voluntary petition filed March 5, 1915.

The evidence is that Leseman loaned Drewes, who was his brother-in-law, $3,500 September 17, 1912, payable on demand. In November, 1912, he demanded payment, and Drewes gave him two demand notes, together with a deed for the premises at Queens, Long Island, in which he was conducting his grocery business, as security. This deed was not recorded by Leseman, but it was good between the parties and against all the world, except subsequent purchasers in good faith and for a valuable consideration from the same vendor, whose conveyance is first recorded. Section 291, Real Property Law.

In January, 1915, Drewes secured an offer for his business, stock on hand, and premises at Queens from one Sedorf of $1,625 in cash and

certain premises at Richmond Hill, Long Island. Leseman consented to take these premises in exchange for the demand notes and the unrecorded deed for the Queens premises which he had received from Drewes as security. The transaction was carried out as follows: January 18, 1915, Christine Sedorf conveyed the Richmond Hill premises to Henry D. Drewes. On the same day Henry D. Drewes conveyed the Queens premises to Christine Sedorf. January 19th, Leseman surrendered the demand notes and unrecorded deed to the Queens premises to Henry D. Drewes, who with his wife, in consideration thereof, conveyed the Richmond Hill premises to him.

[1] It is admitted that the deed to the Queens premises was really a mortgage; that on January 19, 1915, Drewes was insolvent; that Leseman had reasonable cause to believe that he was insolvent; and that the transaction of that date was within four months of the filing of the petition. Still we discover no preference, but merely the exchange of valid securities, viz., the unrecorded deed delivered as security for a loan in 1912 for the deed to the Richmond Hill premises delivered in 1915.

[2] It is objected that parol testimony should not have been admitted as to the contents of the deed and of the notes delivered by Drewes to Leseman in 1912 and of the terms on which the deed was delivered; but, in view of the testimony that the deed and notes had been destroyed, secondary evidence was plainly admissible.

[3] The trustee relies further on section 258 of the Tax Law, which reads:

"Sec. 258. *Effect of Nonpayment of Taxes.* No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the tax imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded."

This provision of the state law as to evidence applies to actions in its own courts, not to actions in the federal courts. Blodgett v. Zinc Co., 120 Fed. 893, 897, 58 C. C. A. 79; Groton Bridge Co. v. American Bridge Co. (C. C.) 151 Fed. 871, 876; Johnson v. New York Breweries Co., 178 Fed. 513, 101 C. C. A. 639.

Then it is argued that, notwithstanding the testimony to the contrary, the unrecorded deed must have been surrendered January 18th, because Drewes on that date gave a full warranty deed of the Queens premises to Sedorf. But the unrecorded deed, in the absence of notice, would not affect Sedorf's title, and it is not only more consistent with all probabilities that Sedorf had no such notice, but also with the express testimony that Leseman surrendered it to Drewes in exchange for the deed to the Richmond Hill premises the next day, and that the deed and the notes were then destroyed.

[4] At all events the trustee is not within the protection of section 60a of the Bankruptcy Act, because, not being a subsequent purchaser in good faith for a valuable consideration, and not representing any such person, the conveyance was not by law required to be recorded

against him. See our decision in Re Boyd, 213 Fed. 774, 130 C. C. A. 288, and Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726.

The decree is affirmed.

In re SOBOL.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 191.

1. BANKRUPTCY ⊂=136(2)—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—PUNISHMENT OF CONTEMPTS.

Where, about 10 minutes before a bankrupt entered the courtroom to receive sentence in a criminal prosecution for concealing assets, he was served with an order to pay over assets so concealed to the trustee, and during that time he did not indicate in any way that he did not intend to comply with the order; he was not in contempt at the time of the sentence, and the court was without power to punish him for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

2. BANKRUPTCY ⊂=136(2)—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—PUNISHMENT OF CONTEMPTS.

That a bankrupt has been sentenced for concealing assets, and has served out his term, is no defense in a proceeding to punish him for contempt in failing to comply with an order to turn over the assets so concealed; and this was true, though the judge, in sentencing him, was influenced by his opinion that the bankrupt was also guilty of contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

3. CONTEMPT ⊂=24—DEFENSES—INABILITY TO COMPLY WITH ORDER.

Inability to comply with an order requiring the payment of money, resulting from poverty, insolvency, or other cause not attributable to the fault of the party charged, will under ordinary circumstances excuse a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 71–74.]

4. CONTEMPT ⊂=39, 66(7)—PUNISHMENT—DISCRETION—REVIEW.

In the absence of statutory regulation, the matter of dealing with contempts and how they should be punished are within the trial court's discretion, and such discretion will not be interfered with, unless grossly abused.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 110, 232–237.]

5. BANKRUPTCY ⊂=446—REVIEW—CONTEMPT PROCEEDINGS.

Where, on an application to punish a bankrupt for contempt in failing to comply with an order requiring him to turn over assets to the trustee, the court made no sufficient examination as to the bankrupt's ability to comply with such order, but denied the application on the erroneous ground that the bankrupt had purged himself of contempt by serving a sentence imposed upon him for concealing such assets, the order would be reversed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Solomon Sobol, bankrupt. On petition of John L. Lyttle, as trustee, to revise an order denying an application to

punish the bankrupt for contempt. Petition granted, and order reversed.

George Gordon Battle, of New York City (Louis H. Solomon, of New York City, on the brief), for bankrupt.

Emanuel M. Kaiser, of New York City, for trustee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. In the course of proceedings in bankruptcy, an order was made directing the bankrupt to pay to the trustee in bankruptcy the sum of $15,413.23, alleged to have been concealed by him. The order was made on January 11, 1916, and was served on the bankrupt on the next day, who failed to comply with it.

The trustee in bankruptcy, on August 7, 1916, petitioned the court that an order be granted adjudging the bankrupt in contempt for his failure to comply with the court's order. The delay in the making of this application was due to the fact that the bankrupt had been indicted for fraudulently concealing assets from his trustee. He had pleaded guilty, and on January 12, 1916, had been sentenced to a term of six months' imprisonment. The sentence was imposed on the very day on which he was served with the notice to pay over $15,413.23 to the trustee. On June 16, 1916, the bankrupt was released from prison, and in August following the motion to punish for contempt was made.

At the hearing of the motion to punish for contempt the bankrupt swore that he did not conceal the sum of $15,413.23, but that he had concealed the sum of $3,200, and that the same had been spent by him after the adjudication and before the motion was made to punish for contempt. He also swore unequivocally that he could not pay any moneys over to the trustee, as he had no moneys, having spent what he had concealed in supporting his family. He stated, also, that the reason why he had not explained the matter at the hearing before the referee was that he was under indictment at the time and was acting under the advice of counsel in remaining silent.

The application to punish for contempt was denied, the District Judge filing a memorandum, in which he stated that he had been informed by the District Judge who imposed the sentence already referred to that in imposing that sentence he intended to punish, not only the crime of concealing the assets, but also the contempt in not paying over the concealed assets as ordered. An application for reargument was made and denied; the District Judge in his memorandum saying:

"I decline to follow the rigidity of practice insisted upon by the trustee, when I know that it was the intent of the first judge to whose attention this whole matter was brought to close the Sobol incident by a six months sentence."

[1, 2] If the bankrupt was not in contempt at the time sentence was imposed, it is difficult to understand how he could be punished as for a contempt by the imposition of the sentence. The bankrupt had been served with the turn-over order in the corridor of the court but five

or ten minutes before he entered the courtroom to receive sentence. He did not, prior to sentence, indicate in any way that he did not intend to comply with the order. He could not be expected to comply within ten minutes of the time he received an order to pay over $15,413.23. He could not, therefore, have been in contempt at the time of sentence, and the District Judge was therefore without power at the time to punish for the contempt; and at the time sentence was imposed the District Judge had no evidence before him as to whether Sobol had or had not in his possession the property he was ordered to turn over. The sentence imposed was for concealing assets, and if in fixing the penalty for that offense the trial judge was influenced by the opinion he entertained that the bankrupt had also been guilty of another offense, which had not yet been committed, and upon which he was not then arraigned, that fact is not a defense of which the accused can avail himself, when brought before the court to answer for the second offense.

The two proceedings were entirely distinct. The criminal case charged him with concealing assets. The contempt proceedings charged him with not complying with the court's order to turn the moneys over. The fact that a bankrupt has been sentenced for concealing assets and has served out his term is no defense in a proceeding to punish him for contempt with an order to turn over the assets he concealed. The District Judge was in error in thinking that the bankrupt was purged of the contempt when he served out his sentence on the charge that he had concealed assets, and that to punish him now for contempt would be to punish him twice for the same offense.

[3-5] The law is, of course, well settled that inability to comply with an order requiring the payment of money, resulting from poverty, insolvency, or other cause not attributable to the fault of the party charged, will under ordinary circumstances be received as a valid excuse from the consequences of contempt; and it is also settled, in the absence of statutory regulation, that the matter of dealing with contempts and how they should be punished are within the trial court's sound discretion, and that such discretion will not be interfered with, unless it has been grossly abused. But in this case the District Judge has made no sufficient examination to find whether any of the above reasons for not punishing for contempt, exist, and has denied the application on the erroneous ground that the bankrupt by serving his sentence has closed the incident. For that reason the order sought to be reviewed is reversed, and the petition for review is granted.

It is so ordered.

FAIRBANKS v. AMERICAN PIANO CO.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 3024.

APPEAL AND ERROR ⊜1221—MODIFICATION OF DECREE—UNFAIR COMPETITION —INJUNCTION.

The decree of a District Court, entered upon mandate of the Circuit Court of Appeals in a suit for infringement of trade-mark, considered and modified, and, as so modified, approved as in conformity to the mandate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4722.]

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

Suit in equity by the American Piano Company against the Knabe Bros. Company. From a decree entered on mandate, N. H. Fairbanks, receiver of the Knabe Bros. Company, appeals. Modified.

The following is the memorandum referred to in paragraph 1 of the opinion:

It appearing to the court that the inconveniences which will result to appellant from enforcing the requirement, announced in our opinion of April 14, 1916 (232 Fed. 140, 146 C. C. A. 332), that the cheek block of appellant's pianos be secured in place by the use both of glue and screw, more than outweigh the benefit by way of protection to appellee afforded thereby, the provision in question is hereby so modified as to require the securing of the cheek block by screw only, in the case of both upright and grand pianos.

Kramer & Bettman, of Cincinnati, Ohio, for appellant.

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Our opinion upon appeal from the final decree of the District Court as first entered (229 Fed. 23, 143 C. C. A. 325) directed the entry of a modified decree in accordance with our decision upon the various meritorious questions involved; many of the details of the modified decree being worked out in that opinion. By a later memorandum (232 Fed. 140, 146 C. C. A. 332) certain details were further considered; and by a still later memorandum still other items were passed upon.

The present appeal is from the modified decree entered pursuant to our mandate; appellant's contention being that the decree as entered is not in accordance with "either the letter or spirit" of our opinions. Our former opinions and orders have so fully covered the specific questions now raised as to render further discussion unnecessary. There seems required no more than the bare decision whether the District Court has correctly applied our directions, so far as made or intended, with respect to the particular features assailed as erroneous.

The criticism that the spirit of the decree, as entered, is out of harmony with our decision, is too intangible to act upon. The District Judge has, of course, followed our mandate according to his interpretation of it, and of our opinions and orders on which the mandate is based. He was not bound to use as a basis for the modified decree the draft presented by appellant in preference to that prepared by appellee, or to adopt one arrangement or method of statement in preference to another. It must be remembered that the original decree below was in effect affirmed, except so far as it was specifically modified.

Our conclusions are these:

1. We see no substantial basis for objection to either the first, second, fourth, sixth, and seventh paragraphs of the modified decree as entered, nor to paragraph 5 when considered in connection with the amendment to paragraphs 8 and 15 herein provided for. The third paragraph of the decree does not seem to be criticized.

2. Paragraph 8 should be amended so as to read as follows:

"8. It is further ordered, adjudged and decreed that said the Knabe Bros. Company, its officers, agents, employés and representatives be, and they hereby are, severally and respectively perpetually enjoined from doing any act, or making or authorizing or permitting to be made any statement or representation, by advertisement or otherwise, that would lead the public to believe that pianos manufactured by or for defendant, or to be sold or disposed of by or for it, are Knabe pianos; but nothing in this decree shall be construed to forbid the assertion of a claim that the Knabe Bros. pianos have the quality of Knabe pianos, provided in connection with such claim defendant shall unmistakably disclaim that its pianos are manufactured by the original manufacturers of Knabe pianos, or by any successor of such original manufacturers, so as to preclude any confusion in that respect."

3. Paragraph 12 should be amended by substituting the following language in place of the last clause therein, viz.:

"The printed and framed notice provided for by paragraph 11 of this decree shall contain no qualifying language other than that set forth in paragraph 10 hereof."

4. Paragraph 15 should be amended to read as follows:

"15. Subject to the prior provisions hereof, it is further ordered, adjudged and decreed that nothing herein shall prevent Ernest J. Knabe, Jr., and William Knabe, III, from doing business under their own names or under the name of the Knabe Bros. Company, or from stating fully in catalogues, circulars or other advertising, either in connection with the notice provided for by paragraph 10 of this decree or otherwise (but not as a part of that notice), the whole truth in regard to its and their manufacture and that of complainant, including the facts that the piano of their manufacture is made under the supervision of Ernest J. Knabe, Jr., and William Knabe, III, that they are grandsons of William Knabe, I, the extent to which the piano business was built up by their father, grandfather and themselves, the extent to which they received their training and education under their father, including also all other acts and claims elsewhere in this decree expressly or impliedly permitted."

5. Except as modified by the amendments expressly provided for by this opinion, the decree appealed from is affirmed.

6. The costs of this court will be divided.

PHILADELPHIA, H. & P. R. CO. v. LEDERER, Collector of Internal Revenue.

(Circuit Court of Appeals, Third Circuit. May 26, 1917.)

No. 2226.

1. INTERNAL REVENUE ⟸38—RECOVERY OF TAXES PAID.
An action cannot be brought against a collector of internal revenue to recover back taxes paid to his predecessor in office.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84.]

2. INTERNAL REVENUE ⟸38—RECOVERY OF TAXES PAID.
Act Feb. 8, 1899, c. 121, 30 Stat. 822 (Comp. St. 1916, § 1594), providing that no suit, action, or other proceeding by or against any officer of the United States shall abate by reason of his death, or the expiration of his term of office, but that the court may allow it to be maintained by or against his successor in office, does not authorize an action against a collector of internal revenue to recover back taxes paid to his predecessor in office where no suit, action, or proceeding was pending against such predecessor, and a mere claim for refund of the taxes was not a suit or proceeding against the collector.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84.]

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

Suit by the Philadelphia, Harrisburg & Pittsburgh Railroad Company, to the use, etc. against Ephraim Lederer, Collector of Internal Revenue. Judgment for defendant (239 Fed. 184), and plaintiff brings error. Affirmed.

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

Edward S. Kremp and Francis Fisher Kane, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] The satisfactory opinion of Judge Thompson (239 Fed. 184) relieves us from discussing nearly all the questions raised by this writ of error. We concede the force of the company's argument that in substance, and especially in practical effect, suits such as this are against the collector as an official rather than as an individual—his personal liability is rarely, if ever, enforced—and it may be that Congress might with safety and propriety extend the existing law to cover the situation now presented. But, until the change be actually made, we are bound by the law as it stands, and we see no reason to doubt that the statutes and decisions now in force prevent the company from recovering in this action for the taxes collected by William McCoach, the defendant's predecessor in office. No suit to recover them had been brought against McCoach, and for this reason the act of 1899 does not apply.

We need hardly say that without statutory permission no suit to recover a federal tax can be maintained. Moreover, the statutes on this subject must be strictly obeyed; they lay down the conditions and

limitations under which the sovereign consents to be sued, and this consent should not be enlarged by construction. We turn for a few moments to the act of 1899, since this seems to be the company's principal reliance. Some additional facts should first be stated in order to make the position clear. The company paid the tax for 1909 in June, 1910, the tax for 1910 in June, 1911, and the tax for 1911 in June, 1912. These taxes were paid under protest to McCoach, who remained in office until October 7, 1913. During his term—namely, in June, 1912, January, 1913, and May, 1913, respectively—the company claimed the refund of these three taxes; and in June, 1913, it also presented a petition to abate the tax of 1912, apparently on the ground that penalties had been incurred in addition to the tax, although we do not precisely know what abatement was asked for. The claim for the refund of the tax for 1909 was rejected by the Commissioner of Internal Revenue on July 15, 1912, but apparently the subsequent claims for refund of the taxes of 1910 and 1911, and also the petition for abatement in connection with the tax for 1912, were not disposed of until February, 1914.

On October 22, 1913, after McCoach had retired from office, the company filed a supplemental affidavit with the Commissioner in support of its petition to abate the tax of 1912, and on the same day asked him to reopen and reconsider his refusal to refund the tax of 1909. On October 27, 1913, this request to reopen was granted, and at the same time the Commissioner asked for additional information and affidavits in reference to the claims for the refund of the taxes for 1909, 1910, and 1911, and also in reference to the petition to abate the tax of 1912. Accordingly an affidavit was furnished on January 14, 1914. In February, 1914, the petition for abatement was refused, and apparently at the same time the claims for the refund of the taxes for 1909, 1910, and 1911, were also refused; for on February 13, 1914, Lederer notified the company that these claims, and also the petition for abatement, had been examined and rejected by the Commissioner. In March, 1914, a claim to refund the tax for 1912 was presented, and was refused soon afterward. The present suit was brought on June 29, 1914, and sought to recover from Lederer the taxes for the four years.

[2] From these facts it seems clear to us that the act of 1899 does not apply. The act is as follows:

"No suit, action, or other proceeding, lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office; but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs."

The only "suit, action, or other proceeding" that could have been begun against McCoach while he was in office would have been a suit for the taxes of 1909 and 1910; but no such suit was brought, and it cannot be successfully contended that a mere claim for refund,

which is a matter wholly for the Commissioner, is a suit or proceeding against the collector. The basis of an action against the collector is his receipt of the tax, and if he has not received it we do not see how he can be called on to pay it back; and the fact that Lederer was the channel by which the Commissioner transmitted the refusal to refund did not impose liability. Lederer was liable, if at all, for the tax of 1912, for this had come into his own hands; but no statute made him liable for money that was collected by his predecessor, but had never been sued for.

For these reasons, and for those to be found in Judge Thompson's opinion, the judgment is affirmed.

ARUNDEL SAND & GRAVEL CO. v. NAYLOR & CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1917.)

No. 1499.

1. SHIPPING ⊂=42—CONTRACTS OF HIRE—IMPLIED WARRANTIES.
Where a scow, having no accommodations for a crew, and not accompanied by any employé of the owner, or intended to be, was hired from the owner without any special conditions or exemptions, a warranty of its seaworthiness and fitness for the work for which it was chartered was implied, where the parties and their business were well known to each other, and the owner was aware of the nature of the work for which the scow was procured.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 156–164.]

2. SHIPPING ⊂=58(2)—HIRING—ACTIONS—SUFFICIENCY OF EVIDENCE.
In a suit for the loss of goods, due to the sinking of a scow which was hired for use in unloading them from a steamer, where the evidence showed that the capsizing of the scow was caused by the springing of a leak, that there was no improper loading, and there was nothing to show that the scow was subject to any unusual strain, or was overloaded, or that the nature of the cargo caused the accident, and it appeared that everything practicable was done to prevent the scow from sinking after discovery of the leak, a finding that the sinking was due to the unseaworthy condition of the scow was warranted.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 238–241.]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Libel in admiralty by Naylor & Co. and others against the Arundel Sand & Gravel Company and another. From a decree against the defendant named, it appeals. Affirmed.

For opinion below, see 237 Fed. 725.

John Henry Skeen and Clarence A. Tucker, both of Baltimore, Md. (Knapp, Ulman & Tucker, of Baltimore, Md., on the brief), for appellant.

John B. Deming and George Forbes, both of Baltimore, Md. (Whitelock, Deming & Kemp, of Baltimore, Md., on the brief), for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. For a more detailed statement of facts reference is made to the reported opinion of the court below. 237 Fed. 725. It will serve the purpose of this appeal to say that the appellee, Davison Chemical Company, hired from the appellant, Arundel Sand & Gravel Company, one of its scows, known as No. 63, to be used in unloading from a steamer in the harbor of Baltimore a cargo of pyrites consigned to the Davison Company, but belonging to Naylor & Co., the other appellee. During the progress of the work, and while alongside the steamer, the scow capsized and sunk, having on board at the time about 450 tons of pyrites which became a total loss. A libel was filed by the owner and consignee of the cargo against appellant, owner of the scow, and the Terminal Shipping Company, which was employed to unload the steamer and for whose use the scow was provided. The trial court held the appellant solely at fault and entered a decree against it for the resulting damages. As against the Terminal Company the libel was dismissed.

[1] The numerous assignments of error are reducible to two questions which will be briefly considered. First is the question of law as to whether there was an implied warranty of the seaworthiness of the scow for the work to be performed. The scow had a capacity of 500 tons and appears to have been built primarily for transporting sand and gravel for its owner in local waters. It was not equipped with pumps, had no accommodations for a crew, and was not accompanied by any employé of the owner, or intended to be, when turned over to the Davison Company. The scow in question was one of a large number owned by appellant which were used mainly in its own business but which were frequently hired out to other parties, including the Davison Company. The record indicates that all the parties to this suit, and the businesses respectively carried on by them, were well known to each other, and the appellant must have been aware of the nature of the work for which this scow was procured. It is not shown or suggested that the contract of hiring was other than the usual one in such cases, and in the absence of special conditions or exemptions we deem it not open to doubt that it implied a warranty of the fitness of the scow for the work for which it was chartered. The rule of law is so well settled as not to need the aid of argument or citation.

[2] The other question is one of fact: Was the scow in an unseaworthy condition when delivered to the Davison Company, and was the loss set up in the libel occasioned by that condition? The trial court answered this question in the affirmative and a careful study of the record satisfies us that the finding is amply supported by testimony. Indeed, it is not easy to see how any other conclusion could be reached. That the capsizing of the scow was caused by the springing of a leak, and the inflow of water sufficient to overturn it, is established by the testimony of a number of witnesses and confirmed by all the circumstances attending the accident. The opposing view is unsupported by proof and rests altogether upon surmise and conjecture. Some attempt was made to show that the loading was unskillfully done, in that the pyrites were not properly distributed upon the deck of the scow, but the uncontradicted testimony is quite to the contrary, and no reason appears for discrediting the statements of the witnesses in that regard.

There is nothing to show that the scow was subjected to any unusual strain, whether by stress of weather or otherwise; and it cannot be said to have been overloaded at the time, for its capacity exceeded by a safe margin the weight of the pyrites then on board. Nor was the nature of the cargo such as to afford an explanation of the accident, since a scow designed to carry sand and gravel would certainly, if in proper condition, carry safely an equal weight of pyrites. To this it may be added that everything practicable seems to have been done, after the leak was discovered, to prevent the scow from sinking and to get assistance. Without attempting a detailed review of the testimony, it suffices to repeat our conviction that it supports the ultimate conclusion of fact found by the learned District Judge, and this was sufficient to establish the appellant's liability.

Affirmed.

MARK SEONG et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 257.

1. COURTS ⟸96(1)—RULES OF DECISION—PRECEDENTS.

The decision of the Circuit Court of Appeals as to the country to which a Chinese person unlawfully within the United States should be deported is the law of the circuit until overruled by the Supreme Court, or until the law is amended by Congress.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 334.]

2. ALIENS ⟸32(10)—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

There is no conclusive presumption that one of the Mongolian race was born in China, and where all that is known regarding him is that he was seen last in Canada, he must be deported to Canada or discharged.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92.]

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

Habeas corpus by Mark Seong and others. From an order (227 Fed. 131) dismissing the writ, the petitioners appeal. Modified and affirmed.

D. M. Silver, of Buffalo, N. Y., for appellants.

S. T. Lockwood, U. S. Atty., of Buffalo, N. Y.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1, 2] These petitioners were found in the town of Tonawanda, N. Y., with a third Chinese person, Haum Pon, under a bridge over the Erie Canal near the northerly end of Rattle Snake Island. This island is a part of New York and is about five miles from Canada. Inspector Ohlin testified that he saw the defendants get off the train at Hamilton, Ontario. Haum Pon, who was with these appellants was tried and his case was appealed to this court. U. S. v. Sisson, 230 Fed. 974, 145 C. C. A. 168. We found him to be unlawfully in the United States and ordered him returned to Can-

ada which is the country from whence he came. No possible reason is suggested why any distinction should be made between Haum Pon and his associates and yet he was ordered to be returned to Canada and his companions, whose legal status is identical with that of Haum Pon, are ordered returned to China. This disposition is directly contrary to our decision in the Haum Pon Case. The situations are precisely similar and the judgment should be the same in both cases. Our decision in the Haum Pon Case is the law of this circuit and must so remain until overruled by the Supreme Court or until the law is amended by Congress. There is no necessity for further elaboration of our opinion upon this question If we have not made our position plain to the officials engaged in executing the law, it is idle to attempt to do so now. There is no conclusive presumption that one of the Mongolian race was born in China and where all that is known regarding him is that he was seen last in Canada, the only alternative is that he be returned to Canada or discharged. Yee Suey v. Berkshire, 232 Fed. 143, 146 C. C. A. 335.

The order of deportation should be amended by providing that the appellants be deported to Canada and as so amended it is affirmed.

SAFE-CABINET CO. v. GLOBE-WERNICKE CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1917.)

No. 59.

1. PATENTS ⟸328—ANTICIPATION—IMPROVEMENTS IN METALLIC STRUCTURES.
Claims 1, 2, 5, 6, 8, 9, 11, 12, and 13 of the Wege patent, No. 999,929, for an improvement in metallic structures built of sheet metal or metal plates, consisting of interlocking parts which can be assembled and locked without screws, bolts, rivets, or other similar appliances, *held* anticipated and invalid.

2. PATENTS ⟸112(1)—PRESUMPTION OF VALIDITY.
Where it was admitted by the Patent Office that a patent was granted inadvertently to the unsuccessful party to an interference proceeding, the usual principle that a patent is prima facie valid, and that the burden is on one sued for infringement to establish invalidity, was inapplicable.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 162.]

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

Suit by the Safe-Cabinet Company against the Globe-Wernicke Company. From a decree dismissing the bill, complainant appeals. Affirmed.

The Safe-Cabinet Company is a corporation organized and existing under the laws of the state of Ohio and has its principal place of business in the city of Marietta in that state. The Globe-Wernicke Company is a corporation organized and existing under the laws of the state of Ohio and has its principal place of business in the city of Cincinnati. It also has an established place of business in the borough of Manhattan in the city of New York.

The suit is brought for the alleged infringement of patent No. 999,929, granted by the United States Patent Office to the plaintiff as assignee of Peter M. Wege for "fireproof cabinets and safes"; the same being metal containers

adapted for the preservation of documents against fire. The patent was granted on August 8, 1911, for "improvements in metallic structures," on an application filed May 14, 1910.

The court below dismissed the bill for want of equity.

James L. Steuart, of New York City (James H. Griffin, of New York City, of counsel), for appellant.

Robert H. Parkinson, of Chicago, Ill. (Wallace R. Lane, of Chicago, Ill., of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The first question is as to the validity of the patent in suit. The court below dismissed the bill, on the ground that the claims in suit are invalid, unless perhaps restricted to the exact device shown in the application; the court being doubtful whether such restriction is permissible. If, however, such restriction be permissible, the court was satisfied there was no infringement.

The patent in suit is for "new and useful improvements in metallic structures." In the specification the patentee states:

"My invention relates to improvements in metallic structures which are built up of sheet metal or metal plates which form the walls thereof, and the objects of my invention are to provide a strong rigid structure which can be manufactured at a low cost, and will possess great strength and rigidity, and the respective parts of which can be readily and easily assembled, and the parts of which are maintained and locked in their assembled positions, without making use of any screws, bolts, rivets, or other similar appliances."

The claims of the patent number 15, but of this number only claims 1, 2, 5, 6, 8, 9, 11, 12, and 13 are in suit. They are as follows:

1. A metallic structure, comprising in combination a frame of sheet metal provided with interlocking flanges, wall members provided with flanges adopted to interlock with the flanges on the frame, and means for locking said wall members in position in said frame.

2. A metallic structure comprising in combination a frame of sheet metal having a plurality of sides, each of which forms one of the walls of the structure, interlocking flanges on said frame, wall members provided with flanges adapted to interlock with the flanges on the frame; and means for locking said wall members in position in said frame.

5. A metallic structure comprising in combination a frame with a plurality of sides, each of which forms one of the walls of the structure, wall members adapted to fit into said frame and having a tension engagement with said frame, and a locking wall member constituting means for locking the other wall members in the frame.

6. A metallic structure comprising in combination a frame with a plurality of sides, each of which forms one of the walls of the structure, wall members adapted to fit into said frame, said wall members having a tension engagement with said frame, and a locking wall member constituting means for locking the other wall members in the frame, and means for locking said locking wall member in position in the structure.

8. A metallic structure comprising in combination a frame of sheet metal having a plurality of sides, each side forming one of the outer walls of the structure flanges on said frame, a plurality of sheet metal wall members adapted to fit into said frame flanges on said wall members adapted to contact with flanges on the frame and to be under tension when said wall members are forced into the frame, a locking wall member constituting means for locking the other wall members in position in the frame, and flanges on said locking wall members adapted to contact with other wall members under tension.

9. A metallic structure comprising in combination a frame of sheet metal having a plurality of sides, each side forming one of the outer walls of the

structures, flanges on said frame, a plurality of sheet metal wall members adapted to fit into said frame, flanges on said wall members adapted to contact with flanges on the frame and to be under tension when said wall members are forced into the frame, and a locking wall member constituting means for locking the other wall members in position in the frame, flanges on said locking wall member adapted to contact with other wall members under tension and means for locking said locking wall member in position in the structure.

11. A metallic structure comprising in combination a frame of sheet metal provided with interlocking flanges, wall members provided with flanges adapted to interlock with the flanges on the frame and a wall member constituting means for locking the other wall members in position in the frame.

12. A metallic structure comprising in combination a frame of sheet metal having a plurality of sides, each of which forms one of the walls of the structure, interlocking flanges on said frame, wall members provided with flanges adapted to interlock with the flanges on the frame, and a wall member constituting means for locking the other wall members in position in the frame.

13. A metallic structure comprising in combination a frame of sheet metal having a plurality of sides, each side forming one of the walls of the structure, flanges on said frame, a plurality of sheet metal wall members adapted to fit into said frame flanges on said wall members adapted to contact with flanges on the frame and to be under tension when said wall members are forced into the frame, and means for locking said wall members in position in the frame.

Every claim of the patent makes one element in the combination, either "a frame of sheet metal provided with interlocking flanges," or "a frame with a plurality of sides, each of which forms one of the walls of the structure." Both of these limitations upon the frame are recited in some of the claims, and at least one of them in all the claims. In all the claims, the interlocking combination of the wall members with such a frame is specified.

The specification describes the patent as composed of the following four main elements:

First. A "frame" made from resilient or yieldable sheet metal and provided with "interlocking flanges" projecting inwardly of the frame. This frame is rectilinear in shape, and forms the upper and lower outer walls, and the two outer side walls of the safe.

Second. A sheet metal plate, which forms the outer back wall of the structure.

Third. Four inner wall sections, provided with interlocking flanges which interlock with the flanges inside the frame. These inner wall sections are spaced from the outer walls, thereby providing a "dead air space" between said inner and outer walls. Said sections form the upper and lower inner wall members and the two inner side members of the cabinet.

Fourth. A back inner wall member, which serves the further function of locking the other wall members in their positions within the frame, under tension, when the flanges of said wall members are interlocked with the flanges within the frame.

The patent in suit is constructed on the serial system, where you start in with one piece and follow it up with another piece, which locks the first piece in place, and so on till you get to the last piece, and upon locking that piece in place everything is locked against displacement.

The plaintiff's counsel particularly directed the attention of the court to the fact that the so-called "frame" of the patent in suit, to attain strength and rigidity, is a distinct entity or unitary structure, and that,

when the inside wall members are assembled within this frame, they are retained therein by the interlocking flanges described and the co-operating action of the inner back wall member. This inner back wall member, being made to have a driving fit, is forced into its assembled position under considerable pressure, whereby the entire structure is placed under tension and the inner wall members retained in assembled position within the frame, without necessitating the employment of screws, bolts, rivets, or other similar appliances. In other words, the respective parts of the structure, viz., the exterior shell or frame and the inner shell or interior wall, are locked in their assembled positions without making use of any screws, bolts, rivets, or other similar appliances, to maintain them in assembled position.

It may not be important whether or not bolts or rivets are employed in the construction of the frame, if, in the case of fire, all the parts of the frame are directly exposed to the heat and expand uniformly. In such case there is no danger of shearing or rupturing rivets, or bolts used in the frame, per se. It is vitally important, however, that there be no bolts or rivets connecting the inner walls of the structure with the frame. This is because of the fact that such inner walls, not being directly exposed to heat, but being protected by the dead air space between the outer and inner walls, expand much more slowly and to a considerably less degree than the outer walls. Accordingly, such unequal expansion between the inner and outer walls would occasion the shearing of any rivets or bolts which might be employed in connecting them.

The old type of safes embodied double walls, between which was packed heat-insulating material, such as plaster of paris, concrete, asbestos, magnesia, and similar materials, with a view to making the safes fire proof. The outer and inner walls of these structures were rigidly secured together by bolts or rivets, so that the entire structure was practically a unitary one. The structures were not only heavy and cumbersome, but were open to serious disadvantages, the most fatal of which was the shearing of the rivets or bolts, uniting the outer and inner walls, when the structures were subjected to high temperatures, incident to fires

This unequal expansion between the outer and inner walls, often amounting to an inch or more, depending on the size of the safe, resulted in the shearing or rupturing of the bolts or rivets, thereby destroying the structure, and, usually the documents contained therein.

The first advance in the art over the structures thus described consisted in eliminating the fire proof packings employed; i. e, the plaster, concrete, and so forth, and the stamping up of the inner and outer walls from sheet metal. In these improved structures, the outer and inner walls were spaced apart, thereby providing a dead air space, which proved a sufficient insulator to protect the contents of the safe against external heat. These improvements resulted in a safe which was more economical to manufacture, and much lighter than the safes of the old type. In the sheet metal safes of the old type, either rivets or bolts, or both, were employed to secure the inner and outer walls in their assembled positions, with the attendant disadvantage already mentioned.

The court is asked to believe that the problem which confronted the patentee of the patent in suit was to construct a safe wholly of sheet metal and having the advantages referred to, such as economy of manufacture, lightness, great strength, and the employment of a dead air space between the outer and inner walls, in lieu of the fireproof medium, and yet devoid of the serious disadvantage inherent in sheet metal safes wherein the outer and inner walls were secured together by bolts or rivets. In other words, we are asked to believe the problem was to construct a strong rigid safe cabinet from sheet metal, of the general type specified, wherein the outer and inner walls of the structure were secured together without employing bolts, rivets, or similar rigid means.

The fact is that it had been common, for many years before application for this patent was made, to build up both single-wall and double-wall metallic structures by forming interlocking flanges on adjacent walls adapted to engage with each other, and thus securing the parts snugly together without bolts, screws, rivets, or other extraneous fastening, so that they could be readily put together or taken apart without the use of extrinsic fastening elements, and when united would form a substantially unitary, self-sustaining structure. During the 10 years preceding the application for this patent, sheet metal had come rapidly into use as a substitute for wood in building a great variety of office furniture, and interlocking flanges were generally used to unite sheet metal walls of such structures, sometimes with and sometimes without additional fastenings.

It appears that prior to Wege, the plaintiff's assignor, such structures had been made with a preliminary frame of sheet metal bent to form a plurality of its walls, and having united thereto additional walls (including the inner and outer walls, as well as adjacent walls) by flanges on such walls interlocking into flanges upon the frame or shell. In other cases no preliminary frame or shell was provided, and the structure was built up by making each wall separately, providing it with suitable flanges which were interlocked with flanges on adjacent walls as its walls were successively brought together. Flanges of greater or less complexity and of a great variety of outlines were used for this purpose, according to the convenience or fancy of the artisan. Such structures had been extensively made with one or more of the interior flanged walls serving to lock adjacent walls in the encompassing frame, and such locking walls had been further locked in place.

The alleged invention of the patent in suit consists in forming a "metallic structure" by bending or upsetting a sheet of metal in a "frame" corresponding to the several dimensions of the proposed structure, and constituting a portion of the outer walls thereof, providing this "frame" with flanges and mounting additional walls on this "frame" by means of interlocking flanges engaging with those of the "frame." An interior wall abuts against adjacent walls, and is itself locked in place by projecting edges on adjacent walls, behind which it is forced, designated in the specification as "a means for locking such wall member in position in the structure."

The object, as stated in the patent, is to dispense with bolts, rivets, or screws, while making a rigid structure which can be put together,

or taken apart, without inserting or removing such extraneous fastening agents.

The evidence, however, shows to our satisfaction that at the time Wege claims to have made his invention there was no novelty in using interlocking flanges as a means of connecting together the several walls of a "metallic structure" of the same general character, and composed of the same materials, described in the patent; or in using in connection therewith an inner locking wall to lock in place other inner walls placed at right angles to such locking wall; or in locking such locking wall in place; or in substituting such means of locking together such walls for bolts, rivets, screws, or similar appliances. This method of constructing sheet metal structures (including sheet metal filing cabinets) considerably antedated Wege's alleged invention.

The evidence shows that some of the prior structures had the sheet metal walls so locked together by their interlocking flanges, and subsequently inserted flanged walls, sprung in place, as to dispense altogether with the use of "bolts, screws, rivets, or other similar appliances"; while others had used interlocking flanges for this purpose and supplemented them with screws, bolts, or rivets. Such flange connections had been used where for any reason it was desirable to dispense with rivets, screws, or other extraneous means of attachment, and where it was the purpose to have the structure easily put together and taken apart, without occasion for inserting or removing screws, rivets, or bolts.

In building up rectangular structures of sheet metal, the flexibility of such metal had before been depended upon to enable the flanged walls to snugly engage with each other and be held under tension; this flexibility affording sufficient yield to permit the flanged parts to be sprung into engagement with each other, and be there held by positive frictional engagement, and to compensate for slight variations in the dimensions of the sheet metal walls and of the frame to which these walls are attached.

As the counsel for the defendant pointed out in their brief, and as the evidence in the record makes clear, if the structure of the patent in suit can be distinguished in any details from prior metallic structures of the same material before in general use and prior to the White structure, it is in the fact that the initial element of the patented structure consists of the continuous solid frame of sheet metal, first bent or upset to form integrally "the upper and lower outer walls and the outer side wall of the section," and within the "frame" so constituted the outer flanged rear wall is inserted and there held by the several inner walls, which are successively attached by flanged engagement, so that the walls constituting the "frame" do not have to be secured to each other by bolts or rivets, and have a residual tension imparted by their continuity, while the whole structure is put together or taken apart without the insertion or removal of bolts, screws, rivets, or any device other than the constituent walls secured to the frame by their engaging flanges. And this distinguishing detail cannot be claimed as the invention of Wege, for he is anticipated in this respect by White, his former employer.

There is evidence in the record that the White structure was manufactured by the General Fireproofing Company of Youngstown, Ohio, prior to the filing of the White application and before the earliest date asserted for the Wege invention. White was vice president of the company, and at that time Wege was superintendent of the factory. Wege left the company on October 1, 1909, and claims to have first conceived his invention on or about October 23d of that year. He went into the employ of the plaintiff on October 9th, and some months later, and while White's application was pending in the Patent Office, filed his application for the patent here in suit, assigning it to his new employer, the plaintiff herein.

The issuance of the patent in suit appears to have been due to an inadvertence in the Patent Office. The application for it was filed on May 14, 1910. But on November 13, 1909, an application was filed, serial number 527,755 by Alexander P. White, for a patent for an improvement in metallic structures. The White application was on file in the Patent Office more than six months before the application of Wege for the patent in suit was filed. After the issuance of the patent a hearing was had before the examiner of interferences and he awarded priority of invention to White. An appeal was taken to the examiner in chief, who recommended that the interference be dissolved, on the ground that the counts did not accurately define White's structure. The Commissioner, on appeal, declined to follow the recommendation to dissolve the interference, and referred the case back to the examiners in chief. A majority of the examiners in chief then awarded priority to White, one member dissenting. On appeal from that decision to the Commissioner, he held that White was entitled to make claims 1 and 2, and entitled to priority thereon, but denied his right to the others. An appeal was taken to the Court of Appeals of the District of Columbia and that court, in a unanimous opinion filed on March 6, 1916, sustained White's right of priority upon all the claims, reversing the commissioner in so far as he had awarded priority only on claims 1 and 2. White v. Wege, 44 App. Cas. D. C. 495. White's priority on all the claims now in suit having been thus established, a patent was issued to White, No. 1,180,810, on April 25, 1916.

In the argument before us counsel for the appellant asserted that it was a bold and radical concept on the part of Wege to picture in the imagination a structure demanding the exacting requirements of a fireproof safe, wherein the parts thereof were held together without employing bolts, rivets, or other rigid attaching means between the outer and inner walls of the safe. But as White was having the structure of his patent manufactured in the factory at Youngstown, Ohio, in January or February, 1908, and shipped to New York, where it was placed in a public salesroom in the early part of that year, the "radical concept" of Wege did not occur to him soon enough to enable him to maintain his claim to patentable novelty. The White structure had the continuous outer frame of sheet metal, constituting a plurality of outer walls, with flanges interlocking with the flanges of the inner walls, forming quite as complete an interlock as that illustrated in the

patent in suit. The inner walls have flanges similar to those in the inner walls of the patent in suit and the rear inner wall serves to lock in place by frictional contact the adjacent inner walls, and is itself locked in place by flanges in the adjacent walls, behind which it is sprung. It is composed entirely of sheet metal parts firmly held together under tension by the interlocking flanges without other means of fastening, and the walls are adapted to be inserted, removed, and replaced without mutilation and without taking the frame apart. It was without bolts and without rivets. The testimony shows that:

"The characteristic and distinctive features of the device lay in the manner in which the different parts were locked in engagement by interfitting flanges. The back portion was in a form resembling a pan; that is to say, the edges of the four sides were turned to make flanges. The edges of the sides were also flanged, and into these flanges of the edges the flanges of the back portion interfitted. Then in the back there was a supplemental pan-shaped form, also having flanges on the edges, which also fitted into the flanges on the sides. In speaking of sides thus far I refer to the exterior wall members. There were also interior walls on the sides, and each of these interior side wall members consisted of two parts, each part being of the familiar pan shape. The line of division between the two pans was vertical; one of these two pans, comprising each interior side wall, was inserted so as to engage and hold in place the backs against the flanges on the exterior side walls. The second pan, completing the interior wall, was forced behind the flange on the front edge of the exterior wall. The purpose of making the interior wall in this particular instance of two parts was to adapt the parts to be sprung into position, so that they would hold the wall members—that is, the outer wall members—in place by frictional contact. This splitting of the interior wall member in two parts was not at all essential, as the interior wall could be slipped into position from the perpendicular position or from the top of the device. This method of assembling would involve, however, or as practiced did involve, the bending back of the flange on the top of the exterior wall. To obviate that, the interior wall was formed in two pieces as described. It follows, from the manner in which this structure was put together, that it possessed the peculiarity of having no bolts or rivets."

[2] The usual principle that the patent is prima facie valid, and that the burden is on defendant to establish invalidity, is inapplicable to this case, in view of the admission of the Patent Office that the patent was granted inadvertently and that the invention claimed did not belong to Wege, on whose patent the suit is founded, but to the prior applicant, White, in respect to every claim here sued upon. And we concur fully with the court below in its opinion that Wege was never entitled to the claims that were inadvertently given him. White's priority over Wege in putting the interlocked or articulated metal sheets into a boxlike frame is established beyond question.

Prior in time to White is the Van Wie patent, No. 843,643, applied for on January 16, 1906, and issued on February 12, 1907. The object of the patent "is to produce a stove which can be quickly assembled, and in which the whole interior may be easily removed and replaced, without the use of bolts or rivets." The evidence shows that the Detroit Stove Works built and sold that structure continuously since and including January, 1907, selling about 40,000 annually. It is not important that the Van Wie "metallic structure" was for a stove and that of Wege for another purpose.

The claims of the Van Wie patent include the "frame" and the interlocking flanges, as well as the wall members, in the combination, and many of them would literally cover the structure of the patent in suit, except that they are limited to the use of this combination "in a stove"; whereas, the patent in suit includes the combination broadly, whether used in a stove or any other metallic structure.

Every claim in suit can be read literally upon the metallic structure of Van Wie. After describing the flanged inner walls, which correspond in shape and material with the flanged inner walls of the patent in suit, and the locking wall, which also corresponds in its flanges to the patent in suit, but made in two sections to facilitate its introduction, the Van Wie specification says:

"With this construction all parts are held firmly in spite of any amount of expansion and contraction due to extreme temperatures, for the reason that the spring of metal will yield to all strains."

In the Van Wie patent the double-walled structure of sheet metal serves the purpose of preventing the transmission of dangerous heat, precisely as it would if used in the walls of a fire proof safe. In each case the purpose and effect is to intercept the transmission of heat.

Also prior in time to Wege is the Dick patent, No. 809,497, applied for on February 7, 1905, and issued on January 9, 1906. That was granted for "new and useful improvements in fire-resisting cabinets." The specification discloses a double-walled sheet metal cabinet of the general shape and outline of that in which it now claims to employ the invention of the patent in suit. It describes "paneling of the metal" as employed to give rigidity to the structure, and uses interlocking flanges to join the sheet metal parts together, but reinforces these joints by the use of screws and rivets. It is indistinguishable in function and in general appearance from the patent in suit.

The Van Wie patent and the earlier Dick patent alone made it impossible, as the District Judge pointed out, for invention to reside in fitting sheet metal inside a frame in such wise that it could be attached and removed without tools, and when in place provide an air chamber between frame and lining sheets.

In the Boynton patent, No. 337,127, issued in 1896, we have an instance of a sheet metal structure where the inserted wall members are held in the outer structure or frame without the use of screws or similar appliances and merely by the co-operation of interlocking flanges.

The Senge patent, No. 972,476, issued in 1910, discloses very much the same general interlocking system of wall members as the patent in suit. It discloses a double-walled structure of sheet metal, and it discloses the serial method of putting the structure together. It discloses interlocking flanges, and discloses fully the scheme of one wall member holding a predecessor wall member in place, and a final locking device which keys up the whole structure.

An attempt was made to distinguish the flanges of the prior art by calling them "interfitting" flanges, as distinguished from the "interlocking" flanges of the patent in suit. This was explained by saying that "interfitting" flanges would be flanges made to fit, yet not to lock,

while "interlocking" would necessarily be fitting two parts, so that they would not come or pull apart. But the testimony shows that long prior to the patent in suit it was customary to form metallic structures with interlocking flanges.

As this court is satisfied that the patent in suit is invalid as respects the claims now before the court, it is unnecessary to consider the question of defendant's infringement.

Decree affirmed.

BARRETT CO. et al. v. EWING.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 106.

1. COURTS ⊜270—FEDERAL COURTS—DISTRICT IN WHICH SUIT SHOULD BE BROUGHT.

As the official residence of the Commissioner of Patents is in the District of Columbia, suits against him in his official capacity should be commenced in that District.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810.]

2. COURTS ⊜276—FEDERAL COURTS—DISTRICT IN WHICH SUIT MAY BE BROUGHT—CONSENT.

Rev. St. § 4915 (Comp. St. 1916, § 9460), provides that, when a patent is refused, the applicant may have remedy by bill in equity, that the court having cognizance thereof many adjudge that such applicant is entitled to a patent, that any such adjudication, if in favor of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and that, where there is no opposing party, a copy of the bill shall be served on the commissioner. *Held* that, where there is no opposing party, the Commissioner may with his consent be sued outside the District of Columbia.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815.]

3. PATENTS ⊜328—ANTICIPATION—IMPROVEMENT IN STREET PAVEMENTS.

An alleged invention of an improvement in street pavements, consisting of the application to the surface of a concrete pavement of a thin layer of bituminous compound, and the sprinkling or spreading and embedding of sand or small stone fragments into this compound, was anticipated by the Hubbell patent, No. 158,415, covering a process consisting in saturating the concrete forming the wearing surface of a pavement with a thin body or solution of hot pitch or bitumen, though Portland cement, used in the art to which the alleged invention relates, was not used in commercial pavements until after the date of the Hubbell patent.

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

Suit by the Barrett Company and another against Thomas Ewing, as Commissioner of Patents. From a decree dismissing the bill, complainants appeal. Affirmed.

The plaintiff is a corporation organized and existing under the laws of the state of West Virginia and having its principal place of business in the borough of Manhattan, in the city of New York.

August E. Schutte is a citizen of the United States and a resident of the city of Boston in the state of Massachusetts.

Thomas Ewing is United States Commissioner of Patents, having his official residence in the city of Washington, D. C.

On January 26, 1907, an application for letters patent serial No. 354,318 was filed in the United States Patent Office by Schutte, and during the pendency of the application the entire right, title, and interest in the application aforesaid and in the alleged invention therein claimed was by mesne assignments in writing sold, assigned, and transferred to the said Barrett Manufacturing Company, which assignments were recorded in the United States Patent Office.

The application for letters patent was rejected by the primary examiner and then by the board of examiners in chief, and finally by the Commissioner of Patents. An appeal was then taken to the Court of Appeals of the District of Columbia, and that court affirmed the decision of the Commissioner.

Notwithstanding the aforesaid adverse decisions, the Barrett Company, as assignee of the alleged inventor, still claims to be entitled to receive a patent for the invention set forth in the application, and this suit was commenced in the District Court for the Southern District of New York, praying that the court adjudge and decree that the aforesaid Schutte is the original inventor of the improvements set forth in the application, and that the Barrett Company is entitled to receive a patent for the invention as specified in the claims and as assignee of Schutte. It also prays that the Commissioner of Patents be authorized and directed to issue letters patent to the Barrett Company, assignee of Schutte.

The Commissioner accepted service and consented expressly to the jurisdiction of the District Court for the Southern District of New York.

Merwin & Swenarton, of New York City (T. D. Merwin and W. H. Swenarton, both of New York City, of counsel), for appellants.

William R. Ballard, of Washington, D. C., for appellee.

Wm. A. Redding, Arthur C. Fraser, and Henry M. Turk, all of New York City, amici curiæ.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is a suit in equity brought under the provisions of section 4915 of the Revised Statutes, being section 9460 of 8 U. S. Compiled Statutes 1916 Annotated, which reads as follows:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

But before we consider whether the plaintiffs are entitled under the above provision to have a decree from this court establishing their right to receive a patent for the invention as specified in the claims herein involved, it will be necessary to determine a preliminary question.

As the suit against the Commissioner was commenced in the Southern District and not in the district in which the Commissioner officially resides, counsel for the Commissioner in his argument in this court suggested that there may be a question as to the power of the Com-

missioner to consent to be sued in the Southern District of New York, and he has called to our attention three possible grounds of objection. This he has done without stating any opinion which he may entertain as to their merits. These objections are as follows:

(1) That the Supreme Court of the United States declared in Butterworth v. Hill, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. Ed. 119, that the Commissioner of Patents is by law located in the Patent Office and has his official residence at Washington, in the District of Columbia.

(2) That the writ of mandamus to the Commissioner of Patents may only issue from the Supreme Court of the District of Columbia.

(3) That the Department of Justice is given certain powers in regard to suits in which the United States or any officer thereof as such officer is a party or may be interested. See Revised Statutes, §§ 346, 359, 361, 365, 366, 367 (Comp. St. 1916, §§ 515, 533, 536, 540–542).

[1] It may be said of the first suggestion that, inasmuch as the Commissioner's official residence is in the District of Columbia, suits which are brought against him in his official capacity should be commenced in that district by virtue of the provision which requires suits to be brought in the district of which the defendant is an inhabitant. This, however, affords no light on the question whether he has the right, which other defendants are conceded to possess, to waive service in the district of his legal residence and to consent to be sued elsewhere.

It may be said of the second suggestion that it has no bearing on the question under consideration. The statute under which this suit is brought does not contemplate the issuance of a mandamus. Mandamus is a law remedy, and is not sought in this proceeding. It is a suit in equity and not an action at law which section 4915 of the Revised Statutes authorizes.

It may be said of the third suggestion that it is quite inconclusive, inasmuch as the supervisory power of the Department of Justice is coextensive with the territory of the United States and is the same in all the districts.

Is it contrary to public policy that the Commissioner should consent to be sued in a district other than that of his official residence?

[2] The general rule is that a person may waive any right to which he is entitled. But the right to do so is subject to the qualification that no waiver can be upheld which is contrary to public policy. It is for this reason that courts have held that all agreements which seek for example to waive the defense of usury, and agreements to waive objection to acts done or contracts entered into in violation of Sunday laws, are void. But that which Congress has by law permitted cannot be regarded by the courts as contrary to public policy. And Congress, in one instance at least, has authorized suits to be brought outside the District of Columbia, against the head of a department whose official residence is in Washington. Thus Congress provided in section 736 of the Revised Statutes (Comp. St. 1916, § 1031) that proceedings may be instituted against the Comptroller of the Currency in other districts than that of which he is an inhabitant. That section expressly declares that all proceedings by any national banking

association to enjoin the Comptroller under the provisions of any law relating to national banking associations shall be had in the district where such association is located.

It seems unreasonable to suppose that Congress intended by the statute that suits should be brought in the same court which had already passed upon the questions involved, and without regard to the residence of the parties. The act says that after the Commissioner of Patents has refused an application for a patent, or after it has been refused by the Supreme Court of the District of Columbia upon appeal from the Commissioner, "the applicant may have remedy by bill in equity." It does not say that the bill must be filed in the District of Columbia. And after providing that the defeated applicant may have remedy by bill in equity it declares, not that the Supreme Court of the District of Columbia may adjudge, and so forth, but that "the court having cognizance thereof" after notice and other due proceedings may adjudge that the applicant is entitled to receive a patent.

Under the statute, the Commissioner of Patents is not a necessary party to the proceedings. It provides that the parties adversely interested in the application and who are opposing allowance of the patent (as parties to an interference proceeding) may be made parties defendant. And it requires that, "in all cases, where there is no opposing party a copy of the bill shall be served on the Commissioner." This implies that he need not be served if there be opposing parties who have been made defendants. In this case, no opposing parties have been made defendants, and the Commissioner himself is made defendant and had to be served. If the Commissioner had not been made a defendant and opposing parties had been named as defendants, the case might have been brought in any district of which the defendants were inhabitants and the Commissioner would have been concluded by the decree. For the statute provides that, if in such a suit the adjudication is in favor of the applicant, a copy of the adjudication may be filed in the Patent Office, and such adjudication "shall authorize the Commissioner to issue such patent." As the Commissioner may be bound therefore by an adjudication in a suit in another district and to which he is not a party, we can see no reason of public policy which requires this court to say that in a suit under this provision of the statute, in which suit he is a party, the law will not permit him to consent to be sued outside the district in which he has his official residence. The rights of the United States are not prejudiced by such a waiver.

[3] This brings us to a consideration of the case upon the merits. The question is whether the Commissioner of Patents should be directed to issue letters patent to the Barrett Manufacturing Company as assignee of August E. Schutte, claiming to be the inventor of certain improvements in street pavements.

An application for a patent was filed by Schutte on January 26, 1907. The application was duly considered by an examiner in chief in the Patent Office and denied. It was then passed on by the Commissioner of Patents and again denied. An appeal from the Commissioner was then taken to the Supreme Court of the District of Columbia (now Court of Appeals), and the application was again denied. Then

this suit was commenced in the District Court of the United States for the Southern District of New York asking that the court direct the Commissioner to grant the patent, and that application has been denied. The opinion of the District Judge was that the previous decisions were "very obviously right." It was his opinion that:

"Certainly no evidence has been presented to overcome the extremely strong presumptions raised by the formal and unanimous action of so many competent tribunals."

The Commissioner of Patents rested his adverse decision upon the decision in Re Groves, 200 O. G. 856, saying that the art cited being so old the difference of one year in the filing dates of the Schutte and Groves applications was inconsequential. The decision of the Court of Appeals of the District of Columbia was based on the same reasoning. The court said:

"This alleged invention, expressed in substantially the same claims, was before us on the appeal of Groves (In re Groves, 41 App. D. C. 316), and we then affirmed the decision of the Patent Office that nothing patentably novel was shown. The application in the present case was filed about a year prior to that in the Groves Case, but this fact in no way affects the situation. We agree with the Patent Office that no reason has been shown why the same conclusion should not be reached in this case as in that of Groves. We therefore affirm the decision."

It seems that Groves was a highway engineer of Ann Arbor, Mich., and in 1909 he laid in Ann Arbor a pavement of the exact character described in the Schutte application. Groves had no knowledge of Schutte or of his invention at the time this pavement was laid, or at the time his application was filed, about a year and a half later. Groves was not himself familiar with the highly technical subject-matter of patentable inventions, and like a great majority of inexperienced applicants, he believed his invention to be a great deal broader than it was, and his original specification did not cast much light on the invention.

The inventions of Schutte and Groves are identical, in that the pavements actually constructed by them are the same, but the disclosures of their respective applications are not identical.

Schutte is also a highway engineer and a man of long experience with patents. Further, he is connected with a manufacturing firm who make a specialty of highway construction materials, and have for many years devoted their resources to the development of pavements and highways. With these advantages, Schutte in his specification better defined the alleged improvement of his invention.

The pavement built by Groves preceded in point of time construction on a large scale by Schutte, and consequently the pavement which has attracted the attention of the highway engineers of the country is the Groves pavement, a sample of which is in evidence.

Groves' description of his invention showed no patentable difference from the prior art. There was no description of the nature of the concrete. He used the term as an alternative for macadam and thereby not only did not disclose a specific concrete foundation, but treated macadam as the equivalent of concrete. Furthermore, there is no description of the coating as a distinct surface layer, such as is dis-

closed by Schutte, except the functional statement that the surfacing coat will not flake off from the base; and there is no statement that the concrete must have a "clean stone surface." In fact, it is obvious that no such surface was regarded as essential, for it would be quite impossible to give a macadam road, composed as it is of unbound particles, a surface corresponding even remotely to a stone surface.

His description of the method of shaping the surface of the roadbed is applicable to concrete construction, but he states it as the method of surfacing macadam as well, while his description of the application of tar must be understood to mean that only so much of it is allowed to remain on the surface as is absorbed; the surplus being swept off to the gutters instead of remaining as an adhering layer, of measurable thickness or depth.

Schutte's alleged invention relates to the art of constructing pavements from Portland cement, stone, and sand, commonly known as concrete. It consists in the application to the surface of such a pavement of a thin layer of bituminous compound and the sprinkling or spreading and embedding of sand or small stone fragments into this thin layer of bituminous compound.

The ordinary granolithic pavements made by mixing stone and sand with hydraulic or similar cement are said to produce roadways which are too hard for horses and too slippery in wet weather, causing horses to injure their feet and hoofs and causing them to fall, and automobiles to skid. And, where the upper layer is composed of ordinary concrete, the roadway is said to be not quite so slippery; but it wears out very rapidly.

Schutte proposed to remedy that condition. His idea is that if a concrete surface composed of any proportion of stone, sand, and Portland cement, after having set hard, is covered with a thin layer of, say, one-eighth to one-quarter of an inch of relatively pure bitumen or similar cement, and if then sand or small stone chips are thrown upon the surface there will be produced a very suitable and desirable wearing surface—a surface rough enough to prevent automobiles from skidding, elastic and resilient enough to give a good foothold to horses and soft enough to deaden the noise produced by traveling vehicles.

He admits in his specifications that he is aware of the fact that bituminous compounds have been used to fill the honey combed portions of bituminous pavements, and also that, in some cases in reservoir construction, a coating of bituminous compound has been used to make the structure water tight; but he is not aware of roadways constructed of hydraulic or similar concrete treated with a bituminous composition as above stated, in order to produce a nonslippery, elastic surface and to eliminate the wear of the concrete.

He states that:

"A roadway produced according to my invention above described will have the strength and rigidity of concrete (making it possible to lay it on the worst possible soil) and will have the good qualities of a good bituminous pavement without its slipperiness and great cost. It can readily be seen how the cost of such a pavement will be much smaller than the cost of any known bituminous pavement, as the amount of bitumen used is very small and no plant is required for the production of the surface mixture, and so forth.

"To practice my invention, I lay upon the subsoil four to six inches of con-

crete (and in some cases even less) produced in any suitable proportion. I spread over this concrete after the same has set hard (or at any time during the period of setting) a layer of one-quarter of an inch of suitable relatively pure bituminous compound or a mixture of this composition with an amount of fine sand or dust. This can be applied by any suitable means. After the application of the aforesaid bituminous coating, I spread over its surface stone chips cold or hot, or sand, and allow these chips to either be ground in by traffic or forced in by rollers, tamps, or any other suitable means. In this manner I produce a pavement according to my invention having the qualities above described."

In the argument in this court the plaintiffs relied upon claims 2 and 3, which read as follows:

"2. A pavement composed of a relatively thick layer of hydraulic concrete which forms the body of the pavement, said layer having applied directly to its upper surface a relatively thin adhesive cushioning and sealing layer of bituminous cement with mineral matter embedded therein.

"3. A road pavement, comprising a rigid concrete base having a clean stone surface and a distinct surface layer of substantially pure bitumen of approximately one-eighth to one-quarter of an inch in thickness firmly adhering to said clean stone surface, and sufficient inert granular material, to afford a foothold for horses, embedded in the exposed face of said surface layer."

The invention involved in this appeal is a pavement intended for vehicular traffic on city streets and main traveled roadways generally. The pavement consists essentially of two parts, viz. a base of concrete of such strength and rigidity as to be laid directly on the soil, and a surface layer of substantially pure bitumen of one-eighth to one-quarter of an inch in thickness, uniformly covering the surface of the concrete and firmly adhering to it throughout. To insure a perfect and uniform adhesion between the concrete and the surface layer, the upper face of the concrete must, in the language of the inventor who personally drafted the original specification, be "a clean stone surface."

The bitumen is applied hot in liquid form to the concrete, and, after it has been evenly spread over the surface, coarse sand or stone chips are rolled or otherwise forced into the bitumen while still soft enough for them to be firmly embedded in its upper surface; the purpose of their use being to afford a suitable foothold for horses and sufficient tractive grip for the wheels of motor vehicles.

In the argument in this court, stress was laid upon the fact that Schutte's alleged invention is a "combination," not merely because its various factors unite in the production of the unitary result of an improved pavement, but also because the specific characteristics of each of the elements of the combination directly affect, and contribute to the successful working of, the other elements of the combination.

And we are informed by counsel that prior to the invention of the applicant a rigid concrete had never been successfully used in pavement construction except as a foundation between the soil and the pavement proper of brick, asphalt, wood, or other structural material. They say in their brief that:

"Without Schutte's coating the concrete is short lived, and of little value as a roadway. With it, as shown by the evidence, it produces a pavement equal,

if not superior to, the expensive asphalt pavements, and for a fraction of their cost."

In the court below, the plaintiffs' application was denied because of the Hubbell patent, No. 158,415. The application for that patent was filed on December 19, 1874, and it was granted on January 5, 1875. In his specification he stated:

"My present invention is an improvement upon the street pavement for which letters patent No. 115,475, dated May 30, 1871, were granted to me, and the nature of this invention is a process which consists in saturating the concrete which forms the wearing surface of the pavement with a thin body or solution of hot pitch or bitumen, so as to more firmly unite the particles of the concrete and prevent more effectively the formation of dust from the concussion of horses' feet and action of the wheels of vehicles which tend to pulverize and wear it."

He also declared:

"The concrete is composed chiefly of Rosendale or hydraulic cement, and to harden it most effectively is saturated with a solution of lime, though the lime, which is of itself one kind of cement, may be omitted, but the hydraulic cement should in all cases be used to form the wearing surface. There are various brands of hydraulic cement, and I do not confine my invention to any one exclusively. The Rosendale or other suitable and economical cement should be used."

And his claim was stated as follows:

"The improved process of making the surface of my pavement, consisting of combining or slushing and saturating the concrete surface with hot bitumen or tar by absorption, after the hydraulic concrete is laid or set, substantially as described."

The Hubbell pavement substantially consists of broken stone laid upon gravel or earth for a foundation, and bound together by cement and coal ashes or sand between the interstices of the stone, binding them together and forming a wearing surface immediately above the surface of the broken stone.

In the Hubbell patent, we are told the cement used was Rosendale cement which in 1874 counsel say was the only cement obtainable in the United States for road making, and that that was an entirely different thing from Portland cement. The claims make no mention of Portland cement, although the specification declares that the invention relates to pavements constructed from Portland cement, stone, and sand. The plaintiff called as an expert a graduate from the School of Mines at Columbia University, who had had experience as a consulting engineer on cement and concrete work, and who for a number of years had been inspector of asphalt and cement work for the District of Columbia. He testified that the first commercial pavements of Portland cement were laid about 1906, and that the first Portland cement factory was built in this country at Copley, Pa., in 1875. He also pointed out the difference between Portland cement and Rosendale cement, declaring them to be totally different, although he admitted that both are hydraulic cements. He testified that:

"When Portland cement sets in water, it sets to a hard stonelike material, while the natural or Rosendale cement, such as was used in Hubbell's time,

are set to chalklike material, and they harden very slowly. They could not have been used for paving surfaces, nor could a bituminous coating adhere to them on account of their chalkiness."

Portland cement was made 50 years before Hubbell, and, while it was expensive, it was not unknown in this country at the time Hubbell made his application.

And, while Hubbell refers to Rosendale cement, he did not confine himself to that, but declared:

"There are various brands of hydraulic cement, and I do not confine my invention to any one exclusively. The Rosendale or other suitable and economical cement should be used."

This certainly is broad enough to include Portland cement which is a hydraulic cement. They both operate in exactly the same way. It was well said by the District Judge that:

"If an earlier patent set forth as an ingredient in his patented compound sugar, and a later patentee suggested granulated sugar, for a similar compound designed for the same purpose, it would be impossible to discover invention in the light of the known art. I think the analogy applicable to this case."

When Hubbell's cement has "well set," he declares:

"I slush its surface with thin hot bitumen or pitch, and dust the surface of bitumen over with dry cement, and roll and sweep it on the surface to adhere to the bitumen, and thus more effectively hold the particles of cement together and prevent them as far as practicable from forming dust."

When Schutte's concrete has "set hard," he spreads upon it—

"a layer of one-quarter of an inch of suitable relatively pure bituminous composition, or a mixture of this composition with an amount of fine sand or dust. After the application of the aforesaid bituminous coating, I spread over its surface stone chips or sand and allow these chips to either be ground in by traffic or forced in by rollers, tamps, or any other suitable means. In this manner I produce a pavement according to my invention."

This court is of the opinion that Hubbell anticipated Schutte, and that the bill was properly dismissed.

Decree affirmed.

MILLER RUBBER CO. v. BEHREND et al.

(Circuit Court of Appeals, Second Circuit. February 28, 1917.)

No. 151.

1. PATENTS ⟸328—INVENTION—DESIGN FOR TOY BALLOON.
The Brucker design patent, No. 48,150, for a design for a toy balloon having the shape and appearance of a watermelon, *held* void for lack of invention.

2. PATENTS ⟸285—INFRINGEMENT—JOINDER OF CAUSES OF ACTION.
Under equity rule 26 (201 Fed. v, 118 C. C. A. v), which permits a complainant to join in one bill as many equitable causes of action as he may have against the defendant, a cause of action for infringement of a patent and one for unfair competition may be joined, where the necessary diversity of citizenship exists.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 445.]

3. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—"UNFAIR COMPETITION"—SIMILARITY OF GOODS.
The essence of "unfair competition" is fraud, which is a question of fact, and it is sufficient to make out a case to show that the natural and probable result of defendant's conduct is to deceive ordinary purchasers, buying under ordinary conditions, into taking his goods as those of complainant; but, while similarity is evidence from which an intention to deceive may be inferred, similarity alone is not conclusive as a matter of law.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81.

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

4. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION.
Both complainant and defendant made and sold toy balloons, which, when inflated, resembled a watermelon in shape and coloring; complainant being first in the field. Defendant sold only to jobbers and wholesale dealers. *Held*, that defendant was not chargeable with unfair competition, because of the shape or coloring of its balloons, those of both parties being copies of another object in that respect, nor because, without defendant's knowledge, street venders in some cases exhibited one of complainant's balloons, but delivered to their customers those made by defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106.]

5. PATENTS ⟸328—INVENTION—TOY BALLOON.
The Brucker patent, No. 1,136,932, for a toy balloon, discloses improvements in the valve mechanism, but such as required only mechanical skill to devise, and is void for lack of invention.

6. PATENTS ⟸165—CONSTRUCTION—REFERENCE TO SPECIFICATION.
The claim in a patent is the measure of the invention; but the claims are to be construed in the light of the specification, which may limit but cannot expand them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241.]

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

Suit in equity by the Miller Rubber Company against Albert Behrend and Joseph Rothschild, doing business as Behrend & Rothschild. Decree for defendants, and complainant appeals. Affirmed.

The plaintiff is a corporation organized under the laws of the state of Ohio. The defendants are citizens of the state of New York and reside in the city of New York. The defendants are charged with the infringement of letters patent No. 1,136,932, issued on April 27, 1915, and of letters patent No. 48,150, granted on November 16, 1915, both of which were issued to the plaintiff as assignee of Ferdinand F. Brucker. The first relates to a mechanical patent. The second relates to a design patent. Defendants are also charged with unfair competition in trade. Defendants deny the validity of both patents and rely on the prior art. It is also alleged that the design patent is void, in that the claim covers a device not provided for in the statutes of the United States as constituting proper subject-matter of a patent for an ornamental design. The District Judge dismissed the bill.

Otto Munk, of New York City (William F. Hall, of Washington, D. C., of counsel), for appellant.

Philip C. Peck, of New York City, for appellees.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff is a manufacturer of toy balloons, its sales amounting to about $150,000 a year. It appears that there are many toy balloon manufacturers throughout the country, and that the aggregate sale of such balloons runs into a substantial sum of money.

The balloons of the patent in suit are known as "watermelon balloons," because of the striped markings which bear a resemblance to the markings on watermelons, and because of their resemblance to watermelons as respects their shape. The balloon of the defendants is in shape claimed by them to represent a football, but it has dark blue stripings, which resemble the watermelon stripings used by the plaintiff on its balloons. The number of the balloons the defendants sold amounted to 100,000 or more a year.

The defendants have introduced in evidence 12 patents, granted prior to the patents in suit, to show that the alleged inventions of the patents in suit had been known in this country before the plaintiff's supposed invention or discovery. The toy balloon art, as shown by the record, dates back to the year 1896.

[1] In his specification for the design patent, Brucker claims to have invented "a new, original, and ornamental design" for toy balloons; reference being had to the accompanying drawing. The drawing has the shape of a watermelon, and the general appearance of the striping to be found in watermelons. This court decided in Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56, that:

"To sustain a design patent, the design must involve something more than mere mechanical skill. There must be invention."

See, also, Strause v. William M. Crane Co., 235 Fed. 126.

And in Denton v. Fulda, 225 Fed. 537, 140 C. C. A. 521, the court declared that there is nothing novel in a design which copies something well known in life. The design in that case was of a butterfly. In this it is of a watermelon. The one is as lacking in novelty as the other. There can be no pretense that making a balloon, or any other object, to look like a watermelon, involves invention. If we were to hold that it does, we should be compelled to include the whole catalogue of fruits and vegetables, and sustain a design for balloons made to

resemble a cucumber, a pumpkin, a cabbage, or a potato. To discriminate in favor of one against the other would be an arbitrary act. The design patent, No. 48,150, is void for want of invention.

This brings us in the same connection to consider the charge of unfair competition. In George Frost Co. v. Kora Co. (C. C.) 136 Fed. 487, 489 (1904), Judge Coxe, sitting in the Circuit Court for the Southern District of New York, held that defendant in an infringement suit could not have affirmative relief therein for unfair competition on the ground that it constituted a separate and distinct cause of action. This decision was affirmed without opinion by this court in 140 Fed. 987, 71 C. C. A. 19. And this court in New Departure Mfg. Co. v. Sargent & Co., 127 Fed. 152, 62 C. C. A. 266 (1903), had declared, speaking through Judge Lacombe, that:

"Of course, in this suit for infringement of a patent, we cannot inquire into the apparently unfair devices in the way of get up, ornamentation, etc., by which it is suggested that defendants are seeking to deceive the public into a belief that their bells are those of the complainant."

Counsel for defendants in their brief call attention to the above decision, and say that the charges of unfair trade cannot be considered, and that the plaintiff must stand or fall upon the validity of his patent. We do not doubt the correctness of the above decision. But the bill which unites these two causes of action was not objected to on that ground in the lower court. The Supreme Court of the United States has held in several cases that the objection that a bill is multifarious cannot be taken by a party in the appellate court. Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622 (1845); Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514 (1880). It was also declared in those cases that the court might take the objection, but that it would not do so unless it deemed such a course necessary or proper to assist in the due administration of justice. In the case now before us it may assist in the administration of justice as between these parties if we pass on the question of unfair competition which is raised by the pleadings and decided by the court below.

[2] There is however another and conclusive reason why this court should consider the question. This suit was commenced after the promulgation of the new rules in equity. Under rule 26 (201 Fed. v, 118 C. C. A. v), it is provided that the plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. That rule requires that, if there be more than one defendant, the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. Under this rule, provided the diversity of citizenship exists, and it does exist in this case, we see no reason why the plaintiff was not entitled to join in one bill its cause of action on the patent and its cause of action for unfair competition.

To establish the alleged unfair competition, evidence was introduced of sales made by street fakirs in the city of New York. The fakirs exhibited the balloon of the plaintiff, and when the sale was made they gave a small balloon in an envelope, which turned out to be the

balloon of the defendant. The isolated instances of the transactions with the street vendors was not in any manner brought home to the defendants. They sell only to wholesalers and jobbing houses, and are not to be held responsible for unscrupulous methods adopted by itinerant vendors to attract attention and sell their goods to the passing public, without a semblance of proof of knowledge of their practices brought to the attention of defendants. This testimony is of too flimsy a character to support a charge against the defendants of unfair competition. The gravamen of any unfair trade charge is fraud, and this testimony does not connect the defendants in any way with the vendors on the street.

[3] Unfair competition is a question of fact. Howe Scale Co. v. Wyckoff, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. To make out a case it is sufficient to show that the natural and probable result of defendant's conduct will be to lead the public to purchase his goods in the belief that they are the goods of the plaintiff. If the conduct would deceive the ordinary buyer, making his purchases under the ordinary conditions, it is unfair competition. And the law is that a wrongful imitation for a fraudulent purpose will be enjoined. International Silver Co. v. Rodgers Bros. Cutlery Co. (C. C.) 136 Fed. 1019; O'Grady v. McDonald, 72 N. J. Eq. 805, 66 Atl. 175; Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623. In 38 Cyc. 787, the law is correctly stated as follows:

"Mere similarity is not, as a matter of law, conclusive evidence of an intention to deceive. But such intent may be inferred, as a matter of fact, from similarity. Form, color, and general appearance may be considered. The greater the number of points of similarity, the stronger is the inference of an intentional imitation with intent to deceive."

[4] The defendant's balloons are substantially the plaintiff's in appearance, design and purpose. That the plaintiff cannot complain of the shape of the balloons of defendant cannot seriously be questioned. But whether the defendant should be permitted to stripe its balloons in a manner which is an obvious imitation of the plaintiff's, and which has no relation to the working or excellence of the balloon, is a different question, and not so easily answered. We think, however, that, as no one is entitled to a monopoly of a toy balloon made in imitation of a watermelon, the fact that one was the first to make and sell such a balloon as a novelty does not render its manufacture and sale by another unfair competition, where there is no attempt to deceive purchasers as to origin of manufacture by imitation of dress, mark, or label, but the likeness is in the article itself, because both are copies of another article. That was the rule laid down by the Circuit Court of Appeals in the Third Circuit in an opinion which reviews the prior cases, and in which the article involved was a desk telephone. Rice & Co. v. Redlich Co., 202 Fed. 155, 122 C. C. A. 442, 44 L. R. A. (N. S.) 1057. See, also, Steiff v. Bing (D. C.) 215 Fed. 204, 208. It appears to us that the principle announced by that court is sound, and that it governs this case in the matter now under consideration. The likeness complained of here is the likeness in the watermelon itself—in the stripes of the watermelon. There is no evidence, therefore, to support the charge of unfair competition in trade.

[5] The question as to the validity of the mechanical patent remains to be considered. The alleged invention is stated in the specification to relate to a toy balloon "which is inflated by blowing air through a mouthpiece and can be deflated at will by allowing the air to escape from the same." The specification declares that the principle object of the invention consists in applying to a balloon of the type described an improved form of valve mechanism for maintaining the air within the balloon when the latter is in its inflated condition, and also for controlling the escape of the air as the balloon is deflated, and that a further object consists in providing a detachable thimble-shaped cup or shell, adapted to be inserted and retained in the mouthpiece of the balloon, and having at its inner end a small check valve.

The claims are two. Claim 1 reads as follows:

"A toy balloon having a tubular neck or mouthpiece integral therewith, a conical cup-shaped member adapted to be inserted and retained in said neck, a self-closing valve formed in the inner end of said member, substantially as described."

Claim 2 reads as follows:

"A toy balloon having a tubular neck or mouthpiece, a cup-shaped member having inwardly tapering walls, said member being insertable in said neckpiece, a self-closing valve at the inner closed end of said member, and a reinforcing ring surrounding the outer end of said neck or mouthpiece, substantially as described."

It may serve a good purpose to state these elements separately as follows:

Claim 1.

(1) A tubular neck or mouthpiece integral therewith.
(2) A conical cup-shaped member adapted to be inserted and retained in said neck.
(3) A self-closing valve formed in the inner end of said member.

Claim 2.

(1) A tubular neck or mouthpiece.
(2) A cup-shaped member having inwardly tapering walls, said member being insertable in said neckpiece.
(3) A self-closing valve at the inner closed end of said member.
(4) A reinforcing ring surrounding the outer end of said neck or mouthpiece.

In passing on this patent the District Judge expressed himself as follows:

"I am inclined to think that the Gregory patent anticipated the patent in suit, but, whether it does or not, it is quite certain that, in the state of the art shown by the prior use and all the prior paper patents, what Brucker did did not amount to invention. It seems to me that he made what may be called an improvement of a character which does not topple over into the field of invention."

It is undoubtedly true that the most important patent of the prior art is the Gregory patent, No. 1,008,641, which was issued to Thomas M. Gregory on November 14, 1911. The Gregory patent has:

(1) A tubular neck or mouthpiece integral with the hollow body.
(2) A conical cup-shaped member.
(3) A self-closing or "self-sealing" valve on the inner end.

And a comparison of the specifications of the patent in suit and the Gregory patent shows how closely Brucker followed Gregory:

The Patent in Suit.	The Gregory Patent.
"The balloon comprises a hollow body *B* of thin rubber of pure quality and extreme elasticity, which will permit of its being inflated and being expanded to many times its normal size."	"The balloon comprises a hollow body *A* made of thin rubber of pure quality and extreme elasticity which will permit the body to be inflated and expanded to many times its normal diameter.
"It is 'provided with a tubular neck or mouthpiece *C* extending from one end. The outer end of the neckpiece *C* of the balloon is provided with a reinforcing ring *c*.'"	"I provide body *A* with a relatively short tubular nipple *2* having an annular bead *3* at the mouth thereof—both nipple and bead being of rubber and formed integral with the wall *4* of the balloon."
"The valve mechanism which is adapted to be inserted in the neckpiece *C* comprises a cup-shaped member *1*, open at its outer end and having a small valve port *2* at its inner end adapted to be closed by a small check valve *3*. * * * The walls of the cup-shaped member *1* taper inwardly toward the inner end of the neck *C*."	"I add a valve member *5* which is self-sealing in effect, and also particularly construct this valve member to co-operate with nipple *2* to permit radial expansion and longitudinal shortening thereof during inflation. Thus valve member *5* comprises a flat tube of rubber wherein the flat sides are permanently in contact, except when forcibly separated by inserting an instrument of any kind therein, such as a toothpick or match, or when expanded into more or less circular form by attachment to a supporting wall such as a mouthpiece or nipple *2* as in this case. That is to say, member *5* is expanded and kept open at one end by making a fixed or homogeneous union with round nipple *2*, bead *3* being quite stiff enough to retain a round shape, whereas the outer end of said tube is projected into the interior of hollow body *A* and remains flat. Furthermore, member *5* is thicker than body *A* and of a different grade of rubber, and an air-tight union is effected between the parts by steps involving the use of cement acid or other means."
"This form of valve mechanism tends to keep the walls of the mouthpiece *c* always in a distended condition."	"When the balloon is inflated more or less, valve member *5* is sealed or held shut by the compressed air within the balloon said air pressing the flat sides of the tube together. * * *
"The cup-shaped member *1* is inserted in the mouth-piece of the balloon and cemented therein."	"As a toy this balloon has decided advantages over other known balloons on the market, being inflatable and deflatable at the will of the operator and having inherent features to safeguard undue inflation and bursting. Moreover, the self-sealing valve will retain the balloon at any expanded diameter within the limits of safety as herein provided for."
"The valve, after the balloon has once been inflated, is held closed by the pressure of the air within, and in order to deflate the balloon it is only necessary to squeeze the neck *c* near its inner end."	

But the "self-sealing valve" of the Gregory patent is not the "improved form of valve mechanism of the patent in suit." The testimony shows that in order to deflate the balloon of the Gregory patent it was necessary to insert an instrument of some sort, such as a pencil or the like, into the tubular nipple or mouthpiece of the balloon. And the Gregory specifications are silent on the subject of the deflation of the balloon. The specifications allege that:

"Two novel features enter into the invention, comprising, first, the inflation of the balloon and withdrawal and shortening of the mouthpiece when sufficient or maximum inflation is attained; and, second, the self-sealing of the balloon during and after inflation."

The objects of the patent in suit are defined as follows:

"The principal object of the invention consists in applying to a balloon of this type an improved form of valve mechanism for maintaining the air within the balloon when the latter is in its inflated condition and also for controlling the escape of the air as the balloon is deflated. A further object consists in providing a detachable thimble-shaped cup or shell adapted to be inserted and retained in the mouthpiece of the balloon and having at its inner end a small check valve."

Again the specification states:

"In both forms of the invention the valve, after the balloon has once been inflated, is held closed by the pressure of the air within, and in order to deflate the balloon it is only necessary to squeeze the neck *c* near its inner end, so as to slightly dislodge either the valve *3* or *4* as the case may be. This form of valve mechanism tends to keep the walls of the mouthpiece *c* always in a distended condition."

The testimony is—notwithstanding the silence of the Gregory specifications—that originally it was claimed for the Gregory balloons that they could be deflated by squeezing; "but, when it was tried out, they found that it did not work properly, and now they explain how to use it by the use of an instrument to do that." This testimony comes from a witness who is connected with the business of the defendant and who was called by the plaintiff. Gregory originally thought his structure could be deflated by squeezing, but later found that this could not be done. He had failed to solve that problem. The plaintiff solved it.

We therefore think that the court erred in holding that Gregory anticipated the patent in suit. It is true that neither Gregory nor Brucker included this function in express terms in their claims.

[6] It is also true that the claims fix the extent of the protection furnished by a patent. The claim in the patent is the measure of the invention. National Enameling & Stamping Co. v. New England Enameling Co., 151 Fed. 19, 80 C. C. A. 485. The specification, however, may be referred to in construing the patent, and it is well understood that the claims are to be construed in the light of the specification; while the specification is never available for the purpose of expanding a claim, although it may be referred to for the purpose of limiting it. We so held in Fowler & Wolfe Mfg. Co. v. McCrum-Howell Co., 215 Fed. 905, 909, 132 C. C. A. 143. This principle should be applied to the claims of the patent in suit.

In claim 1 the patentee claims a self-closing valve "substantially as described," and in claim 2 he claims a self-closing valve "substantially

as described." Then in the specification he describes the valve as follows:

"To allow the air to come out when wished, the neck of the balloon at *i*, just above the end of tube *B*, is squeezed with the valve inside between the thumb and finger, and that end of the valve which is closed will be made to open and allow the air to be forced out by the contractile force of the rubber balloon."

In Figure 1 as described we have a stiff, rigid, celluloid or papier-maché neck inserted in the rubber orifice of the balloon. This terminates in *3*, which is shown at large in Figure 5. This end of the inflating apparatus as shown in Figure 5 is all of rubber. The essential facts about this mechanism are that *3* of Figure 5 is a gate or flap valve, and that both this gate and its immediately surrounding parts are of rubber and therefore compressible.

The modification shown in Figure 4 is what the patentee calls a tack valve. It can be seen that this apparatus has a certain amount of play between the stopper, shown as a crossbar inside the tube *1*, and the mushroom like extension numbered *4*. The air being blown through at *4* compresses the stopper against the conical interior of the tube; pressure on *4* lets air escape around the edges, while pressure on the other model opens partially the gate *3*.

But, even if the self-closing valve of the claims be read in the light of the description in the specification, we do not think the patent can be sustained. What the patentee did, in view of the prior use and all the prior patents, did not amount to invention. Nothing but mechanical skill was needed to make the simple changes the patentee made over the prior art.

Decree affirmed.

SCHRADE v. CAMILLUS CUTLERY CO. et al.

(District Court, N. D. New York. May 29, 1917.)

1. PATENTS ⟸271, 310(1)—INFRINGEMENT—ACTIONS—PLEADING.
The pleadings in an action, whether in equity or at law, should be so plain, specific, definite, and certain that the court may know, on inspection thereof, whether the suit is for infringement of letters patent or merely for damages for the breach of a contract relating to such patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 414–416, 507–514, 519.]

2. PLEADING ⟸54—REFERENCE FROM ONE CAUSE OF ACTION TO ANOTHER.
While the allegations of one cause of action may be made a part of other causes of action without repeating them, they must be specifically referred to and stated to be made a part of such causes of action, as though fully set out therein.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118.]

3. PATENTS ⟸191—RIGHTS OF PATENTEES.
A patent gives to the patentee and his assignees the exclusive right to make, use, and vend the patented article or thing.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268.]

4. PATENTS ⟸256—INFRINGEMENT—EFFECT OF LICENSE.
A licensee has the right to do the specific thing his license says he may do by way of making, using, and vending, and the licensee may infringe the patent, if he goes beyond the granted privilege.

5. PATENTS ⟸310(1)—INFRINGEMENT OF LICENSEE—PLEADING.
In a patentee's suit against a licensee with limited rights for infringement, it is proper to allege the patent, the license, the extent and limitations of the license, and the doing of acts constituting infringement not warranted or authorized by the license, and that by doing such acts the patent is infringed; but it should be made clear that infringement of the patent and of the patentee's rights thereunder are claimed and relied on.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–514, 519.]

6. PATENTS ⟸310(1)—INFRINGEMENT BY LICENSEE—PLEADING.
In a suit for infringement against a licensee, who was granted only the right to use the machine, and who agreed that he would not violate or infringe the patent, the bill of complaint alleged as a second cause of action that defendants had set up and used infringing machines in the same factory in which the licensed machine was used, and had caused the work done by such infringing machines to be mixed and confused with that done by the leased machine, and had not reported correctly the work done by the patented mechanism, and had diverted work from the licensed machine to the infringing machines, to plaintiff's damage in an amount which he was unable to state, but prayed a discovery thereof, and that plaintiff had requested a verified statement of the amount of work done on the licensed machine, but that defendants had neglected and refused to furnish it. As a third cause of action it alleged that defendants, in violation of the license, had assisted designing persons in an opportunty to examine and copy the leased machine, for the purpose of making infringing machines for defendants' use, and had aided and abetted others in making and selling the infringing machines, and that such acts were not only in violation of the agreement, but in violation of plaintiff's rights by aiding and inducing others to infringe the patent. *Held* that, if it was intended, as claimed, to plead three causes of action for infringement because the rule of damages might differ as to each, such causes of action were incomplete, defective, and equivocal, as each cause

of action should be complete in itself, with appropriate allegations as to damages for the infringement, and there should be no claim for damages for a breach of the agreement aside from the infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–514, 519.]

In Equity. Bill by George Schrade against the Camillus Cutlery Company and others. On motion to dismiss certain causes of action. Motion granted conditionally.

This is a motion by defendants to dismiss the second and third alleged causes of action, set forth in the bill of complaint, on the ground that, as complainant and defendants are and are alleged to be citizens of the state of New York and such causes of action are for mere breaches of contract, this court has no jurisdiction thereof.

A. Bell Malcomson, of New York City, for plaintiff.

McGowan & Stolz, of Syracuse, N. Y. (Benj. Stolz, of Syracuse, N. Y., of counsel), for defendants.

RAY, District Judge. [1] The pleadings in an action, whether in equity or at law, should be so plain, specific, definite, and certain that the court may know on inspection thereof whether the suit is for infringement of letters patent, or merely to recover damages for the breach of a contract relating to such patent.

[2] This bill of complaint contains three alleged causes of action, but the second and third causes of action are incomplete and defective, in that of themselves they allege no cause of action whatever, unless we read into them parts of the first cause of action. They make no reference to the first cause of action, and do not state that any of the allegations of such first cause of action, specifying them, are made a part of the second and third causes of action as though fully set out therein. This may be done without repeating the allegations of the first cause of action, if the allegations of the prior causes of action are specifically referred to and stated to be made a part of the second and third causes of action, as though fully set out therein. This defect may be cured in this case by suitable amendments. But the motion goes further than this, and claims that the second and third causes of action on their face are merely for damages for a breach of agreement or contract relating to such contract while the first cause of action is to enjoin alleged infringement of the patent.

[3-5] United States letters patent gives to the patentee and his assignees the exclusive right to make, use, and vend the patented article or thing. A licensee has the right to do the specific thing his license says he may do by way of making, using, and vending. Such licensee may infringe the patent, if he goes beyond his granted privileges, and hence it is proper, in alleging infringement of a patent by a licensee (with limited rights), to allege the patent, the license, and the extent and limitations of such license, and the doing of acts constituting infringement, not warranted or authorized by such license, and that by doing such acts the patent is infringed. However, it should be made clear that infringement of the patent and of the patentee's rights thereunder are claimed and relied on.

The paragraphs of the bill of complaint numbered I and II set out the residence and citizenship of the parties. Paragraph III reads as follows:

"That this action is brought to restrain the infringement of letters patent of the United States granted to the plaintiff and for violation of the plaintiff's rights under said letters patent contained in agreements with relation thereto entered into by defendants and an accounting and recovery of damages arising from said infringement and such violation of agreements."

The paragraphs numbered IV to X, inclusive, set out the patent in suit, and an agreement (Exhibit A) which leases to and licenses the defendant to use one specific machine and no more, the licensee to do certain things and render certain accounts, and also charges infringement by defendants, in that they have made and used and are still using other machines than the one mentioned in Exhibit A and leased thereby.

Paragraphs XI and XII read as follows:

"XI. As a second and separate cause of action, that the defendants have jointly and collusively made, set up, and used two of the aforesaid infringing machines in the same factory in which is used the machine of plaintiff, licensed for use and leased, under the terms of the agreement (Exhibit A), and as plaintiff is informed and believes have caused the work done by said infringing machines to be mixed and confused with work done by said leased machine, and have not reported correctly the work done by the patented mechanism of the leased machine, and have collusively and wrongfully diverted work from said licensed machine mentioned in Exhibit A to the aforesaid infringing machines, to the injury and damage of plaintiff, but to just what amount plaintiff is unable to state, but prays a discovery thereof.

"XII. That plaintiff has requested in writing that the defendants furnish him with a verified statement of the amount of work done by defendants on the machine licensed and leased to them, in accordance with the provisions of the agreement (Exhibit A), but defendants have neglected and refused to furnish him with such verified statement."

Paragraphs XIII and XIV read as follows:

"XIII. As a third cause of action plaintiff alleges on information and belief that defendants, in violation of their agreement (Exhibit A), have afforded and assisted designing persons in an opportunity to examine and copy the machine leased to them under the agreement (Exhibit A), for the purpose of making infringing machines for defendants' use containing the patented mechanism of the said leased machine, and have aided and abetted others in making, offering, and selling such infringing machines to persons using plaintiff's patented machines under license from him and other prospective licensees of plaintiff, and contributed to such other infringements.

"XIV. That the said last recited acts of defendants have been not only in violation of their agreement with plaintiff, but in violation of plaintiff's rights by abetting, aiding, and inducing others to infringe and violate plaintiff's exclusive rights under his said letters patent, greatly to the damage of plaintiff, amounting to the sum of at least $10,000, as plaintiff is informed and believes."

The agreement, Exhibit A, made a part of the bill of complaint, makes the compensation for the use of the licensed machine dependent on the earnings of such machine and the rendering of a proper and honest account thereof. The diversion of work from such licensed machine to other and to infringing machines is a violation of the defendants' contractual obligations, as is the failure to render an account as

required by the agreement. The license agreement referred to contains the following:

"The lessee agrees that he will not in any way violate or infringe or contest the validity of the letters patent, or patents which may be granted under which he is hereby licensed, or the sufficiency of their specifications or the validity of the title of the lessor to said patent."

And also this:

"The following are also agreed to by the parties as conditions of this lease and license: (a) That the power conveyed by this lease and license is only the right to use the said machine, and not the right to make or sell any machine embodying the inventions as aforesaid, or any of them."

[6] On the hearing of this motion to strike out the second and third alleged defenses, the complainant insisted that it was not intended to set up a cause of action to recover damages for a breach of the agreement referred to, but three causes of action for infringement of the patent, and that three causes of action were set up, as the rule of damages might differ as to each, and that in the pleading the one infringement of the patent and the facts showing the proper rule of damages applicable under the facts stated should not be confounded with the facts applicable to the others.

Assuming this to have been and to be the intent of the pleader, each cause of action should be complete in itself, with appropriate allegations as to damages for the infringement charged, and there should be no claim for damages for a breach of the agreement aside from the infringement of the patent. No reason is discovered why the whole matter might not have been alleged in one cause of action, as the acts of infringement seem to have formed one continuous and connected series of acts. However, this may not be so in fact.

The third cause of action seems to indicate a charge that defendants have given to other and third persons access and an opportunity to examine the leased machine for the purpose of copying same and making infringing machines, and have aided and abetted such other persons in making, offering for sale, and selling such infringing machines to others, who are using complainant's patented machines under a license from complainant, and also to prospective licensees of complainant, and by such acts have been guilty of contributory infringement. These acts are alleged to have been done in violation of the written agreement, as well as in violation of the complainant's rights secured by the letters patent. This third alleged cause of action as a whole seems to be intended as a charge of infringement in the mode pointed out. But both the second and third causes of action, as stated, are incomplete, defective, and equivocal in the respects stated.

The second and third causes of action are stricken out, unless, on payment of $10 costs of this motion, the complainant within ten days amends same, so as to make them complete, and more specific and definite and certain, and such as to show a cause of action for infringement, and not one for mere breach of contract.

The defendant has the right to know what the charge is that he is called upon to meet.

ROSASCO v. THOMPSON et al.

(District Court, S. D. Alabama. May 4, 1917.)

1. ADMIRALTY ⇐47—PROCESS—FOREIGN ATTACHMENT.
Admiralty rule 2 (29 Sup. Ct. xxxix) provides that in a suit in personam the mesne process may be by a simple warrant of arrest in the nature of a capias, or by warrant of arrest with a clause directing, should the defendant not be found, the attachment of his goods and chattels to the amount sued for. Rule 47 (29 Sup. Ct. xliv) abolishes imprisonment for debt on process issued out of admiralty courts, where by the laws of the state imprisonment for debt is abolished. *Held*, that the writ of attachment was a well-recognized process long before the rules were adopted, and the authority for its issuance does not depend upon the rules, and rule 2 does not abolish such writ in those cases where, by reason of the abolishment of imprisonment for debt, there can be no warrant of arrest.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403.]

2. ADMIRALTY ⇐47—PROCESS—FOREIGN ATTACHMENT.
A District Court, having admiralty jurisdiction conferred upon it, has power to issue a writ of attachment in a suit in personam, though it has adopted no rule as to such writ.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403.]

In Admiralty. Libel in personam by one Rosasco against S. K. Thompson and others. On suggestion by Palmer Pillans, as amicus curiæ, that the attachment should be discharged. Writ sustained.

Harry T. Smith & Caffey, of Mobile, Ala., for libelant.
Palmer Pillans, of Mobile, Ala., amicus curiæ.

ERVIN, District Judge. This was a libel in personam, filed by Rosasco against Thompson et al., alleging that the defendants were all nonresidents, for the breach of a charter party by Thompson et al. The prayer asks to have process in due form of law, according to the practice of this court in cases of admiralty and maritime jurisdiction, against the defendants, naming them, and, if they cannot be found, that an attachment may issue against their goods and chattels, and for relief.

Libelants moved for and were granted an attachment by the court, and now comes Palmer Pillans, as amicus curiæ, and suggests that the writ of attachment was improvidently issued and should be withdrawn, and the vessel seized under said attachment should be discharged from the seizure, because the only provision in the admiralty for a writ of this sort, like a writ of foreign attachment at the common law, is contained in the second admiralty rule, and there is provided only as a subordinate clause forming a part of a writ which is primarily a warrant of arrest of the person of the defendant, and no process or warrant for the arrest of the defendant can now be had, for that imprisonment for debt has been abolished by the Constitution of the state of Alabama. The matter was argued at length and submitted to the court for its ruling.

[1] The real question for consideration is whether or not the Supreme Court, in adopting the admiralty rules, so worded rule 2

(29 Sup. Ct. xxxix) as to deprive the admiralty court of the power to issue attachments against nonresidents? Rule 2 reads as follows:

"*In Suits in Personam, Nature of.*—In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias or by a warrant of arrest of the person of the defendant with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition in the nature of a summons to appear and answer to the suit, as the libelant shall in his libel or information pray for or elect."

This question was presented and ruled on in a very short opinion by my predecessor, Judge Toulmin, in the case of Chiesa v. Conover (D. C.) 36 Fed. 334, where he says:

"The only authority for the attachment of the property of the defendant in a suit in personam is found in rule 2 of the rules of practice, which provides that the mesne process may be by a warrant of arrest of the person of the defendant, and, if he cannot be found, for an attachment of his goods and chattels. The attachment of the vessel is not authorized except where the defendant cannot be found, and then, where the warrant of arrest is authorized under the law of the state where issued, it should be in the alternative; that is to say, it should direct, first, the arrest of the person of the defendant, and, if he cannot be found, then the attachment of the property. My opinion, therefore, is that the writ of attachment can be had only where a warrant of arrest of the person of the defendant is authorized. Such attachment can only issue where such warrant can issue, and be executed only where the warrant of arrest cannot be executed, because the defendant cannot be found. As a warrant of arrest of the person of the defendant is unauthorized and illegal under the law of this state, so is a writ of attachment, which is dependent on such warrant of arrest. In other words, as the right to the writ of attachment is dependent on the right to imprison for debt, and as by law imprisonment for debt is abolished in this state, it must follow that the writ of attachment in this case is without authority of law, and should be vacated, and it is so ordered."

I approach the discussion of this question with a great deal of hesitation, because of the great admiration I felt for Judge Toulmin, and my recognition of his great learning and his length of service upon the bench; but I feel that I should not be controlled by any admiration or respect I may have for him in making my ruling, but only by the reasons he may give for such ruling. I differ with Judge Toulmin in the very statement of the proposition. He says the only authority for the attachment of the property of the defendant in a suit in personam is found in rule 2 of the rules of practice. The writ of attachment in an admiralty court was a well-recognized process long before the rules of practice were adopted by the Supreme Court. In the case of Manro v. Almeida, 10 Wheat. 489, 6 L. Ed. 369, the Supreme Court says:

"The prayer of the libel contemplates two purposes: First, to compel appearances; second, to condemn for satisfaction. Now, although the latter may be only incidental, and not the primary object of the attachment, yet, if it be legal for the purpose of compelling appearance, the demand for the one purpose was no ground for refusing it for the other. * * * It is a mistake to consider the use of this process in the admiralty as borrowed from, or in imitation of, the foreign attachment under the custom of London. Its origin is to be found in the remotest history, as well of the civil as the common law."

In Atkins v. Fibre Disintegrating Company, 18 Wall. 303, 21 L. Ed. 841, the Supreme Court again says:

"The use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty, as in the case before us, has prevailed during a period extending as far back as the authentic history of those tribunals can be traced. 'Its origin is to be found in the remotest history of the civil as well as of the common law.'"

See Bremena v. Card (D. C.) 38 Fed. 144.

The writ of attachment against nonresidents, therefore, being a well-recognized process in the admiralty courts, of ancient custom and frequently used, the question for determination is: Was the Supreme Court authorized and has it in fact abolished its use by rule 2, except in conjunction with a warrant for the arrest of the defendant?

The act of August 23, 1842, in section 6 (5 Stat. at Large, p. 518, c. 188 [Comp. St. 1916, § 1543]) provides:

"That the Supreme Court [of the United States] shall have full power and authority, from time to time, to prescribe and regulate, and alter, the forms of writs and other process to be used and issued in the District and Circuit Courts of the United States, and the forms and modes of framing and filing libels," pleas, "answers and other proceedings * * * in suits at common law or in admiralty and in equity pending in the said courts."

It will be noticed in the first place that the authority and directions are to prescribe and regulate, and alter, the forms of writs and other process to be used and the modes of framing and filing the various pleadings. It is possibly true that this authority would authorize the Supreme Court to abolish recognized writs, provided this was expressly done by them; but certainly, in the absence of an express provision so declaring, we should not infer that because the Supreme Court, in enumerating the various processes which might be issued from the admiralty court, coupled a writ of arrest of the defendants with a writ of foreign attachment against his goods, that it was the intention of the Supreme Court to abolish the writ of foreign attachment if the writ of arrest of the person could not be executed. Rule 2, it will be noticed, does not undertake to abolish the writ of foreign attachment. On the contrary, the rule expressly recognizes it. It says:

"In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias, or by warrant of arrest of the person of the defendant with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for."

Now certainly the courts should not consider this reference to a writ of foreign attachment coupled with a capias against the defendant into a declaration by the Supreme Court that no foreign attachment should be issued if the capias was rendered unlawful by the laws of the state abolishing arrest for debt. We should be slow to hold that the Supreme Court intended to abolish such a well-recognized writ, or to forbid its use by the admiralty courts merely because, in a directory rule referring to the various writs which might be issued by the admiralty court, it has coupled this writ with a capias. When this rule was written, the Supreme Court recognized the writ of foreign attach-.

ment, and they also recognized the capias, and merely for the sake of convenience they coupled these two together in the language they used, without any thought, so far as I can see, of providing that the attachment should not be issued unless the capias might also be executed. I cannot bring myself to the conclusion that the Supreme Court ever meant by this coupling of these two writs in this rule to forbid the use of the attachment, unless the capias could be executed. I cannot bring myself to conclude that they ever contemplated at any time an abolition of the writ of attachment.

Not only is this true, but until the Supreme Court has expressly abolished the writ of attachment, or has expressly provided that it could only be used as a part of a capias, and in the event the capias could not be used then the attachment should not be executed, my conclusion would be that the admiralty court, whether there were or were not a rule of such court authorizing the writ, would be authorized to issue a writ of nonresident attachment. Judge Lowell, in Louisiana Ins. Co. v. Nickerson, 15 Fed. Cas. 967, says:

"The only question, therefore, is whether the Supreme Court, by giving authority to begin all personal actions by warrant to arrest, or an alternative to attach goods, etc., if the defendant cannot be found, intended to say that in cases where arrest was illegal, and so the defendant could not be found for any useful purpose of arrest, there should be no attachment. I think not. If this be the law, there is now no mode of obtaining security in a personal action, unless the debtor is not found. This may be in accordance with the law in some of the states, but it has never been so in New England. Such a construction would leave * * * a corporation defendant unprovided for in any event; for such person can never be arrested."

I agree with what Judge Lowell here says. It is true that he then proceeds to show that there was in this court a rule authorizing the writ of attachment to be issued, and he recognizes this rule and orders the attachment issued. He also calls attention to the fact that in the case of Atkins v. Fibre Disintegrating Company, Fed. Cas. No. 602, such attachment appears to have been issued. The ruling of the Supreme Court on appeal of that case has heretofore been referred to. I understand that, in addition to the rule referred to by Judge Lowell, most of the districts have a similar rule also; but there is no such rule here.

[2] Now, if the construction of rule 2 of the Supreme Court contended for is correct, then the admiralty courts have no authority to pass rules on this subject, because they will be in conflict with the rule of the Supreme Court. If, however, the rule of the Supreme Court leaves the admiralty courts authority to make rules on this subject, then this court has the right to issue this writ, whether there is a rule on the subject or not, because, the writ being one well recognized in the admiralty jurisdiction, the court, having admiralty jurisdiction conferred upon it, has also conferred upon it the power to issue the writ, whether it makes a rule on that subject or not. It seems that in many of the districts such writs are issued, either by rule or without, as shown by the following authorities: In re Devoe Mfg. Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764 (N. J., 1883); Workman v. New York City, 179 U. S. 552, 573, 21 Sup. Ct. 212, 45 L. Ed. 314 (N. Y.); Robins Dry

Dock Co. v. Chesbrough, 216 Fed. 121, 132 C. C. A. 365 (C. C. A., 1st Circuit, N. Y., 1914); In re Louisville Packet Co. (D. C.) 223 Fed. 185, 187 (Ky., 1915); Clarke v. New Jersey Steam Navigation Co., Fed. Cas. No. 2,859 (C. C., R. I., 1841); Pouppirt v. Elder-Dempster Shipping (D. C.) 122 Fed. 983, 988 (E. D. Va., 1903); The Alpena (D. C.) 7 Fed. 361, 363 (E. D. Mich., 1881); The L. B. X. (D. C.) 88 Fed. 290, 293 (W. D. Mo., 1888); Cushing v. Laird, Fed. Cas. No. 3508 (S. D. N. Y., 1848); Trask v. Pelletier, Fed. Cas. No. 14,146; Stonecutter Company v. Sears (C. C.) 9 Fed. 8, 10; Bouysson v. Miller, Fed. Cas. No. 1,709 (D. C. S. C., 1802); Louisiana Ins. Co. v. Nickerson, Fed. Cas. No. 8,539 (D. C., Mass., 1874).

Not only is this true, but when we come to study rule 2, which was enacted in 1844, it provided for the issuance of a writ of capias with a clause therein authorizing the attachment of the defendant's goods, if he be not found. At this time there was no provision in these rules abolishing imprisonment for debt. Then later, in 1850, the court adds the paragraph to rule 47 (29 Sup. Ct. xliv) by which provision is made that imprisonment for debt on process issuing out of admiralty courts is abolished in all cases where by the laws of the state in which the court is imprisonment for debt has been or shall be hereafter abolished. This certainly shows that the court never intended to prohibit the issuance of the writ of attachment, or to abolish its use. By the rule of 1850 it abolishes only that portion of rule 2 which authorized the writ of capias.

I am therefore of the opinion that this court has the authority to issue the writ of nonresident attachment, and therefore that its issuance in this case was not improvident, but that such writ was properly issued.

MOBILE & O. R. CO. v. WASHINGTON & C. RY. CO.

(District Court, S. D. Alabama. May 19, 1917.)

1. COURTS ⟸289—OVERPAYMENT OF FREIGHT CHARGES—ACTIONS TO RECOVER—JURISDICTION.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (Comp. St. 1916, § 8573), providing that any person damaged by any common carrier subject thereto may bring suit for damages in any District or Circuit Court of the United States of competent jurisdiction, a federal District Court had jurisdiction of an action by one carrier against another, which had demanded and been paid a portion of the freight on interstate shipments to which it was not entitled under the tariffs filed with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830.]

2. CARRIERS ⟸202—OVERPAYMENT OF CHARGES—ACTIONS TO RECOVER—RIGHT OF ACTION.

Interstate Commerce Act, § 6 (Comp. St. 1916, § 8569), prohibits any carrier from charging, demanding, collecting, or receiving any greater, less, or different compensation for the transportation of passengers or property between points named in the tariffs filed thereunder than the rate specified in such tariff. Section 8 (Comp. St. 1916, § 8572) provides that any common carrier, doing anything prohibited thereby, shall be liable to the persons injured for the full amount of damages sustained.

Section 9 authorizes any person, damaged by any carrier subject thereto, to sue for the recovery of the damages in any United States District or Circuit Court. Plaintiff and defendant had a joint tariff providing a through rate for shipments of lumber originating on defendant's line, but providing no through rate permitting such shipments to be stopped at the junction point and there dressed and then forwarded. On lumber so shipped defendant collected from the original shipper the local rate to the junction point, but demanded and received from plaintiff a portion of the freight from such junction point to destination; the rate in force on such shipments being the same from the junction point as from the point of origin on defendant's line. *Held*, that plaintiff was entitled to sue for the payments so made, though they were voluntary, and though in making such payments both plaintiff and defendant were guilty of an unlawful act, as plaintiff was damaged by such payment, and the statute is not limited to the regulation of contracts between shipper and carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915.]

At Law. Action by the Mobile & Ohio Railroad Company against the Washington & Choctaw Railway Company. On demurrers to complaint. Demurrers overruled.

Sidney Prince, of Mobile, Ala., for plaintiff.

Harry T. Smith & Caffey, of Mobile, Ala., for defendant.

ERVIN, District Judge. This was an action brought by the Mobile & Ohio Railroad Company against the Washington & Choctaw Railway Company to recover money which had been paid by plaintiff to defendant on a claim by defendant that it was entitled to a division of the freight on certain lumber shipments, which originated on the road of the Washington & Choctaw Company, and were delivered by it to the Mobile & Ohio Railroad Company, and transported by said Company over its lines.

The facts averred in the complaint are that both plaintiff and defendant were common carriers under the jurisdiction of the Interstate Commerce Commission, and that certain carloads of lumber were transported over defendant's line and delivered to plaintiff, who then transported same over its lines to point of destination, and that at the time of the transportation of this lumber there were in effect, published and filed, certain joint tariffs and supplements providing for and covering through movements of lumber from points on defendant's railway to destinations over plaintiff's lines; that there was not in effect at this time, or at the time of the payment of the demand sued for, any joint tariff between plaintiff and defendant which provided a through rate, permitting a shipment originating on defendant's line to be stopped at Yellow Pine, and there dressed and then forwarded over plaintiff's line to point of destination; that there was a blanket rate in force on such shipments, which made the charge the same from point of origin on defendant's line to destination, as from Yellow Pine; that the lumber was transported by defendant over its line to Yellow Pine and there stopped and dressed, and then forwarded over plaintiff's line to destination; that defendant collected from the original shipper the local rate for said lumber from point of origin to Yellow Pine; that defendant presented various bills to plaintiff, claiming some 3½ cents per 100 pounds out of the freight that had been collected by plaintiff for the transportation of said lumber by

defendant from point of origin to Yellow Pine, which bills were paid by plaintiff to defendant without any knowledge by plaintiff that defendant had collected from the shippers the freight from point of origin to Yellow Pine; that defendant was not entitled to any division of the freight collected by plaintiff for the transportation of this lumber; that demand had been made by plaintiff of defendant for repayment of this money, which demand was refused.

The act to regulate commerce provides, among other things:

"Sec. 6. No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction."

It is claimed by plaintiff that the collection from it by defendant was illegal under these provisions, and that the act gives it the right to recover the damage it had suffered, being the amount so paid by it to defendant.

Defendant demurs to the complaint, setting up that, under the allegations of the complaint, both plaintiff and defendant were guilty of an unlawful act, that the payment by plaintiff to defendant was voluntary, and that the court has no jurisdiction of the subject-matter of the suit. There are some other grounds of demurrer, as to the sufficiency of the allegations of the complaint, not necessary to be here considered.

[1] Section 9 of the act disposes of the demurrer for want of jurisdiction. Under the facts alleged, the other demurrers would be good, unless the provisions of this act take the facts out from the general rule.

[2] It is conceded by the defendant, where suits are brought by the shipper to recover an overcharge which has been made by a common carrier, that notwithstanding the fact that the money may have been paid by the shipper with full knowledge that its exaction by the carrier was illegal, and notwithstanding the terms of the contract between

the parties, the effect of the act is to make its provisions a part of the contract of carriage, and hence, under the terms of this act, a recovery could be had. But it is contended that the act does not go as far as the plaintiff claims it does, and that where one carrier demands of another carrier more than the share of the freight that the demanding carrier is entitled to, and this demand is paid by the carrier on whom the demand is made, there can be no recovery under the provisions of the act by the one carrier from the other. The whole question depends on the construction of the act.

It will be noticed, in the language of section 8, that in case any common carrier shall do, or cause to be done, any act or thing prohibited by this act, that such carrier shall be liable to the person injured for the full amount of damages sustained in consequence of such violation of the provisions of this act. Section 9 gives right of action to any person claiming to be damaged by any act of the carrier, and provides that suit may be brought in any District Court of the United States of competent jurisdiction. The provisions quoted from section 6 provide:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person, any privileges or facilities in the transportation of * * * property, except such as are specified in such tariffs."

The provision just quoted prohibits the collection by the carrier of a greater or different compensation for the transportation of property than the rates specified in the tariff which may be filed. In this case the allegation is made that this defendant had already collected from the shipper the local rate from point of origin to Yellow Pine, and that thereafter this defendant again collected from plaintiff 3½ cents per 100 pounds to cover the share which it claimed as its portion of the freight for this same haul from the point of origin to Yellow Pine. Certainly, it needs no argument to show that to collect a double fare, or to collect one time as a local rate from the shipper, and to again collect for the same service as a portion of the interstate shipment from point of origin to point of junction on plaintiff's line, is a collection by defendant of a greater compensation than provided for in the rates filed and published according to law.

The second payment having been made by plaintiff, and, under the averments of the complaint, the plaintiff being entitled to all of the freight charges from Yellow Pine to point of destination, certainly plaintiff has been damaged by this payment to defendant to the extent of this payment. Even if the published rates had allowed milling in transit, the defendant, having already collected from the shipper its portion of the freight, would have no right to again collect from plaintiff for the same service.

It will further be noticed that section 6 says:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property."

The language is broad, and does not limit the receipt for carriage of the freight to the receipt from the shipper. The language embraces all payments of freight by any person, and includes in its terms, it seems to me, the various carriers over whose lines a shipment may pass, as well as the shipper and the carrier to whom payment is made by such shipper. I can see no reason to limit this language to transactions between the shipper and the carrier, when the language has not been so limited by the act. Certainly the language is broad enough to embrace payment by one carrier to another over whose lines the freight moves. If the act is, by its terms, made a part of every contract of affreightment between the shipper and carrier, then it seems to me it is also made a part of every contract between the various carriers over whose lines the freight moves.

The act on its face shows all through it that its purpose was not merely to regulate the contracts between shipper and carrier, but, as its title imports, was to "regulate commerce," and it regulates this commerce as between all the parties to a shipment of freight over whose lines such shipment passes. Practically the same question raised by the demurrer is presented in the case of Pennsylvania Railroad Co. v. International Coal Co., in 173 Fed. 7, 97 C. C. A. 389, where a shipper was seeking to recover for an overcharge, and the Third Circuit Court of Appeals used the following language:

"The next assignment of error raises the question whether the plaintiff can maintain this action, in view of the fact that, with knowledge that it was being charged a higher rate for its free coal than other shippers were charged for contract coal, it nevertheless paid the freight without protest. It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful. Thus section 2 provides: 'Such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful'—and creates a statutory right of recovery, not of the freight paid, but of damages, viz.: 'Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.'

"From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by section 8 on the carrier who shall 'do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful,' and, we may add, having conferred such right of action without imposing the precedent condition of protest, it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in United States Bank v. Bank of Washington, 6 Pet. 17, 8 L. Ed. 299, where it was said: 'Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.'"

It seems to me that this decision determines the questions here raised, and as the right of action under the terms of the shipping act is not limited to shippers, but is given to any person who may be damaged, the demurrers are therefore overruled.

UNITED STATES v. HILLSDALE DISTILLERY CO.

(District Court, D. North Dakota. May 31, 1917.)

1. INTOXICATING LIQUORS ⟸138—OFFENSES—LABELING SHIPMENTS—KIND OF LIQUOR.

Under Penal Code (Act March 4, 1909, c. 321) § 240, 35 Stat. 1137 (Comp. St. 1916, § 10410), requiring interstate shipments of spirituous, vinous, malted, fermented, or other intoxicating liquor to be so labeled as to plainly show the nature of their contents and the quantity contained therein, it was sufficient to describe the contents as intoxicating liquor, without specifying the particular kind of liquor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148.]

2. INTOXICATING LIQUORS ⟸138—OFFENSES—LABELING SHIPMENTS.

Under Penal Code, § 240, requiring interstate shipments of intoxicating liquor to be so labeled as to plainly show the nature of their contents, any attempt to evade the law, by failing to set forth the particulars truthfully, or to disclose them plainly, or any attempt to cover up with advertising matter the facts which the law requires the label to reveal, so as to readily catch the eye, violates the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148.]

The Hillsdale Distillery Company was indicted for an offense. On demurrer to the indictment. Demurrer sustained.

M. A. Hildreth, U. S. Atty., of Fargo, N. D.
Fowler & Green, of Fargo, N. D., for defendant.

AMIDON, District Judge. Defendant was indicted for violating section 240 of the Penal Code. The indictment charges that it shipped a package containing intoxicating liquors from St. Paul, Minn., to Tolna, N. D., without such package being labeled on the outside cover, so as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein. Defendant demanded a bill of particulars, which should set forth the label. The government filed such a bill, attaching the label taken from the package of intoxicating liquors as an exhibit. Defendant then demurred to the indictment, as explained by the bill of particulars, upon the ground that it failed to state a public offense, and the case is now submitted on this demurrer.

The label is printed in clear, black type on a yellow background. All the lettering is in small capitals, except defendant's name, which is in large capitals. The name of the consignee is written on the label by typewriter. The quantity of liquor, "2⅛" is also written by typewriter in front of the printed word "gallons," so that the section of the label dealing with the contents of the package reads, "2⅛ gallons intoxicating liquor." This statement is plain in type, and is as conspicuous as any other matter contained in the label, except the words "Hillsdale Distillery Co." It stands immediately opposite the name of the consignee, and is framed in black lines, so as to bring out the statement clearly on the face of the label.

[1] No point is made by the government that the label is not

"plain," or that it does not correctly state the quantity contained in the package. The indictment rests upon the ground that the use of the words "intoxicating liquor" does not adequately describe "the nature of its contents," within the requirements of the law, and counsel for the government urges that the label should descend to particulars, and specify the kind of intoxicating liquor, such as beer, whisky, brandy, wine, or champagne, and state the quantity of each if more than one kind of liquor is contained in the package. I do not think this is a sound interpretation of the law. The statute deals with intoxicating liquor. That term covers all kinds of liquor which it mentions. Any shipment of liquor which comes within the term "intoxicating" must comply with the provisions of the law. I am unable to discover any public purpose that would be promoted by requiring the label to descend into details. On the contrary I can see many practical objections. More than one kind of intoxicating liquors may be placed in the same package. Other cases submitted to the court with this case show that practice not to be uncommon. It would be quite impracticable to set forth in a label an invoice of different kinds of liquor, showing the quantity of each. Further, the requirement of clearness would be greatly promoted by printing the label, instead of using either script or typewriting. It would be impracticable, however, to use printing, if the label is required to specify several kinds of liquor, which would vary both in quantity and kind with different shipments. The limitations of size of the label for different packages might also forbid the setting out of details in the label, if the requirement of the law that it shall "plainly show" the matters specified is also complied with. If it were held that the label must contain an invoice of the different kinds of liquor in the package, it is manifest that such a label would frequently be impractical in size, or fail to be "plain" in its disclosures. In my judgment, therefore, the specification "intoxicating liquor" is a sufficient disclosure of "the nature of the contents" of the package to satisfy the law.

It is impossible to lay down any universal rule that will be applicable to all labels. Each case arising under the statute will have to be dealt with according to its peculiar features. In several cases that recently came before this court the word "liquor" was the only disclosure as to the nature of the contents of the package, and this word was either written on the back of the label, or written or printed so as to conceal, rather than disclose, what the package contained. Those labels were held to be a violation of the law.

[2] The statute requires that the particulars it mentions shall be "plainly" shown on the label. Any attempt to evade the law by failing to set forth the particulars truthfully, or to disclose them plainly, falls within the condemnation of the statute. The label should be devoted to disclosing the facts mentioned in the statute, and not to advertising. Any attempt to cover up with advertising matter the facts which the law requires the label to reveal, so as readily to catch the eye, violates the law. Section 240, however, does not contemplate that the label shall be made impractical in the channels of commerce, and in my judgment this would be the result of requiring it to set

forth an invoice showing the quantity and particular kind of different varieties of intoxicating liquor.

The demurrer is therefore sustained.

POSTAL TELEGRAPH CABLE CO. v. CITY COUNCIL OF AUGUSTA.

(District Court, S. D. Georgia, N. E. D. May 14, 1917.)

TELEGRAPHS AND TELEPHONES ⊜10(12)—RIGHTS IN UNDERGROUND CONDUITS.

Under a city ordinance requiring all telephone and telegraph wires, on or over the streets of the city, or thereafter installed, to be placed underground in conduits of sufficient number to accommodate existing wires and the natural increase for a reasonable time in the future, and providing that all excavations, constructions, etc., should be under the ordinances of the city, and under the supervision and control of the commissioner of public works, where a telegraph company did not utilize all of the space in its conduits with its wires, the city could not appropriate such space for its wires, and then deny the telegraph company the right to use it for wires subsequently installed, though no express authority had been granted to the company to lay the conduit on the particular street.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6.]

In Equity. Suit by the Postal Telegraph Cable Company against the City Council of Augusta. Decree for plaintiff.

C. E. Dunbar and Dunbar & Elliott, all of Augusta, Ga., for plaintiff.

I. S. Peebles, Jr., City Atty., of Augusta, Ga., for defendant.

SPEER, District Judge (orally). The ordinance upon which the complainant relies is as follows:

"Sec. 195. Within ten years from November 4, 1901, all telephone, telegraph, and electric light wires of all kinds, now on or over, or hereafter placed on or over, the streets of the city of Augusta, within the fire limits, except trolley and feed wires of electrical car lines, shall be placed and kept underground, as hereinafter required. Such of said wires as are required placed underground as may be installed within said ten years shall be so placed within said period; such as may be installed after the expiration of said period shall be so placed upon installation.

"Sec. 196. The wires required placed underground in the preceding section shall be placed in terra cotta conduits (or conduits of other first-class or standard material, laid in such manner, and with the joints, so constructed, as to be first-class in every particular). The manholes shall be safely covered, and while open shall be guarded by a substantial iron railing, and, if at night, by lights also. Such conduits shall be laid in sufficient number, not only to accommodate the existing wires, but the natural increase for a reasonable time in the future. All excavations, constructions, repairs, and renewals shall be done under the existing or future ordinances of the city of Augusta, and under the supervision and control of the commissioner of public works of Augusta."

Now, within the ten years the complainant obtained authority from the proper representative, from the commissioner of public works in Augusta and constructed this conduit. It utilized in part some of its wires, but did not utilize it in toto. The city authorities, finding there

was space there for occupancy by its own wires, appropriated it for that purpose, and then, it seems to the court, quite arbitrarily forbade the Postal Company to exercise the power which had been granted by the ordinance of 1901. That ordinance obviously looks, not only to the wires that were then to be laid by these various telegraph and telephone companies, but to those which might be needed, because of the increase of their business.

It is said that there was no express authority to lay the conduit on this particular street. That may be true, but the ordinance is general, and in its operation obliges the telegraph and telephone companies to lay such wires as may be neccessary for their business underground. To this end this particular conduit was constructed. If the city had any objection to it, it ought to have expressed it at the time the company was laying it. That it did not have such objection is obvious from the fact that no expression of objection was made.

It is said that there was no express grant for that particular street, but the grant was made by the original ordinance for all the streets. That is what was implied, and, as I understand, is what was expressed. The instrument not only implies, but requires, all wires to be placed underground. It grants the authority to use its discretion to lay these wires in such manner as may be prescribed by the city authorities. I therefore think it is very clear that the city had no right to take this conduit, and use it for its own purpose, and exclude the Postal Company from any use of it whatever. It is said that the use by the Postal Company would interfere with the wires of the city, but the weight of the evidence is that this is not the fact; but, if true, the city would not have authority to appropriate the conduit of the Postal Company, and then, because of its own wrong prevent the use by the Postal Company, for the reason that the Postal Company would interfere with the wires already placed there by the city. I think, however, gentlemen, that this is a case for settlement. I think you can very well arrange this matter, and consent to the Postal Company putting its wires in.

The court directs that an order be taken authorizing such agreement, if that be possible, and, if not, that the city be enjoined from any interference with the officers of the Postal Company in placing its wires in its own conduit, or with the wires when so placed.

CONTINENTAL TRUST CO. v. BUTTS COUNTY et al.

(District Court, S. D. Georgia, W. D. May 15, 1917.)

REMOVAL OF CAUSES ⊂=31—RIGHT TO REMOVE—NECESSARY PARTIES.

A county in Georgia issued a series of warrants, and was subsequently induced to issue another series for the same consideration. The holder of the second series brought suit against the holders of the first warrants, and also against the county for equitable relief. *Held* that, if the whole matter was to be adjusted in one proceeding, as it should be, the county was both a proper and a necessary party, since it was entitled to be heard as to the legality of the second series of warrants, and also as to the propriety of a part payment which had been made on the first

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

series, and hence the cause was not removable from a Georgia state court to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71.]

In Equity. Suit for equitable relief by the Continental Trust Company against Butts County and others. On motion to remand. Cause remanded.

Robert C. & Philip H. Alston, of Atlanta, Ga., for plaintiff.
E. J. Reagan, of McDonough, Ga., for defendant Butts County.
T. B. Higdon, of Atlanta, Ga., for other defendants.

SPEER, District Judge. This is a case where Butts county, Ga., issued warrants of a certain series to the Salisbury Metal Culvert Company, a North Carolina corporation, for material furnished for the improvement of its roads. It is alleged that it was subsequently induced to issue another series of warrants for the same consideration. The latter series is held by the plaintiffs here. They brought suit in the superior court of Butts county against the holders of the first warrants, and also against Butts county.

It is quite impossible, as the court understands this record, for the court to do complete equity, in the absence of Butts county as a party. Butts county is entitled to be heard as to the legality of the second series of warrants, and also as to the propriety of a part payment of 25 per cent., which it has made on the first series. It is therefore a proper party; in the opinion of the court, it is also a necessary party, if the whole matter is to be adjusted in one proceeding, and of course the law abhors a multiplicity of actions.

All the parties are before the superior court of Butts county, and the case ought not to have been removed. Two of the defendants are citizens of other states, and the essential Butts county is a citizen of this state. For these reasons, I feel obliged to direct that the cause be remanded.

In re KNAPP BROS. et al.

(District Court, N. D. New York. May 31, 1917.)

JUDGMENT ⊂⊃828(3)—CONCLUSIVENESS—MATTERS CONCLUDED.

Petitioners sold land to U., who told them to send the deed to the bankrupts' private bank, and they would receive their money. They sent it to the bank, accompanied by a letter asking the bankrupts to put the money on interest and send a check. U. had no money in the bank, but was organizing a corporation, and one of the bankrupts drew a check, purporting to be that of the corporation, marked it "Paid" and sent petitioners a certificate of deposit for the amount. The bankrupts were then insolvent, but did not fail for some time, during which, so far as appeared, petitioners could have obtained their money on the certificate of deposit. After bankruptcy the trustee recovered judgment against the corporation for the amount of such check, with interest, as for an overdraft. Petitioners sued U. and the corporation in the state court, which decided against them, holding that they received from the bank just what they requested. *Held* that, in the face of this judgment, there was no

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

theory on which the bankruptcy court was authorized to direct the trustee to assign the judgment recovered by him to the petitioners.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1507, 1508, 1515.]

In Bankruptcy. In the Matter of Knapp Bros., a copartnership, and Charles J. Knapp and others, individuals, bankrupts. On application by Ella J. and Nellie E. Wheaton for an order directing the trustee to assign a certain judgment to the petitioners. Application denied.

Vere H. Multer and R. F. Bieber, both of Binghamton, N. Y., for petitioners.

E. D. Cumming, of Deposit, N. Y., and Archibald Howard, of Binghamton, N. Y., for trustee.

RAY, District Judge. An order of reference was made to a special master, with directions to take evidence and report same to the court with findings of fact. This has been done. There is no pretense that the petitioners, Ella J. and Nellie E. Wheaton, ever owned the judgment or the cause of action on which it was obtained. The claim to the relief demanded is based on equities growing out of the following transactions:

I. September 30, 1908, said petitioners were the owners in fee of certain premises in the village of Deposit, Broome County, N. Y., of the value of $2,300. The Deposit Theater Company, of Deposit, N. Y., was not then incorporated, but was at a later date. One Daniel G. Underwood represented certain interests and interested parties which later became the Deposit Theater Company. In fact, he was not agent for any one; but he desired to get hold of the property for the purpose of transferring it to such company when organized. He negotiated for the purchase of said property with a view to such transfer later, and such negotiations resulted in the execution of a deed by said petitioners to him. He told them to send the deed to the Bank of Knapp Bros., private bankers, and they would get the money. Underwood had no account or credit or money in the bank.

II. On or about September 30, 1908, the deed was sent to the bank, accompanied by a letter written by one of the petitioners, but representing both, and which reads as follows:

"Binghamton, N. Y., Sept. 30/08.

"Mr. C. Knapp—Dear Sir: Find inclosed deed for house and lot. Please hold the same in your possession, until the sum of $2,300 is paid you by Dan Underwood. Would like the amount put on interest in your bank, and check sent to us for same.

Miss Nellie E. Wheaton.
"Mrs. Ellen J. Wheaton."

C. Knapp was one of the firm of Knapp Bros. No money was paid or left at the bank by Underwood, or any one for him; but Knapp, knowing the purpose of the transaction, arbitrarily caused a check to be drawn, reading as follows:

"Deposit, N. Y., Oct. 8, 1908. No. ———.

"Knapp Brothers, Bankers, Successors to the Deposit National Bank:

"Pay to the order of Cfs. for E. J. or N. E. Wheaton in payt. of Deposit Property, $2300.00, Twenty-Three Hundred Dollars.

"Deposit Theater Co. to be
"C. P. K. by L. D. H."

—marked across the face by stamp: "Paid Oct. 9, Knapp Bros., Bankers, Deposit, N. Y.," and charged it to the Deposit Theater Company, not then incorporated or organized, and directed an account to be opened with such company. Such an account was placed on the books, but no money was paid or deposited by any one. The bank in fact was insolvent at the time.

On the same day Knapp Bros. made out and sent to the petitioners a certificate of deposit reading as follows:

"$2,300.00. Deposit, N. Y., Oct. 8, 1908.

"Knapp Brothers, Bankers, Successors to the Deposit National Bank.

"Mrs. Ellen J. Wheaton has deposited with this bank twenty-three hundred dollars, payable to the order of Ellen J. or Nellie E. Wheaton, on return of this certificate properly indorsed. Interest at the rate of four per cent. per annum if left six months.

"No. 14,273. Knapp Bros., H.

"Certificate of deposit, not subject to check."

Indorsed: "Ellen J. Wheaton."

The petitioners were ignorant of these transactions at the bank and of its insolvency; but, as seen, they received the obligation of the bank in the above form.

III. In January, 1909, Underwood and wife conveyed said premises to the Deposit Theater Company, then organized. The theater company paid nothing to Underwood or the bank for such premises, nor did any other person, or in consideration for such credit to Underwood, or for such certificate of deposit. The said Knapp Bros. continued in business until the close of business April 8, 1909, when they failed.

IV. The result was the Deposit Theater Company had the petitioners' real property, of the value of $2,300; the bank received nothing, was insolvent, and the petitioners had such certificate of deposit, substantially worthless. It will pay a small dividend in bankruptcy.

V. In July, 1910, one Gregory, as trustee in bankruptcy of Knapp Bros., both as a firm and as individuals, recovered a judgment in the Supreme Court of the state of New York against said theater company for a purported overdraft, the amount of such check and interest, viz. $2,566.57, and same was docketed and became a lien on such premises. This is the judgment which the petitioners seek to have assigned to them.

VI. The petitioners brought an action in the Supreme Court of the state of New York against Underwood and wife and said theater company, setting out the facts, in the main, demanding judgment for the unpaid purchase price of such premises, and demanding that it be declared a lien prior to such judgment last referred to. The petitioners were defeated in that action; the Supreme Court holding that the petitioners got from the bank of Knapp Bros. what they requested—that is, credit with that bank for the purchase money. That court ignored the fact that the bank received nothing and was insolvent at the time.

In face of this last judgment and decision of the Supreme Court of the state, I fail to discover any theory on which this court can direct the trustee in bankruptcy of Knapp Bros. to assign to the petitioners

the judgment against the theater company recovered on the alleged overdraft of said theater company. It was not recovered on any indebtedness of the theater company to the petitioners, but on an alleged indebtedness of that company to the Knapp Bros. (private bank). True, Knapp Bros. were insolvent, and in fact received nothing for the delivery of the deed to Underwood, and he received nothing for deeding the property to the theater company and paid nothing to the bank, but an obligation of the bank (Knapp Bros.) to the petitioners was created by the check credit given and the certificate of deposit, and subsequently the theater company acknowledged its liability to the bank, and the judgment resulted. The petitioners could have demanded, and, so far as appears, could have received, their money of the bank on the certificate of deposit at any time prior to its failure. That liability of the bank, Knapp Bros., now in bankruptcy, has not been denied or questioned by the trustee, and, so far as appears, the situation of the petitioners is the same as if the money had been paid to the bank by Underwood or the theater company. True, the directions to Knapp Bros. were to deliver the deed to Underwood when and only when $2,300 was paid by him, but then followed this:

"Would like the amount put on interest in your bank and check sent to us for same."

This meant, of course, the sending of a certificate of deposit or its equivalent and the creation of an indebtedness of the bank to the petitioners. There is no evidence or suggestion that the nonreceipt of the $2,300 by the bank had anything to do with the insolvency of the bank or its failure; that is, the violation of the duty of the bank to the petitioners in delivering the deed without payment of the money by Underwood is not shown to have resulted in any loss or damage to the petitioners. Clearly the petitioners have a claim against the bank (Knapp Bros.); but the Supreme Court has decided, as stated, that the petitioners had and have no claim against Underwood or the theater company or the property.

The application is denied.

KNAPP et al. v. BULLOCK TRACTOR CO.

VANCE v. CHICAGO PORTRAIT CO. et al.

(District Court, S. D. California, S. D. May 19, 1917.)

Nos. 545, 570.

1. COMMERCE ⇐81—FOREIGN CORPORATIONS—LIABILITY TO BE SUED.
That a foreign corporation is engaged in interstate commerce does not render it immune from the assertion of jurisdiction by the state courts in any state in which it is engaged in doing business, and in which proper provision is made by law for the assertion of jurisdiction over it.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 45.]

2. CORPORATIONS ⇐642(1)—FOREIGN CORPORATIONS—"DOING BUSINESS"—WHAT CONSTITUTES.
A foreign corporation is "doing business" within a state, where it is engaged in a more or less continuous effort, not merely casual, sporadic,

or isolated, to conduct and carry on within such state some part of the business in which it is usually and generally engaged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521.

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

3. CORPORATIONS ⊜642(4)—FOREIGN CORPORATIONS—DOING BUSINESS—WHAT CONSTITUTES.

An Illinois corporation was selling farm tractors in California through resident sales agents, who were given exclusive territory, in which they were required to solicit and procure orders. Their contracts required them to receive all goods shipped, to deliver, set up, and start every machine sold, and instruct the purchaser how to adjust it. and to be responsible for all tractors purchased. Orders for machines provided that they were not to be valid until accepted by the company, and contained a warranty and an agreement to furnish free of charge any part proving defective within one year, and by its agreement with its agents the company agreed to furnish a supply of repairs or spare parts. The company reserved the right to make sales at the San Diego exposition, and within two years its president had been in the state superintending and directing the management of its affairs, and various directors, employés, and agents, including its general manager, had assisted in demonstrating, operating, and repairing tractors, and on one occasion a sale had been made by the general manager. *Held*, that the corporation was doing business in California.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2524.]

4. CORPORATIONS ⊜642(4)—FOREIGN CORPORATIONS—DOING BUSINESS—WHAT CONSTITUTES.

An Illinois corporation was carrying on the business of enlarging portraits and selling frames under a system of contracts providing for the employment of district managers, road managers, solicitors, etc., to secure orders for enlarging portraits, and to secure the purchase of and payment for frames in which portraits were contained; its annual business in California on the sale of frames exceeding $10,000. It had a road manager in California, who had general supervision of the soliciting and securing of orders, and of the work of salesmen, solicitors, etc., and was required to devote his entire time to its business. *Held*, that it was doing business in California.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2524.]

5. CORPORATIONS ⊜668(4)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—"BUSINESS AGENT."

A resident sales agent of a corporation engaged in selling farm tractors, who was given exclusive territory, in which he was required to canvass for orders, and who was required to receive all goods shipped, and to deliver, set up, and start every machine sold, and to instruct purchasers, and who was to be furnished a supply of repairs or spare parts, was a "business agent" of such corporation, upon whom service of process was properly made, under Code Civ. Proc. Cal. § 411, providing that, in suits against a foreign corporation doing business and having a managing or business agent within the state, service may be made by delivering a copy of the summons to such agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2610.

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

6. CORPORATIONS ⊜668(4)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Where service of process could not be made upon the business agent of a corporation in charge of its principal place of business within the state, because the action was brought by such business agent, process was

properly served under Code Civ. Proc. Cal. § 411, on another business agent located elsewhere within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2610.]

7. COURTS ⟸366(2)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.
The decisions of state courts as to the validity of state statutes are not binding upon the federal courts, so far as rights secured under the federal Constitution are concerned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 954.]

8. CONSTITUTIONAL LAW ⟸309(3)—CORPORATIONS ⟸668(12)—FOREIGN CORPORATIONS—SERVICE—DUE PROCESS OF LAW.
Civ. Code Cal. § 405, requiring every foreign corporation to file with the secretary of state a designation of some resident of the state upon whom process may be served, and providing that process may be served on the person so designated, but if no such person is designated then on the secretary of state, violates the due process clause of the Constitution, so far as it authorizes service on the secretary of state without requiring him to give any notice to the corporation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Corporations, Cent. Dig. § 2619.]

9. CORPORATIONS ⟸668(7)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—OFFICERS AND AGENTS.
Under Code Civ Proc. Cal. § 411, authorizing service upon a foreign corporation having a managing or business agent, cashier, or secretary within the state, by serving such agent, cashier, or secretary, service on the secretary of a foreign corporation in the state in his private capacity on a pleasure trip, and not as a representative of the corporation, was not sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613.]

10. CORPORATIONS ⟸668(5)—FOREIGN CORPORATIONS—PROCESS—BUSINESS OR MANAGING CONDUCT—BUSINESS AGENT.
A foreign corporation's resident road manager for an entire state, required to devote his entire time and attention to its business, and having general supervision of its business and of its salesmen, crew foremen, collectors, deliverymen, and district managers, is a managing or business agent, upon whom process may properly be served, under Code Civ. Proc. Cal. § 411.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2611.]

11. CORPORATIONS ⟸668(16)—PROCESS—QUASHING—ISSUING NEW PROCESS.
Where, on a motion to quash service of process upon a foreign corporation, it appears that such corporation has a business or managing agent within the state upon whom process might be served, the court, in quashing an invalid service, may authorize the issuance of process, in order that proper service may be had upon such managing agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2627.]

At Law. Two actions—one by J. Herbert Knapp and another, partners doing business as Knapp & Black, against the Bullock Tractor Company, and the other by L. F. Vance against the Chicago Portrait Company and others. On motions to quash the service of summons. Service quashed in part, sustained in part, and new process ordered.

These two cases, though entirely unrelated in other respects, present the same general question of law, and for that reason, and for purposes of brevity, have been considered and will be decided together. The question in each case is: When is a foreign corporation "doing business" within the state of California to an extent sufficient to give the courts of that state jurisdiction to render a judgment in personam, and upon whom may service be made sufficient to bind such foreign corporation? Both of these actions were com-

menced in the superior court of Los Angeles county, Cal., and both have been removed to this court and are before the court on motions to quash service of summons.

In the Bullock Case it appears, from the affidavits on file in support of and in opposition to the motion, that the defendant corporation is a corporation organized and existing under the laws of Illinois and having its principal place of business in Chicago. It is engaged in the manufacture and sale of certain farming machinery known and described as "Bullock tractors," and which it sells in different states of the Union, through the agency and medium of certain "sales agents," who are appointed by it, and who act pursuant to contracts, the terms of which are set out in affidavits. It is the claim of defendant, of course, that it is not doing business in California; that it is merely engaged in interstate commerce, selling its tractors in California through the agency of factors or commission merchants. The true facts, however, as proven by the language of the contracts entered into by defendant, negative this contention. The contracts, one of which was held by plaintiffs and the other by the California Hydraulic Engineering & Supply Company, of San Francisco, upon whom service of summons was had in the action, are substantially similar in their terms. They purport to have been entered into by the defendant at Chicago and by the sales agents at their places of business in California, and contain a provision whereby the plaintiffs in the one instance, and the Engineering & Supply Company in the other, were appointed "sole and exclusive sales agents," under the terms and conditions of the contract, in certain described territory in California, to wit, the southern half of the state in the first contract, and the northern half in the second. Other material terms of the contracts are appended in the margin.[1]

The order blank referred to in paragraph 4 of the contract is also set out in full in the affidavits, and shows an order addressed to the Bullock Tractor Company, to be signed by the purchaser, and not to be valid until accepted

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[1] "Said agent, for the commission herein agreed to be paid, agrees as follows:

"(1) Said agent hereby agrees to thoroughly and with due diligence canvass for the sale of the machines covered by this contract all the territory herein mentioned, and the company agrees to furnish free to such agent such advertising matter and order blanks as it may consider necessary, and said agent agrees to receive, pay transportation charges on, and diligently distribute said advertising matter.

"(2) To receive all goods shipped under this agreement at the written request of said agent, to pay freight on same from factory, keep the same well housed and in good condition, and to make good any damages resulting from the improper handling or storage of same until sold or reshipped, to keep the same free from all charge and expense to said company, including all taxes which may be assessed on such goods carried over in said agent's possession from the preceding year, to collect from the purchaser the freight on all goods sold, and to make no charge for freight handling, storage, or other expenses; but if such company shall remove or transfer any goods received under this contract, said agent shall be entitled to the actual freight paid by him thereon.

"(3) To deliver, set up, and fairly start every machine sold, and to instruct the purchaser how to adjust it to work in the different conditions, to pay all livery expenses that may be incurred by experts or salesmen furnished by said company while assisting said agent, provided the same are furnished at the written request of or with the consent in writing of said agent.

"(4) To take a signed order from each purchaser on blanks furnished by said company, at the list price hereinafter specified, said order subject to the approval and acceptance of the company, and to use or give no warranty other than the regular warranty which is incorporated in said order blanks furnished by said company and printed on the back of this contract and made a part thereof.

"(5) Said company agrees to pay to said agent as commission on tractors sold in accordance with the terms of this contract, or through any agency or means within said territory during the life of this contract, fifteen per cent. (15%) discount from the list prices herein named as follows: f. o. b. Chicago.

75-55 H. P. "Giant" Creeping Grip	$4250.00
50-35 H. P. "Senior" " "	$3500.00
30-20 H. P "Junior" " "	$2000.00
15-10 H. P. "Baby" " "	$ 950.00

"It is further mutually agreed, however, that *said company may sell tractors at the Panama California Exposition at San Diego and turn over any and all orders to said agent,* made to parties in territory herein covered by this contract, and said agent shall

by the Tractor Company, and contains upon its back a written warranty over the name of the defendant, wherein defendant company warrants its tractor, and "agrees to furnish free of charge any part that may prove defective within one year," and provides for the sending by the company of an expert, who shall put the tractor "in working order." The cost of sending the expert is to be borne by the company if the trouble be due to defective material or workmanship; otherwise, to be borne by the purchaser. Said warranty also provides that, if the tractor could not be made to work well, the purchaser should return it to the agent, and the price was thereupon to be refunded. In addition, it appears from the affidavits that within two years last past the president of the Tractor Company had himself been in California "superintending and directing the management of the affairs in said state," and giving directions for the remodeling of said tractors, in order to overcome certain defects detected in the operation thereof; that in 1915 and 1916 sundry directors, employés, and agents, including the general manager of the company, came into the state of California, assisted in demonstrating, operating, and repairing tractors, and in one instance the general manager himself conducted the negotiations for the sale, and sold to a purchaser one of the tractors out of the stock on hand in plaintiff's storeroom.

In the Chicago Portrait Company Case it appears that the defendant company, which is not unknown in the federal courts (Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Strain v. Chicago Portrait Co. [C. C.] 126 Fed. 831), and whose business may be fairly and substantially described by a reference to Dozier v. State of Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264, and Davis v. Commonwealth, 236 U. S. 697, 35 Sup. Ct. 479, 59 L. Ed. 795, is an Illinois corporation, with its headquarters and place of business in Chicago, in that state. It carries on a very extensive selling campaign for enlarged portraits and frames, and has a very complicated and comprehensive system of contracts in vogue providing for the employment throughout the United States of "district managers," "road managers" "crew managers," "solicitors," "collectors," "deliverymen," and other persons who may be required or called upon to secure orders for

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receive a commission of 5 per cent. on all tractors so sold at said Exposition to parties in his district.

"The commission shall be paid on machines only when sold and settled for, and none shall be paid on machines returned, nor on orders not filled, nor on repairs furnished gratis on machines.

"Said agent shall receive as commission on all repairs for tractors or attachments 25 per cent. off the list prices thereof, and said agent agrees to pay all freight and express on same.

"(6) Said agent agrees to be responsible for all tractors purchased and ordered in writing through him that may be shipped under this contract, and to make settlement promptly for same at the net cash price herein named, after deducting the said commission on all machines so ordered in writing by him under this contract as herein provided.

"Said company agrees to furnish such a supply of repairs or spare parts as it may be necessary to properly provide for the requirements of the trade in the territory covered by this contract, and said agent herein agrees to exercise reasonable diligence and care with reference to all repair parts so shipped under this contract, and to make an accounting to said company of all repair parts semiannually, and to pay for all repairs sold from such stock of repairs under his care, less the commission as herein provided.

"It is expressly agreed between the parties hereto *that all machines ordered, repair parts, or goods shipped under this contract, shall remain and be held by said agent as the exclusive property of said company until the purchase money shall have been paid in full, and said company may at any time without notice, take possession of the same.*

"(7) Said company agrees to use its best efforts to complete and ship all machines ordered, and shall not be held responsible for damages in case of the inability of said company to furnish the goods or any part of them.

"(8) It is further agreed that, should this contract be terminated by expiration or otherwise, said agent will hold any unsold machines, attachments, repairs, or other property, subject to the company's order for a period of not to exceed 90 days from expiration, without charge.

"(9) It is further agreed that this contract shall not be valid and binding upon said company until the same is approved by an officer of the company at its offices in Chicago, Illinois, and that it cannot be changed in any of its provisions by any person without the written approval of an officer of the company at Chicago, Illinois." (Italics supplied.)

enlarged portraits, and, what apparently is of more importance, secure the acquiescence of purchasers to the purchase and payment of the frame in which the portrait is contained. The annual business of the company, in California, on the sale of frames alone, and exclusive of portrait enlargements, exceeds $10,000. The contract between the defendant and its "road manager for the state of California" is in the record, and shows that such road manager, one Frank S. Huffman, is to have general supervision in the matter of "soliciting and securing orders for the enlargement of pictures and of the procuring of orders for frames and the delivering of the same, and of advising, counseling, or directing and encouraging others so engaged, either as salesman, crew foreman, collector, deliveryman, or district manager." The contract further provides that said Huffman would "devote his entire time and attention to first party's business." The contract also contained this language, which is very significant, to wit: "It is further agreed that the business of first party is carried on and conducted in all the states and territories of the United States of America."

In the Bullock Case the action was brought to recover damages for breach of warranty with respect to tractors handled by plaintiffs for defendant. In the complaint it was alleged, inter alia, that the defendant "is, and at all times herein mentioned has been, doing business in the state of California; that it has and maintains an office at No. 157 North Los Angeles street, in the city of Los Angeles, in the county of Los Angeles, and state aforesaid, which is its principal place of business in the said state of California." Apt allegation was also made to the effect that the company had not complied with the provisions of section 405 et seq. of the Civil Code of the state of California, hereinafter referred to. Service of summons was made and due return thereof had upon the California Hydraulic Engineering & Supply Company, as "business agent" of defendant, and also upon the secretary of state of California.

In the Chicago Portrait Company Case service was had upon one S. M. Paine, who admittedly is the secretary of defendant corporation, and an officer upon whom, ordinarily, under the laws of the state of California (section 411 C. C. P.), service could be made. It is apparent, however, that the said Paine resides and has his office in the state of Illinois, and that, though he was served in the state of California, it was while he was in the state of California on a short "pleasure trip" for a vacation with his wife and family, and while he at no time, as seems to be fairly deducible from the proofs, was engaged in transacting business of, or in any wise representing, defendant company. The claim is made by plaintiffs that Paine came to California, not solely on "pleasure," but to transact business for the company, including the adjustment of the very transaction sued on herein. This is but the conclusion, apparently, of plaintiff, and is met by positive denial of Paine. There is no statement in the affidavits as to what he actually did while here.

Seymour L. McCrory, of Los Angeles, Cal., for plaintiffs Knapp & Black.

Schweitzer & Hutton, of Los Angeles, Cal., for plaintiff Vance.

Bicksler, Smith & Parke, of Los Angeles, Cal., for defendant Bullock Tractor Co.

Geo. H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, Cal., for defendants Chicago Portrait Co. and others.

BLEDSOE, District Judge (after stating the facts as above). The contentions of defendants in both cases seem to be directed to the point that, because they are engaged in interstate commerce, they are not "doing business" in the state of California within the terms of the law of said state providing for service of summons. Section 411 of the Code of Civil Procedure of California reads:

"The summons must be served by delivering a copy thereof as follows: * * * 2. If suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier or secretary within this state· To such agent, cashier, or secretary. * * * 6. In all other cases to the defendant personally."

And much, if not most, of the argument has been expended in the effort to cite a multitude of cases to the effect that defendants are engaged in interstate commerce, and therefore are not amenable to the laws of the state of California.

[1] Without in any wise attempting to refer to these authorities, it suffices to say that, since the decision in International Harvester Co. v. Kentucky, 234 U. S. 579, 587, 34 Sup. Ct. 944, 58 L. Ed. 1479, the fact that a foreign corporation may be engaged in interstate commerce does not in any wise serve to render it immune from the assertion of jurisdiction by the state courts in any state in which it may be engaged in doing business, and in which appropriate provision is made by the law thereof for the assertion of jurisdiction over it. Atkinson v. U. S. Operating Co., 129 Minn. 232, 152 N. W. 410, L. R. A. 1916E, 241; Armstrong Co. v. N. Y. Central, 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335. Out of the multitude of authorities cited, and which have been examined by the court in the course of its labors, no really satisfactory, comprehensive, and scientifically accurate determination of what is necessary or may be sufficient to constitute "doing business" in a state has been encountered. In cases like those at bar, in which the corporation obviously is seeking to do all the business it can, and yet all the while escape the jurisdiction of the local tribunals, it probably would not do to accept the general statement indulged in by the Supreme Court in St. Louis Ry. Co. v. Alexander, 227 U. S. 218, 227, 33 Sup. Ct. 245, 248 (57 L. Ed. 486, Ann. Cas. 1915B, 77), where Mr. Justice Day declared:

"In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation had subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

In so far as that may seem to imply a conscious "subjection" of itself to the "jurisdiction and laws of the district," it could hardly ever occur in a case like the ones at bar that the inference could be drawn. Much more compelling language was indulged in by the same court in the International Harvester Case, supra, where the same justice declared:

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state."

In similar vein, Mr. Justice Brandeis in a recent decision (Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, decided March 6th, 1917) says:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in

such manner and to such extent as to warrant the inference that it is present there."

[2-4] So, also, it was said by Judge Hawley, of this circuit, in Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, 687, 44 C. C. A. 128, 131:

"The general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state."

Just what may be meant in that statement by the phrase "some substantial part of its ordinary business" is perhaps indefinite; but I think, upon reason and authority, it may be said that if the corporation is engaged in a more or less continuous effort, not merely casual, sporadic, or isolated, to conduct and carry on within the state some part of the business in which it is usually and generally engaged, it may be said with due and becoming propriety to be "doing business" within such state. Copper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Vaughn Machine Co. v. Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 801; Neyens v. Worthington, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142; Penn Collieries v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127.

Within these limits and upon the facts adduced in the cases at bar, there can be no conclusion other than that each of the defendant corporations is doing business within the state of California. The other questions in the case are as to the sufficiency of the service had.

[5, 6] In the Tractor Company Case service was had upon a corporation that was in every sense of the word a "business agent" of the defendant in California. Some criticism is indulged in because of the fact that the complaint alleges, as adverted to hereinabove, that defendant's principal place of business in California was in Los Angeles. Obviously, however, no service could have been made upon defendant's business agent at its place of business in Los Angeles. So to do would have been for plaintiffs to have served themselves in a suit by them against defendant. Such would doubtless have failed to comply with the due process requirements of the law. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. There is no reason, however, why, though defendant's principal place of business in California may have been, as alleged, in Los Angeles, service could not have been made upon an appropriate business agent located elsewhere within the state.

Although, in view of the holding of the sufficiency of the service on the business agent of defendant, the question of the sufficiency of the service upon the secretary of state is not necessary to a decision herein, yet, since motion has been made to quash it, I am constrained to hold that such motion should be granted. Such service was had pursuant to the provisions of section 405 of the Civil Code of California, which is contained in title 1, part IV, of said Code, entitled "Foreign Corporations," and provides as follows:

"*Designation of Person on Whom Process may be Served—Service on Secretary of State Valid, When.*—Every corporation other than those created by

or under the laws of this state must, at the time of filing the certified copy of its articles of incorporation, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served. A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment. Such process may be served on the person so designated, or, in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such corporation."

This section would seem to be in conflict with the provisions of section 411 of the Code of Civil Procedure heretofore referred to, which provides how summons in a civil action "*must* be served," and in the face of such conflict it might be contended with some show of reason that, in a case involving the question of sufficiency of service of summons, the provisions of the Code of Civil Procedure should control. However, that contention seems to be foreclosed by the decision of the Supreme Court of the state of California in Olender v. Crystalline Mining Co., 149 Cal. 482, 484, 86 Pac. 1082, where the court seems to hold that the act providing for service upon the secretary of state is a "substitute" for the service formerly prescribed by the Code of Civil Procedure. In my judgment, however, in so far as section 405, supra, purports to provide for service of process upon a foreign corporation by substituted service upon the secretary of state, it fails to comply with the due process clause of the federal Constitution and is, to that extent, void.

[7] I am aware, of course, that this precise question was passed upon adversely to the conclusion just announced by the Supreme Court of California in the Olender Case, supra. I am also aware, however, that it is the duty of this court to declare the law, in so far as rights secured under the federal Constitution are concerned, untrammeled by decisions of state courts, which in this respect, at least, are not binding upon it.

[8] It is noticed that no provision is made in the section of the Civil Code referred to for the sending of any notice by the secretary of state to the corporation sought to be subjected to the jurisdiction of the state tribunal. In this respect the case is essentially different from that of Mutual Reserve Association v. Phelps, 190 U. S. 147, 158, 23 Sup. Ct. 707, 47 L. Ed. 987, and is brought within the terms of the decisions in King Tonopah Mining Co. v. Lynch (D. C.) 232 Fed. 485; Southern Ry. Co. v. Simon (C. C.) 184 Fed. 959, and Pinney v. Providence Loan Co., 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, 80 Am. St. Rep. 41. The Circuit Court in the Simon Case, supra, states the controlling principle in simple yet apt language:

"It is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense."

If the California statute contained some provision, such as was found in the Phelps Case, supra, for a notification by the secretary of state of the defendant corporation of the fact of service and the pendency of suit, it then might fairly be presumed that official action in such behalf would be promptly and properly performed, and that defendant would in due course be given notice of the pending litigation.

The fact that no provision was made for direct appointment by the foreign corporation of the secretary of state as its agent to receive service of process I consider to be immaterial. If it came into the state to do business, presumably it came in intending to comply with and be bound by the laws of the state regarding such a corporation as it was, and it would not be unreasonable to hold that it accepted the privilege of doing business subject to the limitation that service upon the secretary of state, followed by notice to it, should be considered as sufficient. However, the California statute like the Nevada statute and the Louisiana statute contains no provision for notice to the defendant, and in that respect it could easily, and would probably, be true, as is so clearly stated by Judge Farrington in the Lynch Case, supra, that defendant would have absolutely no knowledge at all of the existence of the litigation or of the fact of service. To intimate that, under such circumstances, it nevertheless may be bound, and a valid judgment secured against it, shocks the conscience and demonstrates that such attempted service constitutes a want of compliance with the due process clause of the Constitution. For these reasons I am constrained to hold, as above indicated, the provision of section 405 above referred to unconstitutional.

[9] Service in the Portrait Company Case, though made upon the secretary of the corporation, was not made, in my judgment, in compliance either with the law of the state of California or the general law controlling the situation. Subdivision II of section 411 of the Code of Civil Procedure, heretofore referred to, provides for service upon the secretary of a foreign corporation "doing business and having [maintaining?] a managing or business agent, cashier, or secretary within this state." This I am persuaded means that service pursuant to this section can be had upon one of the officers mentioned only in the event that he is engaged in the state in a representative capacity for the corporation in the capacity indicated.

Under the general law it would seem that the mere casual presence of an officer of the corporation in the state, not engaged in the business of the corporation, will not suffice to warrant service of process as against the corporation upon him. St. Clair v. Cox, 106 U. S. 350, 358, 1 Sup. Ct. 354, 27 L. Ed. 222. It seems clear from the evidence adduced that Paine was in California purely in his private capacity on a pleasure trip, and not in any wise as representative of defendant corporation. The secretary of a corporation, away from its domicile, "does not carry the corporation in his pocket." Louden Machinery Co. v. American Malleable Iron Co. (C. C.) 127 Fed. 1008. For this reason I am constrained to hold that motion to quash service of summons as made upon him should be granted. Premo Co. v. Jersey-Creme Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015.

[10, 11] It is apparent, from the papers before the court, that there is a managing or business agent of the defendant Portrait Company residing and conducting the business of the corporation in California, to wit: Frank S. Huffman, road manager for entire state, located in Oakland, Cal., and it would seem as if valid service of process might be had upon him. He seems to be of sufficient rank to justify the

conclusion that it is "reasonably certain that the corporation would be notified of the service." Denver & R. G. R. R. v. Roller, 100 Fed. 738, 741, 41 C. C. A. 22, 25 (49 L. R. A. 77). The question has not been presented or argued in the case, but it would seem, upon reason, as if it were competent for the court now to authorize the issuance of process out of this court in order that service may be had upon the managing agent of defendant aforesaid. Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138.

Appropriate orders quashing service of summons upon the secretary of state in the one case and upon the secretary of the company in the other will be entered and an order made providing for the issuance of process for service upon the road manager as hereinabove indicated.

MINTZER et al. v. NORTH AMERICAN DREDGING CO.

(District Court, N. D. California, Second Division. August 28, 1916.)

No. 184.

1. NAVIGABLE WATERS ⟸39(4)—RIGHTS OF RIPARIAN OWNERS—IMPROVEMENT OF CHANNELS.

Whatever may be the rights of riparian proprietors in the land underlying a navigable stream below mean high-water line, they are held in subordination to the public right of navigation and the coincident right to employ all appropriate means to improve the channel for such purpose.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 21.]

2. NAVIGABLE WATERS ⟸37(7)—LANDS UNDER WATER—CONSTRUCTION OF GRANT.

Where the state granted a tract of marsh or tide land, which was intersected by many tidal sloughs or creeks, some of considerable magnitude and others dwindling to mere ditches or rivulets, and neither the channel of one of such streams nor the land underlying it was excepted from the grant, the grantee had a valid legal title to the land through which the stream ran, including the soil underlying the channel, even though the stream was navigable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 212–215.]

3. NAVIGABLE WATERS ⟸39(4)—RIGHTS OF RIPARIAN OWNERS—IMPROVEMENT OF CHANNELS.

Even for the purpose of improving a stream for purposes of navigation, there is no right to take and carry away the soil underlying the stream and belonging to the riparian proprietor without compensation, and to sell it to another for the betterment of his land.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 21.]

4. EVIDENCE ⟸10(5)—NAVIGABLE WATERS ⟸1(7)—EVIDENCE OF NAVIGABILITY—JUDICIAL NOTICE.

While courts take judicial cognizance of the navigable character of large and well-known bodies of water, as to those of a more insignificant character, the history and nature of which are less known, the fact of navigability must be established by evidence, and the burden of proof rests on the party asserting that character.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 13; Navigable Waters, Cent. Dig. §§ 12–15.]

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5. NAVIGABLE WATERS ⟸1(3)—TEST OF NAVIGABILITY.
The mere depth of water does not place a stream in the category of a navigable waterway, other essentials being absent; nor will the want of depth or capacity in part of its course take a stream out of that category, if the other characteristics are present.
[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 7.]

6. NAVIGABLE WATERS ⟸1(4)—TEST OF NAVIGABILITY.
That a stream is one in which the tide ebbs and flows does not necessarily tend to demonstrate its navigable character.
[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 8.]

7. NAVIGABLE WATERS ⟸1(1)—WHAT CONSTITUTES—NAVIGABLE STREAM.
A tract of marsh or tide land, largely submerged at flood tide, was intersected by many tidal sloughs or creeks, one of which was, in its lower reaches, as wide as 100 feet or over, with a depth of from 2 feet or less at low tide in its shallowest parts to approximately 7 or 8 feet at its flood, and deepening somewhat towards its mouth. A grant of such lands did not except such stream, and it had never been meandered by the state, or designated as a navigable stream by statute. It had never been used or regarded as navigable, other than for duck boats or punts for hunting and fishing, until within a few years, when an oil company established a plant on adjoining land, and on a few occasions took small amounts of material to its plant on the flood tide by power boats and scows of light draft. It ran wholly through unimproved private property, and was not accessible or available to the public, or to any private industry other than the oil company's plant, and, though within the corporate limits of a city, it was at least a quarter of a mile from the nearest established street. *Held*, that it was not a navigable stream, which could be improved for purposes of navigation against the wishes of the riparian proprietor.
[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5, 11, 16.]

In Equity. Suit by Lucio M. Mintzer and others against the North American Dredging Company, in which the City of Richmond intervened. Decree for plaintiffs.

J. K. Johnson and W. P. Johnson, both of San Francisco, Cal., for plaintiffs.
D. J. Hall, of Richmond, Cal., for intervener.
Earl D. White, of Oakland, Cal., for defendant.

VAN FLEET, District Judge. This is a bill to enjoin the defendant from further proceeding to dredge out and deepen a certain waterway or channel traversing lands alleged to belong to the plaintiffs' testator, and from carrying away the earth or soil therefrom, as constituting a willful and malicious trespass and waste, and to recover damages for the waste and injury already done.

The answer of the defendant denies any ownership or right of any kind in the plaintiffs in the land involved, and sets up that the channel in question is "known and designated as the south channel of the San Pablo Canal, all within the city limits of the city of Richmond, county of Contra Costa, state of California, and that said channel is, and has been for many years last past, a navigable waterway, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the Bay of San Francisco," and that "for many years last

past vessels engaged in commerce have navigated and traversed said channel"; that all the acts done and committed by defendant, of which complaint is made, have been had and done under and in pursuance of a contract theretofore entered into between defendant and said city of Richmond, whereby "defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo Canal, to a uniform depth of eight (8) feet below low tide," and that the work of dredging said channel was being done by defendant "for the purpose of improving said waterway in the interest of commerce and navigation," etc. It denies that plaintiffs have suffered any damage, or that defendant "has committed any willful or malicious or any trespass upon any property of plaintiffs." It then alleges, as ground of affirmative relief, that after defendant had removed approximately 22,000 cubic yards of material from said channel it was stopped by the injunction issued herein, and has since discontinued work under said contract, and that by reason of such interruption and delay in its work defendant has suffered damages on its part, for which it asks judgment against the plaintiffs.

The city of Richmond was permitted to file a bill of intervention, in which it alleges that the channel in question is a natural arm of San Pablo Bay, which is a navigable body of water within the state; "that the depth of water in said channel varies with the rise and fall of the tide, and that at ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet"; and, after alleging substantially in the terms set up in the answer the navigation of said channel during recent years between other points and the city of Richmond, it is alleged that in order to improve the navigability of the channel and render it more suitable for commerce "it became and is necessary to deepen said channel, throughout its entire length to a width of eighty (80) feet and to a depth of eight (8) feet at ordinary low tide." It is alleged "that the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants, and the public generally that the navigability of said channel be improved and increased as aforesaid, thereby affording better transportation facilities for the city of Richmond, its inhabitants, and the public generally." It admits the entering into the contract as set up by defendant for the deepening and widening of the channel, and alleges that it has procured for that purpose a permit from the War Department of the United States for such improvement. It denies any right or title in plaintiffs in or to the premises involved, or that any soil or other thing of value is being taken from plaintiffs' property.

In response to the bill of intervention the plaintiffs filed an answer, denying all its allegations as to the navigability or commercial value of said channel, and alleging that the intervener and the Standard Oil Company of California have entered into a contract "whereby it was agreed that the city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should

pay to the city of Richmond 10.74 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant herein, North American Dredging Company of Nevada, for dredging said alleged channel as aforesaid, and that the aim and purpose of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor." And it is alleged that, if said channel is deepened in accordance with the contract between the intervener and the defendant, "it will enable the Standard Oil Company of California to obtain a waterway to the San Pablo Bay over and across and upon the land and property of plaintiffs." There is a further allegation that the city contemplates using the dredged channel as an open sewer; but no evidence was offered on the subject, and it may be disregarded.

The evidence shows that the channel in question, which is about a mile in length, runs in its entire course through a tract of salt marsh or tide land, comprising some 500 acres more or less, having its northerly boundary on San Pablo Bay, and extending southerly for a distance of a mile, more or less, between a natural waterway known as San Pablo Canal or creek, which borders it on the east, and the potrero or highlands, constituting the San Pablo peninsula, on the west. This land was acquired by Dr. Tewksbury, the grandfather of the plaintiffs, in the early '70s by grant from those holding patents from the state under the State Tide Land Act (Stats. 1867–68, p. 716; Stats. 1869–70, p. 541); and the title has been regularly transmitted to plaintiffs' testator, in whose estate it now rests. Like all lands of its character on the margins of the sea, its bays and inlets, it is subject to tidal action, being largely submerged at flood tide and mostly exposed at its lower stages. As disclosed on the map, and by a personal inspection made by the court, it is intersected by many tidal sloughs or creeks, cut by the flux and recession of the waters of the bay in their diurnal flow, some of them of considerable magnitude, and others dwindling to mere ditches or rivulets. At the height of the tide many of these sloughs have a considerable depth of water, while at its lowest stages, in most of them, the mud bottom lies exposed, or practically so. The particular channel in controversy branches from San Pablo Canal or creek, a stream of much greater magnitude, a short distance south from where the latter debouches from the marsh land into San Pablo Bay, and thence winds its way in a general southerly direction throughout the length of the tract of land above described. It varies in width and depth, being in its lower reaches as wide as 100 feet or over, and narrowing somewhat farther south, with a depth, dependent upon the state of the tide, of from two feet or less at low tide in its shallowest parts toward the south, to approximately seven or eight feet at its flood, and deepening somewhat as it flows to its mouth and enters the San Pablo Canal.

Neither the channel nor the land underlying it was excepted from the grant by the state to its patentees of the tide lands through which it runs, nor in the deeds from the latter conveying the title to plaintiffs' ancestor, nor is the channel in any way referred to or mentioned in said

conveyances; nor, so far as appears, has it ever been meandered by the state or designated among the streams or waterways declared navigable in its statutes. While referred to in the answer as the "south channel of San Pablo Canal," it bears no name or designation on the official map. At the time Dr. Tewksbury acquired these tide lands and for many years thereafter there was no settlement in the immediate neighborhood, the contiguous highlands being devoted to farming and grazing, for which latter purpose the marsh lands were included so far as available. It was for this purpose, apparently, that Dr. Tewksbury acquired the marsh lands. He owned a large acreage in the adjacent highlands, and the evidence shows that shortly after the acquisition of the marsh lands he constructed a dyke across them near their northern boundary to keep out the tide and render the land more available for pasturage; much of the grasses growing thereon making good food when the waters were kept out. This dyke, but for a tide gate therein, was built solidly across the channel in question, and the evidence tends to show that it was maintained for many years—as late as 1901—in a condition efficient to restrain the influx of the tide and render the lands more available for pasturage of cattle. Since then the dyke has largely disappeared and no longer obstructs the channel, although evidence of its existence remains. During all these years, while San Pablo Canal was navigated to some extent, the channels and sloughs intersecting these lands, including the one in controversy, were never used or regarded as available for any species of navigation, other than for duck boats or punts for hunting and fishing; no larger craft ever attempting to traverse them. This condition continued down to about the year 1900 or a little later. About that time the Santa Fé Railroad determined on Point Richmond as a terminus on San Francisco Bay, and immediately thereafter the town or city of Richmond sprang up. The latter is built upon the highlands to the south and west of the marsh lands in question, and these highlands, extending northerly in a peninsula terminating in San Pablo Point, partially divide the waters of San Pablo Bay from the Bay of San Francisco, of which it constitutes an arm. When incorporated some years since, the corporate limits of the town were made to include this body of tide lands; but the latter remains unreclaimed and unimproved, except by the Standard Oil Company as hereinafter stated. The town has now grown to a place of considerable population and commercial importance, with a deep water harbor on the eastern shore of the Bay of San Francisco.

Some years since the Standard Oil Company of California established a refining plant at Richmond, its site covering a considerable acreage of highland and including a portion of tide or marsh land purchased by it from plaintiffs' testator off the southerly end of the tract above described. At that time the slough or channel in question continued into or through the portion of the marsh land acquired by the Oil Company, but the latter has since built a levee or bulkhead across the channel and along the northern boundary of its marsh lands, and has either wholly or partially filled in the channel where it crosses its land. Immediately north of the marsh land sold to the Oil Company is an unimproved strip of land, about 200 feet wide, sold by the plaintiffs' predecessors to the Belt Line Railroad, which narrow strip runs across the

marsh between the lands of the Oil Company and the present holdings of the plaintiffs, forming the southerly boundary of the latter and the northerly boundary of the former. It is only since the establishment of the Oil Company's works that any effort has been made to navigate the channel by craft of burden, and the evidence shows in that regard that upon some few occasions power boats and scows of light draft have been taken up through San Pablo creek or Canal and into this channel on the flood tide, carrying some small amount of material for the use of the Oil Company; but it was found that, excepting at such periods of high tide, it was impracticable to put the channel to such use without deepening it for the purpose. Accordingly the dredging work which the bill seeks to stop was commenced in 1915, as the result of an arrangement between the Oil Company and the city, whereby the latter contracted with the defendant to do the work of dredging the channel as set forth in the pleadings, and the Oil Company, in consideration of the removed soil being deposited on its land within its levee or bulkhead, contracted with the city to pay it the same price per yard for the material dredged which the city was to pay the defendant for its removal. Upon the theory that the channel constituted a public navigable waterway, and its improvement a benefit to navigation, a permit from the officers of the War Department for the prosecution of the work was procured. The dredging operations were commenced at the levee or bulkhead of the Oil Company, working northerly, and some 900 feet or over of the channel at the south end had been dredged, and about 22,000 cubic yards of material removed, when stopped by the preliminary injunction procured by the plaintiff.

[1, 2] 1. The presentation of the case by the defendant and the intervener proceeds largely, if not entirely, upon the theory that its determination turns solely upon the question whether the channel involved is a navigable waterway, which they affirm it to be, and as such subject to improvement by the authorities for the benefit of commerce and navigation. Of course, if it is a navigable stream, there can be no question that, whatever may be the rights of the plaintiffs as riparian proprietors in the land underlying the stream below mean high-water line, they are held in subordination to the public right of navigation, and the coincident right to employ all appropriate means to improve the channel for such purpose. Willink v. United States, 240 U. S. 572, 36 Sup. Ct. 422, 60 L. Ed. 808; Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251, 35 Sup. Ct. 551, 59 L. Ed. 939. But, under the circumstances disclosed here as to the arrangement under which the work sought to be enjoined is being done and the dredged material disposed of, a question arises whether the rights of the plaintiffs are not being unlawfully invaded, independently of the consideration whether the channel in question is or is not navigable. That the evidence is sufficient to show a valid legal title in the plaintiffs to the land through which it runs, including the soil underlying the channel itself, is not challenged in the argument, nor is the proposition open to dispute. Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541, and cases there cited. Nor is there any question that it is for the state to determine whether she will part with the title to the lands underlying her waters, navigable or otherwise, and vest it in private ownership. Donnelly v.

United States, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710. In that case it is said (228 U. S. 261, 33 Sup. Ct. 454, 57 L. Ed. 820, Ann. Cas. 1913E, 710):

"In Barney v. Keokuk, 94 U. S. 324, 338 [24 L. Ed. 224] it was held that it is for the states to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto. * * * If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

And it is further said (228 U. S. 262, 33 Sup. Ct. 455, 57 L. Ed. 820, Ann. Cas. 1913E, 710):

"But it results from the principles already referred to that what shall be deemed a navigable water, within the meaning of the local rules of property, is for the determination of the several states. Thus the state of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

[3] Such being the law, we may assume for present purposes that this is a navigable waterway, for it nevertheless appears that the plaintiffs own the soil underlying it to the same extent and by precisely the same title as they hold the riparian lands upon its banks, subject only, as to the submerged soil, that their right is subordinate to the right of navigation, which may require its removal for the improvement of the stream. But none of the cases hold, and it is not the law, that for such purpose, more than another, the soil of the riparian proprietor may be taken and carried away, without his consent and without compensation, and transferred to another in private ownership. And yet that is what is being done under the arrangement by which the work in this instance is being carried out—the soil of plaintiffs being taken and deposited on the land of the Standard Oil Company for the betterment of the latter. It is not a question of the value of the thing taken, but one of ownership of property rights. Whatever the value may be, property cannot be thus taken without compensation. It would seem, therefore, that the plaintiffs are entitled to have the removal and appropriation of their soil, as disclosed in the evidence, stopped, independently of the question of the navigability of the stream.

[4-6] 2. But do the facts show this channel to be a navigable waterway, in the sense and for the purpose contended for? This is largely a question of fact, to be determined from the character of the stream, its situation and availability as a highway of commerce, and the other surrounding circumstances affecting the question. While courts take judicial cognizance of the navigable character of large and well-known bodies of water, like our Great Lakes, or of streams like the Mississippi or Ohio, as to those of a more insignificant character, the history and nature of which are less known, the fact of navigability must be established by evidence, and the burden of proof rests on the party asserting that character. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447. The mere depth of water will not place a stream in the category of a navigable waterway, other essentials being absent; nor, on the other hand, will the want of depth or capacity in part of its course take a stream out of that category, if the other characteristics are present.

Nor does the mere fact that it is a stream in which the tide ebbs and flows necessarily tend to any extent to demonstrate its navigable character. As stated by Chief Justice Shaw in Rowe v. Granite Bridge Co., 21 Pick. (Mass.) 344:

"It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But, in order to have this character, it must be navigable to some purpose useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

The essentials of a navigable stream or waterway are thus stated by the Circuit Court of Appeals for the Eighth Circuit in Harrison v. Fite, supra:

"To meet the test of navigability, as understood in the American law, a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. * * * Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating, or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation."

In People v. Economy Light & Power Co., 241 Ill. 290, 324, 89 N. E. 760, 768, it is said:

"To hold that the state can by artificial means make a stream navigable which in a state of nature was not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken * * * for public use without compensation."

See, also, Chisolm v. Caines (C. C.) 67 Fed. 285; Leovy v. United States, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914; Wilson v. Prickett, 79 Wash. 89, 139 Pac. 754.

In his work on Irrigation and Water Rights, Mr. Kinney, treating of navigable waters, states (volume 1, p. 570) the principle that:

"A stream which can only be made navigable or floatable by artificial means is not a public highway."

And at page 567 the author says:

"In order to be a public body of water, it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence creeks which open in navigable waters, but merely lead into private lands, are not public navigable waters."

[7] When these principles are applied to the facts in this case, it is quite apparent, I think, that the latter are lacking in several essentials required to constitute this slough a public navigable waterway. As we have seen, it has never been in fact navigated in any true sense, and

has not been treated or considered, either by the public or by the state, as capable of navigation. While this lack of recognition by the state is not conclusive, it is nevertheless not without potency as a fact in its bearing on the question, since it is not to be lightly presumed that the state will part with its title to property of known or recognized value for public use. But, in the next place, the conceded necessity of the work sought to be prosecuted is a recognition that the channel is not susceptible of being navigated in its present state without artificial aid. And the facts, I think, sufficiently demonstrate that this work, instead of being intended for the improvement of a navigable stream, is really intended to render navigable a stream not so in its natural state. Nor does the evidence show that the channel is or will be in any true sense useful to the public for the purpose of navigation. It is true it is now within the corporate limits of the city of Richmond, which in that sense may be said to constitute a public terminus. But, as the evidence shows, it lies only at its "back door," so to speak, runs wholly through private property, and is so situated that its use is, and so far as appears can be, available only to the Oil Company and the Belt Railroad, should the latter see fit to construct an approach. It is not accessible or available to the public, nor to any other private industry; the evidence showing that the nearest established street of the town is at least a quarter of a mile from its southern terminus. Under the principles above stated, I am satisfied that the court would not be justified upon the facts in holding this channel to be a navigable stream.

It results that a decree must go in favor of the plaintiffs, enjoining the further prosecution of the work in question, and awarding them such damages as they may have suffered, with their costs. Should the amount of the damages not be agreed upon, a reference may be had for its ascertainment.

JENNINGS et al. v. SMITH et al.

(District Court, S. D. Georgia, N. E. D. May 31, 1917.)

1. COURTS ⇐310—FEDERAL COURTS—JURISDICTION—NECESSARY PARTIES.
In a suit by citizens of Louisiana against citizens of Georgia to establish plaintiffs' rights as heirs and next of kin of a decedent, another citizen of Louisiana, intervening as defendant, is not an indispensable party, where his interest, if any, is merely in common with those whose rights rest on the same ground, and hence, when he asks to be stricken as a defendant, without collusion, jurisdiction will be retained by a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857.]

2. COURTS ⇐489(13)—CONFLICTING JURISDICTION—ESTABLISHMENT OF HEIRSHIP.
Where the parties are citizens of different states and the jurisdictional amount is involved, a federal court has jurisdiction of a suit to establish plaintiffs' rights as heirs and next of kin of a decedent.

3. COURTS ⇐273—FEDERAL COURTS—DISTRICT IN WHICH SUIT MAY BE BROUGHT.
Judicial Code, § 52[1] provides that when a state contains more than one district, if there are two or more defendants residing in different districts,

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

[1] Act March 3, 1911, c. 231, 36 Stat. 1101 (Comp. St. 1916, § 1034).

the suit may be brought in either district. Section 57 (section 1039) provides that, when a part of the real or personal property against which proceedings shall be taken shall be in another district in the same state the suit may be brought in either district. Equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides that any person may be made a defendant who has or claims an interest adversely to plaintiff, and that any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. *Held*, that in a suit against defendants, some of whom were residents of the Southern district of Georgia and were claiming adversely to plaintiffs, to establish plaintiffs' rights as heirs and next of kin of a decedent, where permanent administrators had been appointed, who resided in the Northern district, and who individually were parties to the original bill, their appointment did not divest the District Court for the Southern district of jurisdiction, especially where part of the land involved was located in that district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 813.]

In Equity. Suit by Mrs. M. S. Jennings and others against Zadoc Smith and others. On application by plaintiff for leave to amend, and application by plaintiffs and defendant Lonnie Bullard to strike him as a defendant. Granted.

J. S. James and J. R. Bedgood, both of Atlanta, Ga., E. H. Callaway, of Augusta, Ga John J. Strickland, E. K. Lumpkin, and Stephen C. Upson, all of Athens, Ga., F. H. Colley, of Washington, Ga., H. H. Perry and W A. Charters, both of Gainesville, Ga., Wm. M. Howard, of Augusta, Ga., Thomas J. Shackelford and Henry S. West, both of Athens, Ga., Homer Sutton, of Cornelia, Ga., Stanhope Erwin, of Clarksville, Ga., and Little, Powell, Smith & Goldstein, of Atlanta, Ga., for plaintiffs.

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

SPEER, District Judge. The plaintiffs, citizens of Louisiana, have heretofore filed their bill against Zadoc Smith, a citizen of the Northeastern division of the Southern district of Georgia, and others citizens of that division and district. Plaintiffs aver that they are the next of kin and heirs at law of James M. Smith, deceased. The nature of the litigation may be gathered from the opinion of this court, rendered on application for extraordinary relief, by which receivers were authorized, reported in 232 Fed. 921, and in 238 Fed. 48, —— C. C. A. ——, in which a reversal of the order just mentioned was directed.

The plaintiffs now seek to amend the original bill. In the proposed amendment they aver that, since the bill was filed, the ordinary—that is, the probate court—of Oglethorpe county has appointed Erwin, Arnold, and Smith, as permanent administrators of the estate. The administrators have qualified. It is further averred that the personal estate is much more than $1,000,000 in value, and is far in excess of what would be necessary to pay all the debts against the estate, including expenses of administration. It is further alleged that at the time of his death the intestate owned real estate, located partly in the Northeastern division of the Southern district of Georgia, and

partly in the Northern district of Georgia, and at other points in the state. A list of this realty is attached. Petitioners allege that these lands are worth approximately $1,000,000, and that the title to the lands vested in the plaintiffs upon the death of the intestate. They are entitled to possession, subject to the right of the administrators to administer, should the necessity arise They allege that the administrators all reside in the Northern district of Georgia, and, while not indispensable parties, are proper parties to the bill They pray that by proper order each of the administrators be directed to appear, plead, answer, or demur on a day to be designated; they being persons in possession and in charge of the lands in question. The further prayer of the amendment is that the court decree that the plaintiffs own the lands described, and that they be entitled to recover possession from the administrators, together with the rents thereon, etc

Pending the hearing on the original bill, one Lonnie Bullard was made a party defendant by intervention. He is a citizen of Louisiana. The plaintiffs and Bullard now come, and "each and jointly move the court to strike said Lonnie Bullard, as a defendant, from said case." To the allowance of this amendment, the original defendants and proposed defendants object. The objection is on all grounds leveled at the jurisdiction of the court. It is first insisted that the Louisiana intervener, Lonnie Bullard, is an indispensable party, that without his presence the bill cannot proceed, and that, if he remains a party, the jurisdiction must be denied, for the reason that he is a citizen of the same state with the plaintiffs.

In support of the first contention Barney v. Baltimore City, 6 Wall. 280–291, 18 L. Ed. 825, is cited. There Mary Barney, a citizen of Delaware, filed a proceeding for the partition of real estate against the city of Baltimore, several citizens of Maryland, and Matilda and Ann Ridgley, who were citizens of the District of Columbia. It is pointed out in the opinion of the court, pronounced by Mr. Justice Miller, that citizens of the District of Columbia were not citizens of a state, within the meaning of the Judiciary Act, and could not become parties to the proceeding in the federal court, and from the nature of the proceeding the court must parcel out the share of the absent parties at interest without the opportunity for hearing from them. On account of the absence of these essential parties, the proceeding was dismissed.

Torrence v. Shedd, 144 U S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, is also cited for defendants, and was also a proceeding to enforce the partition of land. It had been filed in the state court, and was removed to the Circuit Court. There was a motion to remand, which was denied. There Torrence brought suit against Susan M. Shedd, John B. Brown, and 90 others for partition of a tract of land, to an undivided one-third of which Torrence claimed a title under a deed by Edward Sorin. The court, through Mr. Associate Justice Gray, points out that the object of the suit was not merely the establishment of the title of the plaintiff in an undivided share of the land, but it was the partition of the whole land and the conveyance of his undivided share into the entire estate in a proportional part, as well as the establishment of his title against all the defendants.

Hooe v. Jamieson, 166 U. S. 395–399, 17 Sup. Ct. 596, 597, 41 L.

Ed. 1049, is also cited in support of the objection to jurisdiction. There were citizens of the District of Columbia, and one a citizen of the state of Minnesota, who brought an action for lands in the Western district of Wisconsin. Holding anew that citizens of the District of Columbia could not sue in a federal court, Mr. Chief Justice Fuller, rendering the opinion, observed:

"In the case at bar no application was made for leave to discontinue as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota. Jurisdiction of the case as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one."

The case of Horn v. Lockhart, 17 Wall. 579, 21 L. Ed. 657, was a suit brought in the Circuit Court of the United States by legatees in a will to compel an executor to account for moneys received by him in sales of property belonging to the estate of his testator and to pay to them their distributive shares. It was objected to the jurisdiction that two of the defendants were residents of Texas, the same state with the complainants. This, Mr. Justice Field, for the court, held—

"was met and obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not so interwoven and bound up with those of the complainants, or other parties, that no decree could be made without necessarily affecting them. And it was only the presence of parties thus situated which was essential to the jurisdiction of the court."

And, continued the learned Associate Justice:

"The question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether, to a decree authorized by the case presented, they are indispensable parties; for, if their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them."

[1] In view of these authoritative holdings, what seems a conclusive reply to the contention that Lonnie Bullard, of Louisiana, who became a party defendant by intervention, is a party indispensable to a complete and final decree, is that Bullard himself, now, in the presence of the court, moves to strike his name from the record. He has heretofore filed an application to the same effect. There is no contention that this is collusively done. His existence is not disclosed by the original bill. He intervened voluntarily, and can voluntarily withdraw. His intervention must have been in subordination to the propriety of the main proceeding. Equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii); Hardenbergh v. Ray, 151 U. S. 118, 14 Sup. Ct. 305, 38 L. Ed. 93. For the court to hold him an indispensable party would be, in the absence of both pleadings and proof, to accord him a status for which he does not contend. This makes the issue here, on this point, wholly unlike the cases of partition, etc., where the court was obliged to perceive the interest, and the absence of parties, whose presence is necessary to final decree. Besides, the federal courts from an early period of their history have steadily held that, where the

real merits of the cause can be determined without affecting the interests of absent persons, though proper parties, the cause may proceed without them. A fortiori will this be done where such absent party has voluntarily disclaimed appearance. Volenti non fit injuria. See Thomas v Anderson, 223 Fed. 43, 138 C. C. A 405; Einstein v. Georgia Southern & Florida Ry. (C. C.) 120 Fed. 1008–1010, affirmed on this ground by Circuit Court of Appeals, 218 Fed. 58, 133 C. C. A. 657.

Moreover, under the law of Georgia, the interest of Lonnie Bullard, if it exists, would be merely in common with the others whose rights rest on the same ground with his. Here there is no joint tenancy. Park's Annotated Code, §§ 3722, 3723; Blake v. Black, 84 Ga. 392, 11 S. E. 494.

As to the jurisdiction in a general sense, we must be controlled by the action and deliverance in this case of the Circuit Court of Appeals. It is true that the learned judges of that court reversed the action of this court in granting the extraordinary relief sought. The Circuit Court of Appeals, however, did not dismiss the bill for want of jurisdiction. Of course, had such want appeared, dismissal would have been promptly ordered. So far from doing this, the learned judge rendering the opinion, District Judge Grubb, observed:

"It (that is, the federal court in equity) cannot draw to itself the general administration of the estate of a decedent; nor can it adjudicate the claims of parties thereto, unless there is present the necessary diversity of citizenship and the requisite amount to confer jurisdiction. When jurisdictional requirements are present, the court stops with the adjudication as between such of the parties as have the jurisdictional qualifications. Having determined their claims to a share of the estate, the parties are remitted to enforce their claim, to the state jurisdiction, where the estate is being administered."

This view has the sanction of Waterman v. Canal-Louisiana Bank, 215 U. S. 33, on page 43, 30 Sup. Ct. 10, 12 (54 L. Ed. 80). There Mr. Justice Day, for the Supreme Court, announces:

"The general rule to be deduced from" the decisions "is that, inasmuch as the jurisdiction of the courts of the United States is derived from the federal Constitution and statutes, in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the federal courts * * * the jurisdiction may be exercised, and is not subject to limitations or restrained by state legislation establishing courts of probate and giving them jurisdiction over similar matters."

The learned justice continues:

"This court has uniformly maintained the right of the federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs to establish their claims and have a proper execution of the trust as to them"—citing many cases. 215 U. S. 43, 30 Sup. Ct. 10, 54 L. Ed. 80.

Justice Day, in concluding the discussion of the relief which in proper cases may be afforded by the United States court, remarks:

"It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the federal court."

He, however, significantly adds:

"It has been frequently held in this court that a judgment of a federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim for federal right which may be protected in this [the Supreme] Court."

[2] Recurring to the opinion of the Circuit Court of Appeals in Smith v. Jennings, supra, we find this summation:

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

It is obvious that for the purpose so clearly expressed in section (b) of this ground of jurisdiction thus determined, the action of this court is now invoked. In a closing paragraph of the opinion, the general jurisdiction of the District Court in equity is reasserted as follows:

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

[3] Counsel for the plaintiffs seek to avail their clients of the opportunity thus afforded. The permanent administrators have been appointed. This amendment is to make them parties to the bill, brought by the plaintiffs, and pending in the Northeastern division of the Southern district of Georgia at the time of their appointment. True, the administrators reside in another judicial district, that is, the Northern district of Georgia; but they reside in Georgia. In section 52 of Hopkins' Judicial Code, Annotated, we find the following:

"When a state contains more than one district, * * * if there are two or more defendants residing in different districts, it [the suit] 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. The clerk issuing duplicate writ shall indorse thereon that it is a true copy of a writ issued from the court of the proper district and such original and duplicate writs, when executed and turned into the office from which they issued, shall constitute and be proceeded on as one suit, and, upon any judgment or decree rendered thereon, execution may be issued directed to the marshal of any district in this same state."

Now, from the original bill it appears that Zadoc Smith and several of the defendants, who are claiming adversely to complainants as to the entire estate, reside in and are citizens of the Southern district.

That they have a substantial interest is equally apparent. They were originally sued. This, under the authority of equity rule 37 (superseding the old rule No. 49):

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant, who has, or claims, an interest adversely to the plaintiff." 193 Fed. xxviii, 115 C. C. A. xxviii.

Then follows this significant clause:

"Any person may at any time be made a party if his presence is necessary, or proper, to a complete determination of the cause."

As appears from the record, the adverse claims of the plaintiffs who live in Louisiana and of the defendants who live in the Southern district of Georgia are the substantial thing to which the jurisdiction of the court initially attaches; but, as strongly intimated in the opinion of the Circuit Court of Appeals in this case, supra, the permanent administrators are proper, if not necessary, parties. That they may be added by amendment, with the permission of the court, seems undeniable. New equity rule 28 (198 Fed. xxvi, 115 C. C. A. xxvi); Beecher's Federal Rule Book, Annotated, page 323. Thus amended, this becomes, in part at least, a suit to enforce a legal or equitable claim to the real property within the Southern district of Georgia. To that extent it is a suit of a local nature, and seems to be controlled by section 57 of the Judicial Code. This provides:

"And when a part of said real or personal property, against which such proceedings shall be taken, shall be within another district, but within the same state, such suit may be brought in either district in said state."

The court, however, does not understand that, by the amendment particularly emphasizing the fact that this is a suit of a local nature, the plaintiffs abandon the purpose of the original bill. This was to have adjudicated, in a court to which the Constitution of the United States gives them access, their right to be declared the next of kin and the heirs entitled to the entire estate of the decedent. The original bill was brought against citizens and residents of the Southern district of Georgia. It had features which were apparently intended to be protective of the large interests involved; but the gravamen of the bill was the contest over the heirship. This remains. Permanent administrators, who were, individually, parties to the original bill, have now been appointed. Their appointment, as we have seen, could not have the effect to divest the court of its jurisdiction.

For these reasons, and others which might be given, the amendment by which they are made parties will be allowed. Lonnie Bullard, as an intervener, on his own motion, will be stricken, and the cause will proceed as usual in equity.

WILLIAM A. HIGGINS & CO. v. ANGLO-ALGERIAN S. S. CO.

(District Court, S. D. New York. June 30, 1915.)

1. SHIPPING ⟸132(5)—INJURIES TO SHIPMENT—SUFFICIENCY OF EVIDENCE.
In a suit for damages to a shipment of dates, injured by water, evidence *held* to show that the injury was sustained while the dates were upon the lighters from which they were loaded and before they came aboard the ship.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 483, 484.]

2. SHIPPING ⟸106—BILLS OF LADING—ESTOPPEL.
A recital, in a bill of lading given by a ship's agent, that a shipment of dates was received in apparent good condition, did not estop the ship to show that they were damaged by rain or spray before being loaded on the ship, though when so loaded they were not in apparent good condition, but were stained or discolored, as there could be no greater estoppel than if the recital had been true, in which case the estoppel would only have extended to the apparent condition of the shipment.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414–419.]

3. SHIPPING ⟸142—INJURY TO SHIPMENT—LIMITATION OF LIABILITY—NOTICE OF DAMAGE.
There could be no recovery for damages to so much of a shipment of dates as was removed before notice of damage, where the bill of lading provided that such removal should be a waiver of all claims.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 496.]

4. ADMIRALTY ⟸18—JURISDICTION—TORTS.
Whether a tort consisted in the issuance of a bill of lading, or in its negotiation, admiralty had no jurisdiction; both of such acts having occurred on the land.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 206–221.]

In Admiralty. Libel in personam by William A. Higgins & Co. against the Anglo-Algerian Steamship Company. Libel dismissed.

This is a libel in personam by the assignee of a bill of lading for damage done to part of a cargo of dates shipped on board the steamship Armiston from Bussorah, Persia, for New York during the first days of November, 1911. The steamer lay in the Bussorah Roads, and the dates were brought alongside in lighters, wrapped in oil paper and packed in wooden cases made of three-eighths inch boards. While the loading was going on, heavy tropical rains fell on Bussorah for several nights, drenching the lighters and wetting some of the dates so much that the master refused to take them and sent the lighters back. Some 25,000 cases, nevertheless, were shipped, among which were the 3,000 afterwards sold to the libelant. When they came over the side, the mate gave receipts, and in every case noted upon the receipt that the cases were stained by their own contents or were discolored, or the equivalent. Whether the cases were actually wet by the rain on the lighters does not appear from the testimony of the ship's crew.

When the loading was complete, the ship's agent, at the request of the shippers, gave them a "clean" bill of lading, which read, "Apparently in good order and condition." In the fine printed portion of the bill of lading, however, there appeared this clause: "Mate's receipts to be conclusive evidence of the quantity of and condition in which goods are received by this company from river steamers and craft." In order to procure this "clean" bill, the shippers gave to the ship's agents at Bussorah a contract of indemnity holding them harmless for all consequences arising therefrom.

When the dates arrived in New York, they were placed upon the pier, and it was there found that out of 3,000 cases about 2,000 had been damaged.

Of these 2,000 the casings of 440 were stripped, and it was finally ascertained that some water damage had happened to about 500 in all; but whether the damage was from salt or fresh water is in dispute. More than 1,000 of the cases were removed by the libelant without notice of damage, the bill of lading containing a provision that such removal should be a waiver of all claims.

The master, carpenter, and the mate of the Armiston were examined, and testified without contradiction that the hatches were closed during the heavy rains at Bussorah, and that they had examined the holds and found them clean and dry before the loading began. At Muscat more cargo was taken in fine weather, and the ship had no trouble till she passed Gibraltar. In the Atlantic she experienced unusually heavy weather even for December, and for some days labored heavily and took on board large sea; but no hatches were broken open, and there was no evidence of damage to the cargo The weather was very cold, and when the hatches were opened in New York it transpired that the holds had sweat, but the sweat did not appear to be enough to cause the damage to the dates, although some cargo was damaged in each of the holds except No. 3.

James A. Martin, of New York City, for libelant.
John M. Woolsey, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). [1] In spite of the very reasonable skepticism with which courts regard the proof of a ship's crew in such cases as this, there is no just reason to disregard their testimony, which stands quite unimpeached and which is not contradicted by any inferences necessarily to be made from the evidence touching the dates before they came aboard. Whether they got wet in the lighters while alongside, or whether they were wet before the lighters got them, does not appear; but that they were damaged is certainly the case, and that they were damaged by the rain is certainly favored by all the probabilities. Upon the issue of whether they were wet by salt water I find against the libelant; that is, if they were wet by salt water I think it was not on the ship. The only reason to suspect salt water is that Kemp found a salt reaction by nitrate of silver, but a trace would be enough for that, and salt may grow in the dates or it may get on them in the lighters. All the other witnesses say that the damage was not from salt water, and Kemp was not very certain upon cross-examination. Therefore I find that the dates were not injured by sea water while on the ship.

The only other possible water damage which could have reached them is from the sweat of the holds, but the libelant lays little stress upon this. That the holds did sweat is true enough, and some of the water may have fallen on the cargo; but it is hard to see why, if this was the cause, the Muscat dates should all have come off uninjured, while the Bussorah dates which came aboard discolored and after exposure to foul weather should be injured. Certainty is perhaps not possible, but the likelihood is very strong that the damage did not happen from sweat. I therefore find that the damage occurred through the wetting of the dates either by rain or by sea water before they came aboard and while upon the lighters. As the bill of lading contained an exception against liability for damage from rain or spray or for risks of lighterage, it follows that there is no liability under the contract of carriage.

[2] To meet this difficulty, the libelant relies upon the doctrine of estoppel, and insists that the words of the bill of lading, "in apparent good condition," are not qualified by the clause giving effect to the mate's receipts. I shall accept their position for the purposes of the case and consider it as though the bill of lading created a complete estoppel. What is the ship estopped to assert? Certainly no more than that the goods were in apparent good condition. I cannot see that this should be extended so as to forbid their showing that they were actually damaged by rain or spray and that such damage was excepted from the bill of lading. To give such a bill of lading is in my judgment a tort, for which the libelant has a remedy; but I am now considering simply the ship's liability in contract, to be worked out through an estoppel. It is no doubt unfortunate that, owing to our complicated jurisdiction, I cannot give a remedy upon that tort; but I cannot, and the distinction is therefore vital. If the libelant proceeds by estoppel, the limit of the estoppel is that the ship shall be held to the words used. Obviously, if the cases had not been stained or discolored, if the goods had in fact been in apparent good condition, the ship could have proved that they were wetted by the rain or by spray while in lighters and that the ship was excused under the exceptions of the bill of lading. How can the estoppel put the ship in a worse position than if the statements had been in fact true?

In England the law must be conceded to be in doubt, though I believe that it is in accordance with what I have said. In Campania Naviera Vasconzada v. Churchill (1906) 1 K. B. 237, Channel, J., decided that the ship was estopped by a bill of lading which had the words "in good order and condition." The case involved lumber stained by oil while at the shipper's risk, and the damage was apparent to the master who signed the bill of lading. The decision proceeded upon the theory that, as the ship was estopped to show that the lumber was not in good condition, it could not show that it had been damaged before the ship received it, and could not therefore sustain its burden as carrier of showing that it was not liable. I cannot find that the ship attempted the line of defense that, even if the lumber was damaged while in its custody, the damage was within the exceptions of the bill of lading, and this no doubt was impossible, as the estoppel went beyond the apparent condition of the goods and affected their condition in fact, from which followed the conclusion that they had been damaged while in the ship's custody, a damage the ship could not excuse.

However, in Martineaus, Ltd., v. The Royal Mail, etc., Co., Ltd., 17 Com. Cases, 176, Scrutton, J., who was of counsel for the ship in the case just cited, had before him a bill of lading containing the words "in apparent good condition." The cargo was sugar which the owner of the bill of lading acknowledged had got wet before it came to the ship. Scrutton, J., reasoned that, since the ship was estopped to say that the goods were not in apparent good condition, it was inconsistent with that estoppel to allow them to show that the damage had come from external causes, and that the ship could not prove that an excepted peril had caused the damage. I cannot in the least distinguish this case from the case at bar, except for the clause

about mate's receipts, which I disregard (Crooks v. Allen, 5 Q. B. D. 38, 40), and I can only say with great respect that it seems to me to confuse the wrong done by uttering a false bill of lading with the liability of the ship upon its contract. If the ship could not have proved the wetting of the cargo had the apparent condition been in fact good, then the decision would be without question; but no one could assert that. If it be urged that the cargo could not have been wet without showing it, I should say that that was irrelevant; but, irrelevant or not, it has no application to the case at bar, because no one has connected the discoloration of the dates with their being wet, and, indeed, the mate sent away all lighters which he supposed to have got wet.

The House of Lords, in Crawford v. Allan Line, [1912] App. Cases, 130, expressed an opposite opinion, I think, at least in the judgments of Lord Atkinson and Lord Gorell. In this case flour had been shipped from Minneapolis to Glasgow under a through bill of lading which contained the words, "in apparent good condition." The flour was wet in New York before it reached the ship, and the first question was when the estoppel spoke, which the court fixed at the date of its receipt by them. Having imposed an estoppel upon the ship because it gave the unconditional receipt under such a bill of lading, it was necessary to determine the effect of the estoppel, and in the judgment of Lord Atkinson and Lord Gorell it abundantly appears that they supposed the ship might show that the damage arose from a wetting previous to its receipt by the ship, and that the ship was excused. The Lord Ordinary of first instance had found against the ship in both these particulars, and the House of Lords accepted that finding. I think that this case at least leaves it open to doubt whether the decision in Martineaus, Ltd., v. The Royal Mail, Ltd., supra, expresses the law in England.

[3] In any case there could be no recovery for so many of the cases as were removed before notice. The Persiana, 185 Fed. 396, 107 C. C. A. 416.

[4] While therefore the libelant fails upon this proceeding, I have no doubt that to utter such a bill of lading is a tort, since it is an utterly unjustifiable fraud. The excuse that a bill of lading is not negotiable has no merit whatever, nor have any of the authorities cited any bearing on a case where a false statement is deliberately inserted to be acted upon by innocent third persons. To allow the ship to escape liability under such circumstances would be intolerable. Nothing could more clearly show the corrupt purpose of the parties than the indemnity agreement itself. There are two reasons, however, which prevent any recovery in this case upon that theory. The first is that the libel must be amended to set up a new cause of action, which it is perhaps too late now to do. The Burma, 187 Fed. 94, 110 C. C. A. 330. The second is that this is an admiralty court only and would have no jurisdiction over such a case if the libels were amended, because the bill of lading was issued at Bussorah, if that be the wrongful act, and negotiated in New York, if the wrongful act be its negotiation. One of these acts was a tort, but a tort on land, over which admiralty has no jurisdiction. Williams v. Providence Washington

Ins. Co. (D. C.) 56 Fed. 159. It is not necessary to consider whether in any event admiralty would have jurisdiction over a deceit committed on the high sea.

The libel is dismissed, without costs.

THE MERRIMAC.

(District Court, S. D. Florida. January 27, 1917.)

1. ADMIRALTY ⟸28—PROCEEDINGS IN REM—EFFECT OF STATE LAWS.
Whether a proceeding in rem can be maintained against a vessel for tort causing death depends upon the construction of the state laws.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 278–288.]

2. ADMIRALTY ⟸48—DECREE IN REM—PROCESS TO SUPPORT.
A decree in rem cannot be rendered against a vessel by an admiralty court, where no attachment was ever served.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 404–413.]

3. ADMIRALTY ⟸46—DECREE IN PERSONAM—PROCESS TO SUPPORT.
The ordinary monition issued in suits in rem in admiralty does not comply with the requirements of the monition in personam, and under service thereof jurisdiction to render a decree in personam cannot be maintained.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 393–395.]

4. ADMIRALTY ⟸44—PROCESS—EFFECT OF APPEARANCE.
Where, in a suit in admiralty, defendant filed exceptions challenging the sufficiency of the libel and an answer putting in issue its allegations of fact, it made itself a party to the proceeding in such manner that the court had jurisdiction to proceed to an adjudication of the rights of the parties in personam, though there was not a sufficient service of process to support a decree in personam.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 376–384.]

5. CONSTITUTIONAL LAW ⟸245—MASTER AND SERVANT ⟸11—VALIDITY OF STATUTES.
Laws Fla. 1913, c. 6521, regulating the liability of employers for injuries to employés, does not violate Const. U. S. Amend. 14, because it includes, in the persons, firms, and corporations subject thereto as engaged in hazardous occupations, persons and corporations engaged in boating, when the boat is propelled by steam, gas, or electricity, thereby excluding sailing vessels.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702.]

6. SHIPPING ⟸84(5)—INJURIES TO STEVEDORES—ASSUMPTION OF RISK—STATUTORY PROVISIONS.
A stevedore, engaged in loading or unloading a steam vessel, is within the protection of Laws Fla. 1913, c. 6521, section 4 of which abolishes the doctrine of assumed risk in all cases arising thereunder.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342.]

7. SHIPPING ⟸84(5)—INJURIES TO STEVEDORES—CONTRIBUTORY NEGLIGENCE.
An experienced stevedore, engaged in such business for many years, was guilty of negligence contributing to his injury, caused by the negligent handling of a hatch cover, where it appeared that it was dangerous to be under the hatch when the ship was being loaded and when covers were being placed upon the hatch, and that stevedores were cautioned about this and warned not to stand under the hatches at such time.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342.]

8. SHIPPING ⟸84(5)—INJURIES TO STEVEDORES—CONTRIBUTORY NEGLIGENCE.
Under Laws Fla. 1913, c. 6521, § 3, abolishing the defense of contributory negligence as a bar to an employé's suit for injuries, except where the injured party and the person whose negligent act caused the injury are fellow servants engaged in the performance of the act causing the injury, and the employer is guilty of no negligence contributing to the injury, contributory negligence of a stevedore, engaged in loading a vessel, but having nothing to do with the work of putting a cover on a hatch, did not bar recovery for injuries caused by the negligence of the stevedores engaged in placing such cover.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342.]

9. DEATH ⟸95(1)—DAMAGES FOR DEATH—AMOUNT.
Four thousand dollars would be a proper award for the death of a stevedore having a life expectancy of 27 years, and having a wife 6 years younger than himself and three children, where it was not shown how much he expended on his family in their care and maintenance.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 113–115, 120.]

In Admiralty. Libel by Gabriella Moody against the Merchants' & Miners' Transportation Company and the steamship Merrimac. Decree in personam against the Transportation Company.

A. H. King, Roswell King, and George C. Bedell, all of Jacksonville, Fla., for libelant.

Fleming & Fleming and Joseph S. Diver, all of Jacksonville, Fla., for respondent.

CALL, District Judge. On April 14, 1917, libel was filed against the Merchants' & Miners' Transportation Company, owners, and against the steamship Merrimac, in rem. Upon this was issued an attachment against the vessel, and also a monition in the usual form used in this district, admonishing the parties interested in the vessel to appear on a certain day, and requiring the marshal to serve a copy on the master, agent, or owner of said vessel, and by publishing a notice in the newspaper. The attachment of the vessel was never served at the request of proctors for libelant. The monition was on April 15th served upon Horace Avery, "agent for the Merchants' & Miners' Transportation Company, owners of the within named steamship Merrimac, in the absence of the president, vice president, secretary, and treasurer, and other high officials."

On April 24th exceptions were filed by the Merchants' & Miners' Transportation Company to the libel, challenging the right of the libelant to proceed in rem. On the same day an answer was filed by the owners, admitting the ownership, etc., and denying liability. On June 9th an amended libel was filed in rem by leave of court against said vessel and in personam against the owners. Upon this amended libel no process was issued.

On June 20th the owners, by leave of court, filed exceptions to the amended libel, challenging the right of libelant to proceed in rem on the case made, and in the sixth and seventh grounds attacking the libel as not showing a cause of action against the owners. On the same day the owners filed, by leave of court, answer to the amended libel, setting up virtually the same defenses contained in the answer

filed April 24th, to the original libel. Testimony was taken, and the case brought on for final hearing. Thereupon the respondent insisted upon its exception filed on June 20th.

[1, 2] The consideration of said exceptions was opposed on the ground that answer having been filed at the same time as the exceptions was a waiver of same. This position of libelant I do not think well taken. These exceptions raise the question whether a proceeding in rem can be maintained in this state for a tort causing death. The decision of this question depends upon the construction of chapters 6521 and 6913 of the Laws of Florida. The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. It is beyond question, I imagine, as said by Judge Locke, in The Nora (D. C.) 181 Fed. 845, that "the jurisdiction in actions in rem is only given by attachment and bringing the vessel into the custody of the court, and no valid decree can be entered without such attachment." In the instant case, as above noticed, no attachment was ever served. The vessel was never taken into custody, and hence no decree in rem could be entered in this suit. The question, therefore, whether a lien exists under the state law, becomes a moot question in this case. This disposes of the bulk of the exceptions.

The respondents also contend that libelant can have no relief in this case because she has brought a libel in rem and in personam joined, and such practice is not permitted under the admiralty rules promulgated by the Supreme Court. Rules 12 to 19 inclusive (29 Sup. Ct. xl, xli), provide against whom suits may be brought by materialmen, seamen, pilots, and in suits for damages by collision, for assault and battery, for hypothecation, on bottomry bonds, and for salvage. Unquestionably claims against the vessel and owners cannot be joined in claims coming within the terms of said rules. In The Corsair, supra, the court declined to decide whether there could be a joinder in other claims than those covered by these rules. For the reasons above noted, it is not requisite for this court to decide that question in this case.

[3, 4] The vital question that arises in this case is: Can this court, in the state of pleadings render a judgment in personam against the respondent? The answer to this question depends on whether the respondent, by filing the exceptions and the answer, has made itself a party to this proceeding in such manner that a decree in personam can be rendered against it, if the evidence warrants it. The monition served upon Avery was the ordinary one issued in suits in rem, and does not comply with the requirements of the monition in personam, and jurisdiction under such service cannot be maintained. If the pleadings filed by the respondent are tantamount to a general appearance, there is no more reason why a party may not submit himself to the jurisdiction of an admiralty court than to a court of equity or common law. The rule in those courts last named is that any pleading filed which requires the court to decide upon the merits of the case will be construed to be a general appearance and cure any defect of service; the court having jurisdiction of the subject-matter. In the instant case the sixth and seventh grounds of exception challenge the

sufficiency of the amended libel as against the respondents. This in effect admits, for the purpose of pleading, the truth of matters of fact alleged in the libel, but denies their sufficiency to make the respondents liable. It performs the office of a demurrer at common law, and under all the decisions a demurrer is equivalent to a general appearance. In addition, an answer was filed, putting in issue the allegations of fact upon which the liability of respondent was predicated. I am of opinion, therefore, that the respondent has made itself a party to this proceeding in such manner that the court has jurisdiction of the parties to proceed to an adjudication of their rights in personam.

[5] Chapter 6521, Laws of Florida, defines the persons, firms, and corporations engaged in hazardous occupations, and among them "boating, when the boat is propelled by steam, gas or electricity." Attack is made upon this act as violating the Fourteenth Amendment of the Constitution of the United States. The main contention is that it is unreasonable classification, in that sailing vessels are not included. Without pausing to discuss the cases, I have reached the conclusion that the act is not amenable to the objections urged.

[6] It is also urged that the deceased did not come within the purview of the act, because he was a stevedore, engaged in loading the ship, and not navigation. The statute refers to corporations engaged in "boating," and it is the employés of such corporations to whom the benefits are extended. Section 4 of the act abolishes the doctrine of assumed risk in all cases arising under the act. Therefore, if this case arises under the act, the defense of assumed risk interposed in the answer is disposed of.

It seems to me to be beyond controversy that a stevedore engaged in loading or unloading a steam vessel falls within the protection of the act. Section 3 of the act abolishes the defense of contributory negligence as a bar to the suit, except where the injured party and the person whose negligent act caused the injury are fellow servants, engaged in the performance of such act, and the employer is guilty of no negligence contributing to the injury. And provides for the apportionment of damages where the injured person and the employés of the corporation are at fault. Chapter 6913 provides for survival of actions. It is under the provisions of this chapter of the Laws of Florida that libelant as widow maintains her suit.

The libel in this case alleges two grounds of negligence: First, negligence of the respondent, in that the hatch cover was too short, and by reason of this defect it fell through and upon deceased; Second, that through the negligence of the agents and employés the hatch was allowed to fall upon the deceased. After considering all the evidence in the case, I cannot find that there was any defect in the hatch cover which caused it to fall. The great weight of the testimony shows that the hatch cover was in good condition, and was not in the condition the witnesses who were engaged in placing it in position testified it was. It is perfectly natural that these two men, whose act was responsible for the death of the deceased, should have sought to have excused themselves. In addition to this consideration is the fact that they were shown to have made statements of the occurrence different from those testified to in this case.

[7] There can be no question that the injury to the deceased was caused by the negligent handling of the hatch cover by these witnesses. This being so, it becomes necessary to decide whether the deceased was guilty of negligence contributing to this injury. The testimony of Buckley shows that it was dangerous to be under the hatch when the ship was being loaded, and when the covers were being placed upon the hatch above; that the stevedores were cautioned about this, and warned not to stand under the hatches at such times. The testimony shows Moody to have been an experienced stevedore, engaged in this business many years. It is fair to assume, therefore, that the deceased was fully aware of the danger, and knew the covers were being placed upon the hatches, preparatory to the vessel going to sea. I therefore find that the deceased was guilty of negligence that contributed to his injury.

[8] The next inquiry is: Were the stevedores, Dawkins and Washington, fellow servants jointly engaged in performing the act causing the injury. The testimony shows that these two persons were engaged in putting the cover on the hatch on the main deck, with which the deceased had nothing to do. Therefore it is not such a case as falls within the purview of section 3 of chapter 6521 of the Laws of Florida, where contributory negligence would bar recovery.

[9] It then becomes a question of the amount the libelant is entitled to recover. The testimony shows the average probable earnings of the deceased, but absolutely fails to furnish any guide as to the amount probably expended on his family in the care and maintenance, and the court is left in some measure to conjecture and the general knowledge that all men possess of the probable cost of the maintenance of a wife and three children in the walk of life of the libelant. Taking the life expectancy of the deceased 27 years as a guide to the probable duration of the marital relation between the deceased and libelant, the testimony showing the libelant some 6 years younger than deceased: Now, in addition to the monetary damage, a widow is entitled to recover damages for the loss of marital comfort and association she has sustained by reason of the death of her husband. I find that the libelant is entitled to a decree against the respondent for the sum of $4,000, and her costs in this behalf expended.

A decree will be entered for said sum.

In re GRAFF et al.

(District Court, E. D. New York. May 14, 1917.)

1. BANKRUPTCY ⊂=438—COMPOSITION—RIGHTS AS TO PROPERTY UNDISPOSED OF.

Certain persons claiming to be creditors of a bankrupt firm were claimed by the other creditors to be partners of the bankrupts. J., acting as their representative, or as the representative of the bankrupts, bought up the other claims and the proceedings were terminated by an agreement between all of the parties interested, under which the estate in the hands of the trustee was turned over to J. in full settlement of all of his claims, but the individual property of N., one of the bankrupts, was released and given back to him. The bankrupts, individually and as partners, were discharged. Certain certificates of stock and certificates of indebtedness, which had been in the hands of the trustee, but not scheduled, and apparently considered worthless, were returned to N., and subsequently proved to be valuable. *Held*, that J. had no claim thereto after the expiration of the time for setting aside a composition or a discharge; the situation being exactly as though a composition had been offered and approved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 626.]

2. BANKRUPTCY ⊂=417(4), 491—COMPOSITION—DISCHARGE—SETTING ASIDE—LIMITATIONS.

While N., by applying to the bankruptcy court for an order reopening the proceedings to the extent of taking over the shares of stock and offering them for sale, in order to make his title thereto good, waived the effect of the statute of limitations, so far as it was something to be taken advantage of by himself, he did not waive the statute as to his discharge, nor as to the possibility of indictment for making false statements in the schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 871.]

3. BANKRUPTCY ⊂=372—REOPENING PROCEEDINGS—JURISDICTION.

It was within the jurisdiction of the bankruptcy court to grant N.'s application for leave to turn the property over to the estate and to sell it, in order to remove any question as to title from the failure of such property to pass through the hands of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574.]

In Bankruptcy. In the matter of G. Edward Graff and another, individually, etc., bankrupts. On applications by Thomas F Nevins and others to show cause. Ordered in accordance with the opinion.

Walter H. Merritt, of New York City, for petitioner People's Trust Co.

Watson & Jameson, of Brooklyn, N. Y., for Thomas F. Nevins.

CHATFIELD, District Judge. Thomas F. Nevins, one of the bankrupts above named, owned and scheduled certain property, including some Florida real estate and some personal jewelry (in the possession of his wife and evidently family keepsakes), which was never turned over to the trustee. It appears from the record that both of the bankrupts had one or two wealthy residents of Brooklyn as customers, who presented claims as creditors against the estate for stock-brokerage balances. These men were claimed by the other creditors to have been partners of the bankrupts in certain speculations.

If this claim of partnership was substantiated, the amount due from

these well-to-do men would have enabled the bankrupts to pay all of their other creditors and to have left a surplus in the hands of the firm. These questions were never determined, but Mr. Edward Johnson, now deceased, whose executor is making the present application, acted apparently as representative of the alleged partners of the bankrupts in buying out and presumptively paying off in full all the other creditors of the bankrupts, and thus leaving only himself and the men charged to have been partners with the bankrupts interested in the estate.

While Johnson thus by assignment succeeded to the rights of the other creditors, he nevertheless was not a third party dealing with the bankrupts as an innocent purchaser for value of these claims. His position was subject to such equities as knowledge of the entire transaction might invoke, and his position was in effect the same as that of the creditors who were alleged to be partners with the bankrupts. The bankruptcy proceedings were terminated by an agreement between all of the parties interested, under which the estate, then in the hands of the trustee, was turned over to Johnson in full settlement of all his claims. But the personal property of Nevins, consisting of the Florida land and the jewelry above mentioned, and also an indorsement upon certain notes which Nevins had previously made to further the settlement, were released and given back to him. He in effect surrendered nothing but the firm assets, in the hands of the trustee. In other words, he as an individual was relieved from any obligation beyond his relinquishment of claim to the joint property of the firm.

The final order directing distribution upon this basis of settlement was entered February 7, 1903. It was in effect the payment of a final dividend, but was based upon a composition, and could be attacked for fraud only within the period of 6 months, under section 13, or 12 months after discharge, under section 15, of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. 1916, §§ 9597, 9599]). The time to appeal has long since expired, as has also the period within which any claim could be made against the trustee for any of his acts (section 50, subd. "m" [Comp. St. 1916, § 9634]).

It appears, although the evidence is not clear, that among the papers in the office of the bankrupt partnership, at the time the trustee was in possession, were certain certificates of stock, a note, and two certificates of indebtedness of the Brooklyn Citizen, which were returned to the bankrupt Nevins, by mail, at some time subsequent to the negotiations under which the bankruptcy proceedings were settled. Nevins testifies on this present application that he did not consider this stock and these certificates of any substantial value at that time, and did not consciously omit them from his schedules, which were made up with the partnership schedules by bookkeepers, and which did show the Florida land and the jewelry above referred to.

It appears that during the last few years a considerable amount, viz., about $4,915.21, has been paid by the Brooklyn Citizen to Nevins on account of the note and certificates, and that a certain litigation has been brought by Nevins against the Citizen, because of the possession and claimed ownership of the shares of stock. In this litigation an order was made allowing the Citizen, on terms, to amend its answer, so as to allege lack of title in Nevins because of the adjudication in

bankruptcy and alleged concealment of these assets. Appeal was taken to the Appellate Division, and the Appellate Division for the first time considered the jurisdictional objection that Nevins was not the owner of the stock in question, and in affirming the order appealed from intimated that discharge and distribution in bankruptcy might not have caused title to these assets to revert to Nevins. Nevins thereupon applied to this court for an order reopening the bankruptcy proceedings, to the extent of taking over the shares of stock and offering them for sale, and he presented a bid of $500 therefor.

Inasmuch as the trustee had been discharged, and could not be reinstated, except upon notice to creditors and after another election, the court provided that the former trustee should, if the matter were approved, execute for the court such instrument as would pass the title of the bankrupt estate in and to the property. Upon the hearing of this application, a second bid of $1,000 for the certificates was presented, and it was urged upon the court that the offer of $500 was inadequate. The sale was adjourned, and has not been concluded. In the meantime the executor of the estate of Johnson has obtained an order to show cause why the bankruptcy proceeding should not be reopened and referred to a referee, to obtain the property which was owned by Nevins at the time of the bankruptcy proceedings, and which was not included in his schedules, together with the income, proceeds, and profits derived from such property, and staying any further action upon the application of Nevins for the sale of the shares of stock and certificates of indebtedness. Upon a hearing of the last order to show cause the foregoing facts have all been presented and argued.

[1] It appears that the settlement which led up to the dismissal of the bankruptcy proceedings was based upon payment by Johnson to all of the creditors, except those who were charged with partnership liability. It would appear that Johnson, in so far as he was acting in the matter, had no personal interest, and represented either the bankrupts, in order to settle with their so-called partners, or that he represented these so-called partners, and bought up the claims for their benefit, in order to free themselves from further obligations to the bankrupt estate. In either event, the consent of all parties to the settlement, upon the basis of delivery to Johnson of the property in the hands of the trustee, except such as belonged to Nevins, shows no fraud upon creditors, and shows no personal interest of Johnson in the estate. As between the bankrupts, or as between Nevins and those men charged with the interest of partners, in the stock-speculating operations, there was an absolute refusal on the part of Nevins to contribute to the fund which was turned over to Johnson and which he presumably used in accordance with his agreement with the gentlemen who were alleged to be partners in the bankrupt concern. They consented to the settlement and termination of the bankruptcy proceedings and to the delivery of this property to Johnson. If Johnson was acting as their representative, they freed themselves from further demands at the hands of the creditors and of the bankrupts, by paying the amount necessary to remove all the other creditors, presumptively at the face value of their claims, from the case. If Johnson did not represent these gentlemen, but agreed to relieve them from further claims, upon their

relinquishing any rights to the property which Johnson bought, by paying off the other creditors, then under these circumstances Johnson would have no claim to any of the property which was not in the hands of the trustee at the time he made the settlement in question.

It is apparent, therefore, that the estate of Johnson has no claim to the assets now discovered to be in the hands of Nevins, and Johnson is no longer a creditor of the bankrupt estate. The report of the trustee, dated February 7, 1903, sets forth the assets in his possession and realized by him as trustee, and these are the assets which were turned over to Johnson, and for which Johnson, as trustee or agent, acquired the rights from all of those parties (with the exception of one $12 claim, which was paid in full with his consent) who were not relieving themselves of demands at the hands of the bankrupts, sufficient in amount to more than pay the bankruptcy claims.

The bankruptcy proceeding was concluded in the form of a dividend to the only person then occupying the position of creditor. The trustee was discharged, and his bond relieved from further liability. On the 7th of February, 1903, the bankrupts, individually and as members of the copartnership, were discharged, upon the written consent of the attorneys for Johnson, and by the report of the trustee, made April 25, 1903, it is shown that the trustee had paid the estate in his hands to the sole party occupying the position of creditor, and had "turned over the books and papers belonging to the bankrupt estate to the custody of G. Edward Graff, one of the bankrupts." It is evident that if the shares of stock and certificates of the Brooklyn Citizen were in the office of the bankrupts, and all the books and papers in this office were turned over to Graff, there would be nothing mysterious in the delivery of these shares of stock and certificates to Nevins, whose personal property they evidently had been. The trustee never saw them, or knew of them, and they were not a part of the property to be turned over if the compromise was effected under the assignment made by which Johnson became sole creditor.

This is not a case where one creditor has bought in the claims of the others and taken over the business, or has sought to minimize his own loss by purchasing the property as a whole, in order to preserve it as a going concern. While the case was wound up as if a dividend had been declared, the situation is exactly that which would have been presented if the bankrupts had offered a composition, and the effect of the discharge is to wipe out all the rights of action on behalf of Johnson or any other of the creditors against the bankrupts. The situation must be viewed in equity exactly as if the bankrupts had offered $192,000, more or less, in composition of all their claims, and had thus obtained a discharge and a dismissal of the proceedings, upon approval of the composition. Section 12, subd. "e" (Comp. St. 1916, § 9596). But, if fraud were shown, the only remedy would be to set this composition aside within six months, or to proceed by indictment, if a false statement had been presented in the schedules. The statute of limitations has run against any such remedy. The creditors of the estate have had their claims satisfied, except in so far as a compromise of conflicting claims between the bankrupts and those who were

alleged to be their partners was settled by the giving up by the bankrupts of all claims to the assets which had been scheduled, and by retention on the part of the bankrupts of all assets which may not have been brought to the attention of the trustee.

The case does not show fraud, which would have prevented the discharge, if these assets had been discovered prior to bankruptcy. The most that could have happened would have been that they would have been taken into possession by the trustee as having been omitted through mistake. The evidence of this property was apparently in the hands of the trustee when the schedules were made up, but unknown to the accountants or attorneys who were preparing the schedules, and if the certificates had not been returned to Nevins after the case had been closed, it is impossible to tell how soon he would have remembered previous possession of this stock. Its subsequent rise in value has no bearing upon the title which he obtained at the time of bankruptcy. It apparently was considered worthless then, and his former creditors have no right to object if this property, like the Florida land, experienced a sudden and great increase in value.

[2] The finding of the Appellate Division that the title of Nevins can possibly be attacked for fraud is a finding only to the effect that, if his title be fraudulent or imperfect, he cannot ask relief thereon. The matter was sent back for hearing upon the merits in the state Supreme Court. Nevins has sought to make his title good, against the claim of fraud, by a purchase at the hands of the bankrupt estate. He has thereby undoubtedly waived the effect of the statute of limitations, in so far as the statute of limitations is something to be taken advantage of by himself. He does not waive the statute of limitations as to his discharge, nor as to the possibility of indictment, and accomplishes only the result that the personal property could be dealt with like real estate. If this were real property, title would vest in the bankruptcy estate, until conveyed under the statute. That title could not be cleared, except by a sale, and the proceedings could be reopened and title made. If the creditors had been paid in full, or if a composition agreement had been carried through, and if the balance of the estate had been turned back to the bankrupt, then any after-discovered property, which might result in further proceeds, would also be turned back to the bankrupt, or, if sold, the proceeds would go to him. To hold that a mistake by a bankrupt in the filling out of his original schedules, by which mistake certain valueless property was not taken into account, and which property would not have increased the estate in any way during the period in which the estate was being administered, and which property, if it had been known to the creditors, would not have altered the situation, could be made a basis for upsetting the entire bankruptcy proceeding, would result in an endless series of litigation over every accidental error, which might be taken advantage of by creditors who wished to harass a bankrupt, by disputing the subsequent value to him of property which, even if known to the creditors, would have been considered as of no value whatever.

[3] The application to show cause why the estate should not be opened and this property administered as a part thereof should be

denied. The application of Nevins for leave to turn the property over to the estate, and to sell the same, is within the jurisdiction of this court to carry out, in order to make title to those assets as to which property was vested in the bankrupt estate, and as to which any question as to title may exist from the fact that they have not passed through the hands of the bankruptcy court. If such sale is had, the proceeds would appear to belong to Nevins, after the payment of expenses, subject to any rights as between Graff and Nevins, or the individual creditors of each, inasmuch as the trustee apparently returned the books and papers—that is, the office paraphernalia—to the partner Graff, and left in the possession of Nevins the Florida land, jewelry, and the notes which Nevins had indorsed and which had not been used.

THE BENEFACTOR.

SMITH & TERRY, Inc., v. CLINTON.

(District Court, E. D. Virginia. March 17, 1917.)

1. TOWAGE ⊂=9—TOWAGE SERVICE—BREACH OF EXECUTORY CONTRACT.
A maritime lien does not attach against a vessel for breach of an executory contract for towage service, when the service was not actually rendered.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 9.]

2. SHIPPING ⊂=51—CHARTER—LIEN FOR TOWAGE SERVICE.
A time charterer of a barge *held* entitled to a maritime lien for the service of a tug in towing her to a port, where she was abandoned because of unseaworthiness before the expiration of the charter term.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203–210.]

3. MARITIME LIENS ⊂=9—TIME CHARTER—LIEN FOR DEAD FREIGHT.
A time charterer of a coal barge *held* not entitled to a maritime lien against her for dead freight.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13.]

4. SHIPPING ⊂=58(3)—CHARTER—DAMAGES FOR BREACH.
A time charterer of a coal barge, which had subchartered it for the term at a profit to itself, *held* entitled to recover, as damages for breach of the charter by reason of the unseaworthiness of the barge, the profit it would have made from the subcharter, where that was no more than it could reasonably have expected to make under prevailing shipping conditions.

5. SHIPPING ⊂=58(3)—CHARTER—DAMAGES FOR BREACH.
Libelant chartered a coal barge for three months, with the option of renewal for three months more; the owner agreeing to keep the barge in good condition. During the first term the barge was abandoned for unseaworthiness, and libelant did not exercise its option. *Held*, that it was not entitled to recover damages on account of the second term; there being no way of ascertaining what, if any, profit it would have made, even if it had exercised its option.

6. ADMIRALTY ⊂=66—PLEADING—AMENDMENT OF LIBEL.
Libelant, as charterer, brought suit in rem against a barge to recover damages for breach of the charter. It also brought a suit in personam against the owner to recover damages for loss of its right to renew the charter for another term, in which another vessel belonging in part to

the same owner was seized under foreign attachment, and he gave bond for its release. Subsequently, on exceptions to the libel, one claim for damages was withdrawn in the suit in rem for lack of lien, and was set up by an amended libel in the suit in personam. *Held*, that it was within the discretion of the court to allow the amendment, since all the claims arose from the same breach, and to award a decree thereon against the surety on the release bond.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 519–538.]

In Admiralty. Suits by the New York Disposal Corporation against the barge Benefactor, on libel and petition of Smith & Terry, Incorporated, and by Smith & Terry, Incorporated, against Joseph F. Clinton. Decrees for libelant, Smith & Terry, Incorporated, in both suits.

Edward R. Baird, Jr., of Norfolk, Va., for libelant.

Lewis Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va., for respondents.

WADDILL, District Judge. The controversy now before the court is between Smith & Terry, Incorporated, petitioners in the first-named case, a proceeding in rem against the barge Benefactor, and the same corporation, as libelant in the second case, a proceeding in personam against Joseph F. Clinton, owner of the Benefactor, and grows out of an alleged breach of charter party entered into on the 13th day of December, 1915, between said Clinton, owner of the Benefactor, as the party of the first part, and Smith & Terry, Incorporated, as the party of the second part, whereby the former chartered to the latter for a period of three months, with the option of an additional three months, the barge Benefactor, to transport coal between Hampton Roads, Philadelphia, and Sound ports, at an agreed price of $50 per day. The party of the first part was to furnish the proper crew, including captain, and pay all expenses connected with the barge, for wages, shipping fees, provisions, etc., and furnish a necessary towing hawser, and agreed to keep the barge in good order, and fitted for such work, during the period of service under the charter.

The cause of action arose from a breach of the charter party, because of the alleged unseaworthiness of the barge. The petitioner in the in rem proceeding makes five separate claims against the barge, as follows:

1. Bill of tug W. B. Keene, for loss of time	$ 300.00
2. Bill of Smith & Terry, Incorporated, owner of tug Underwriter, for loss of time	300.00
3. Bill of Smith & Terry, Incorporated, owner of tug Underwriter, for towing barge Benefactor from Providence, R. I., to New York	150.00
4. Bill for dead freight	425.00
Total	$1,175.00

—together with (5) a claim for $3,351.50, being profits the libelant would have received during the first three months covered by the charter, from December 13, 1915, to March 13, 1916.

In the proceeding in personam libelant sought to recover the sum of $4,602.50, being profits that would have been made, as claimed, during the extended period of their option of three months from March 13,

1916, had not the barge proved unseaworthy; and in the in personam proceeding libelant has by an amended libel, also set up item No. 5, of $3,351.50, in the in rem proceeding—it being conceded that recovery for that amount cannot be maintained in the in rem proceeding.

The claims thus made depend on different considerations, and require that they be separately passed upon, which the court will do without undue elaboration.

[1] First. Claims 1 and 2, aggregating $600, for tug hire in connection with the cargo of coal taken before breach of the charter party because of unseaworthiness, presents the question whether a lien in rem attaches against a vessel for breach of an executory contract for towage service, when the service was not actually rendered. The right of lien under such circumstances does not exist under maritime law. Authorities to support this might be given almost without number. The Prince Leopold (C. C.) 9 Fed. 333; The Thomas P. Sheldon (D. C.) 113 Fed. 779, affirmed The S. L. Watson, 118 Fed. 952, 55 C. C. A. 439; The Francesco (D. C.) 116 Fed. 83—are cases which deal directly with this subject, and to them, and the cases therein cited, reference may be had as containing a full statement of the law on the subject.

Libelant insists that, conceding the law to be as stated by the court, they can nevertheless recover, as the liability for the $600 was incurred after the contract of towage had been entered upon; the barge having been brought from Philadelphia to Hampton Roads to receive the cargo. The court does not think that the bills covered by the $600 items can be affected by this towage service, whatever may have been the rights of the charterer, if any, to assert a claim for towing the barge from Philadelphia, which the libelant has not made.

[2] Second. Claim 3, for towage of the Benefactor from Providence, R. I., to New York, $150, should be allowed. The towage was actually performed, and the suggestions that the allowance should not be made because the charterers were obligated to return the barge to New York and that this service was not rendered on the faith of the barge, cannot be sustained under the facts of this case. The charterer, it is true, was required at the expiration of the charter period to return the barge to New York; but this expense was not incurred upon that theory at all, but was contracted for taking her back from her port of destination on the Sound, on her return trip, and before she had been abandoned because of unseaworthiness; and it likewise cannot be said that the charterer, while the barge was in its possession, and being actually towed by it, was not looked to as security for the expenses incurred in connection with the barge, while in their service.

[3] Third. This item of $425 is for dead freight, as follows: The charterers claim that the barge had a capacity of 1,350 tons of coal, whereas she only carried 1,180 tons, a shortage, or dead freight, of 170 tons, and that they therefore lost at $2.50 per ton on this deficiency, the sum of $425.

This contention of the petitioner cannot be maintained. In her then condition, 1,200 tons was, as the testimony shows, all she could safely carry. The explanation of the barge's master seems reasonable, that to have taken on another car of coal would have overloaded the barge,

and hence 1,180, instead of 1,200, tons were taken. Moreover, what is said regarding items 1 and 2, as to lack of a maritime lien to support those claims, largely applies here. The mere fact that the libelant claimed that, under its charter party, more coal might have been taken, does not give a lien for loss arising from failure to put it on board.

Fourth. The fifth item in the in rem proceeding, $3,351.50, as before stated, has been withdrawn, and asserted in the in personam proceeding, by amended libel which brings the court to the consideration of the in personam proceeding, and the right of the libelant to recover therein, either for the amount set up in the original libel, of $4,602.50, or in the amended libel, of $3,351.50. In considering this feature of the case, it must at the threshold be determined (1) whether any right of recovery exists, by reason of the unseaworthiness of the barge; and (2) whether the libelant is entitled to claim for estimated profits on what it would have made, had the option to extend the charter party for the second three months been taken up, assuming the barge to be seaworthy. These questions will be taken up in the order stated:

[4] (1) The court is convinced, upon full consideration of all the testimony in the case, that the barge was unseaworthy, and that the libelant was fully warranted in refusing to carry out the contract under the charter party, and that it is entitled to recover for losses sustained by reason of the unseaworthiness of the barge during the first three months of the contract, that is, from December 13, 1915, to March 13, 1916, and that the sum claimed, to wit, $3,351.50, is what it should reasonably recover by reason of the breach of the contract on the part of the respondent. During these three months the charterers had subchartered the barge at a profit to itself of $2.50 per ton, and respondent insists that he is not bound by these figures, and should not be held liable for the same; that he was in no way bound by the contract with the subcharterer, or party to the same, or had any knowledge thereof.

Assuming this position to be well taken, it would not alter the result, as $2.50 per ton is the profit that the libelant could reasonably have expected to make during the three months in question, taking into account the then condition of tug hire and other expenses incident to making the required voyage; and the court likewise finds that the libelant might reasonably have expected to make three voyages in addition to the one actually made during the three months in question.

[5] (2) Considering the claim for $4,602.50, covered by the original libel in personam, for estimated profits covering the three months extension period of the charter party, the court's conclusion is that the libelant is not entitled to recover any part of this item, for the reason that it did not avail itself of the right to extend the option for the additional three months, as contemplated by the charter party, and give to the respondent the notice required of such purpose to extend. Moreover, it does not follow that there would have been any profit during these latter months, had the option been taken up, in which event the libelant's right of recovery would have been for nominal damages only. Richard et al. v. Holman et al. (D. C.) 123 Fed. 734. And it is quite clear that during that period, namely, from the 13th of March to the 13th of June, 1916, no such profit as $2 per ton could have

been made in the then condition of freights for the transportation of coal between the ports covered by this charter.

[6] This brings us to the final question presented by the pleadings and proofs, as to whether or not the libelant is entitled to set up its claim for damages arising under the charter party, covering the first three months period, by an amended libel in the in personam proceedings. In support of this right, libelant cited Benedict's Admir. § 413; 1 Cyc. 860; McCready v. The Brother Jonathan, Fed. Cas. No. 8,732a; Davis v. Adams, 102 Fed. 520, 42 C. C. A. 493; The San Rafael, 141 Fed. 270, 72 C. C. A. 388.

Respondent insists that, notwithstanding these authorities, the general effect of which he does not especially controvert, it cannot be maintained that a different cause of action from that set up in the original libel can be interposed by amendment. The doctrine contended for, that an amendment should be limited to an elaboration of the claim already asserted, as distinguished from a new one, is undisputed; but in the judgment of the court it cannot be said that the claim asserted in the amended libel is of that character. All the claims stated in the in rem and in the in personam proceedings grow out of an alleged breach of the charter party aforesaid, which chartered the barge Benefactor to the libelant and petitioner, Smith & Terry, Incorporated. It first claimed, among other items in the in rem proceeding, for losses arising from the unseaworthiness of the barge during the first three months of the running of the charter period; and, secondly, in the in personam proceeding sought to recover damages for alleged loss of profits which it would have received during the three months of the extension period. The item for losses sustained during the first three months was, upon exception by the respondent to the libel, withdrawn from the in rem proceeding, and subsequently, by the amendment in question, set up in the in personam proceeding, and in which, by foreign attachment, another vessel, the Joseph F. Clinton, of which the respondent Joseph F. Clinton was one-fourth owner, was attached. The respondent specially appeared therein, claimed the vessel, gave bond, and caused the barge to be released, before the filing of the amended libel.

The court has, for reasons herein stated, denied to the libelant the right of recovery in the in personam proceeding for the amount of the original claim, that is, for damages for loss of profits arising during the extended period of the charter, and has awarded damages for the losses sustained during the first three months of the contract; and its conclusion is that the petitioner has the right to file the amended libel, and to assert in the in personam proceedings the claim for damages sustained during the first three months of the contract, as heretofore allowed.

The right of amendment is largely a matter of discretion (Wiggins Ferry Co. v. Railroad, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; The Oregon, 158 U. S. 206, 15 Sup. Ct. 804, 39 L. Ed. 943; Davis v. Adams, 102 Fed. 520, 525, 42 C. C. A. 493; Richmond v. Copper Co., 20 Fed. Cas. 738), and the court does not believe that it would be in consonance with right and justice, or in accordance with the equitable principles of maritime law, to refuse the amendment, and deny to the

libelant any right of recovery in the case, either in the in rem or the in personam proceeding. The respondent should not be allowed to escape liability in the in rem proceeding because of the lack of a lien upon the res, and in the in personam proceeding to come in and litigate with the libelant its rights and liabilities under the charter party in question, and deny the libelant the right of amendment in the in personam proceeding, to assert its entire claim; that is, the one withdrawn in the in rem proceeding. This is more particularly true, since the respondent, notwithstanding his special appearance in the in personam proceeding, has filed therein a cross-libel asserting his right of recovery for an alleged breach of the charter, on the part of the libelant, for the sum of $4,160.59, which is in effect a waiver of the special appearance.

The court's conclusion is that the respondent is not entitled to any recovery on his cross-libel, for the damages sustained by breach of the charter, the same having been broken by the respondent owing to the unseaworthiness of the barge Benefactor, and that the libelant, Smith & Terry, Incorporated, is entitled to recover the amount set out in its amended libel, in the in personam proceeding against the defendant Joseph F. Clinton individually, and against the surety on the bond given for the release of the barge Clinton attached in these proceedings. The Palmyra, 12 Wheat. 1, 10; Newell v. Norton, 3 Wall. 266, 18 L. Ed. 271; The Beaconsfield, 158 U. S. 310, 15 Sup. Ct. 860, 39 L. Ed. 993; The Brother Jonathan, Fed. Cas. No. 8,732a; Boden v. Denwolf (D. C.) 56 Fed. 847; Fairgrieve v. Insurance Co., 112 Fed. 364, 50 C. C. A. 286, also on certiorari, 186 U. S. 484; Cyc. vol. 1, p. 860.

The bond given by the said Joseph F. Clinton for the release of his interest in the barge, being for the sum of $5,000, an amount in excess of the sum decreed in favor of the libelant, Smith & Terry, Incorporated, to wit, the sum of $3,351.50, a decree will be entered in its favor for the full amount of $3,351.50 in the in personam case, and for $150 in the in rem proceeding, with costs in the in personam case, and without costs in the in rem proceeding.

SAVANNAH RIVER SALES CO. v. McFARLAND.

(District Court, E. D. Pennsylvania. May 31, 1917.)

No. 4030.

1. SALES ⇐174—REFUSAL TO DELIVER—NONPAYMENT.

Under a contract for the sale of lumber to be shipped in installments in vessels to be furnished by the buyer, and to be paid for within a specified time after receipt of the bill of lading, the seller was entitled to refuse further deliveries, where the buyer refused to pay for a shipment as it had agreed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434.]

2. SALES ⇐195—PAYMENT OF PRICE—EXCUSES—ANTICIPATED BREACH.

The buyer was not justified in refusing to make payment for a shipment because the seller's insistence on the contract being carried out as

made led the buyer to believe that the seller would refuse to make further deliveries, thereby breaking the contract, after the time limit expressed in the contract had expired.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 509.]

At Law. Action by the Savannah River Sales Company against James B. McFarland, Jr., trading as the McFarland Lumber Company. On motion by defendant for a new trial. Rule discharged.

C. Alison Scully and Owen J. Roberts, both of Philadelphia, Pa., for plaintiff.

J. Q. Hunsicker, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The trial of this case resulted in a directed verdict in favor of the plaintiff. This direction, or more accurately speaking, the rulings which preceded it, might well be deemed by the plaintiff to have involved an arbitrary denial of its at least technical rights. This phase of the case, however, affords the defendant no just cause of complaint. It follows that the present motion might be disposed of by dismissing it without further comment. The earnestness with which the motion has been pressed by counsel calls for a statement of the reasons which lead us to the conclusion reached. Before taking up the reasons for a new trial in the order given, an outline statement of the main features of the case of the plaintiff and of the defense may be of aid in reaching the precise appellate questions with which we are concerned. The contract which provoked this litigation was, in substance, one by which the plaintiff agreed to sell and deliver, and the defendant agreed to accept and pay for, a quantity of lumber which, for the purposes of this case, we will state in round figures of 2,000,000 feet. This lumber was to be provided by the plaintiff to be put upon vessels furnished by the defendant. The shipments were to be made from time to time, and each shipment was to be paid for within the specified time after receipt of the bill of lading, and the whole quantity of lumber contracted for was to be thus shipped within the time likewise specified. The price was in like manner predetermined. The defendant's proffer of a contract embodied among its other terms that of a delivery f. o. s. vessel at a designated port. In its acceptance, the plaintiff modified the terms of the proposed contract in this respect by making the place of delivery f. o. s. vessel, but accompanied it with this provision that the loading should be done by it through its employés and at a price named by it. In substantial effect the change made in the contract was one affecting only the price and making the delivery f. o. s. The plaintiff promptly proceeded to carry out its contract in accordance with its terms by loading the first vessel provided for the purpose by the defendant. The defendant refused to fully comply with its part in the contract by making, instead of a full, a partial, payment for the lumber shipped, seeking to excuse, or at least explain, its failure to fully perform by stating that there had not, at that time, been an opportunity to verify the bill of lading as to the quantity and quality of the shipment. A fairly substantial deduction was made from plaintiff's bill to protect the consignee from an insignificant shortage in quantity and quality of the lumber. The plaintiff

refused to acquiesce in this deduction, protesting against it and insisting upon the compliance by the defendant with its contract. In the meantime, however, it had proceeded before this dispute had developed to load the second vessel. Intermediately the consignees had experienced a difficulty in securing vessels to carry the shipments, and anticipated further difficulties and consequent delays in the arrival of vessels in time to take the shipments called for by the contract. In further consequence, they opened negotiations with the plaintiff looking to a modification of the contract in this respect and tendering compensating concessions on their part. The plaintiff at once met these overtures with a statement of its attitude as one of insistence upon the contract as made being carried out, and its unwillingness to change or modify the contract as made in any respect.

Cotemporaneously with these negotiations, the second vessel arrived at its port of destination, and its cargo of lumber was accepted by the defendant. What then came to pass is this: The defendant, evidently assuming that the plaintiff would refuse to deliver lumber after the time limit had expired, and evidently, also, having been advised by counsel that such a refusal would be a breach of the contract as made and put the plaintiff in default, further assumed the right to refuse to pay for the lumber already delivered, payment for which was called for by the contract in order that they might be in a position to recoup themselves for a loss under this anticipated breach of contract by plaintiff. The defendant, in the assertion of what it deemed to be its rights as thus stated, refused to make the payments in accordance with the contract, and demanded of the defendant an extension of the time within which further shipments were to be made. In the meantime the loading of a third vessel had been proceeded with, and the vessel had been partially loaded when the refusal of the consignees to pay came to its climax, and the time limit for further deliveries expired. The plaintiff then at once stopped further deliveries, and declared a breach of the contract by the defendant on the double ground of its refusal to pay for shipments in accordance with the contract and the expiration of the time limit for delivery. The plaintiff took further steps, now of no importance to us, beyond the fact that they resulted in the plaintiff remaining in possession of the lumber which would otherwise have gone to make up the third shipment. They thereupon brought this their action to recover from the defendant the value of the lumber which they claimed to have delivered to the defendant, as set forth in the statement of claim, the lumber loaded upon the three vessels, of which mention has been made. At the trial, they proved the contract as made; proved the delivery of lumber in accordance with the contract embraced in the loads of the first and second vessel, but, for reasons now unnecessary to be discussed, failed to make proof of lumber delivered on board of the third vessel. They proved, also, the failure and refusal of the defendant to make payment of the lumber as delivered in accordance with the contract, and asked for a verdict upon the proposition of law that the failure to pay in accordance with the contract for the lumber as delivered excused them from performance of the contract on their part to furnish further deliveries, and gave

them the right in law to recover on their contract, so far as they had performed.

The defense made was that the plaintiff, by its refusal to extend the time of deliveries called for by the contract, or, as the defendant would doubtless prefer to have its position stated, the plaintiff, by the announcement of its attitude of not intending to make deliveries after the time limit had expired, had breached by anticipation its contract of delivery, and that the defendant had, in consequence, the legal right to defalk its damages from the amount of the plaintiff's claim, and by way of counterclaim to receive a certificate from the jury of its right to have from the plaintiff a sum equal to that in which the amount of the defendant's damages exceeded the plaintiff's claim. The view taken by the trial judge may be expressed in the statement that the jury were directed to find a verdict in favor of the plaintiff for the value of the first and second shipments of lumber. The defendant now complains of this direction, voicing its complaint in 19 stated reasons for a new trial, which, for convenience, may be discussed in the order set forth, bunching such of them as may be discussed together.

1 and 2. The first two reasons may be passed over as purely formal.

3 to 19. The remaining reasons may be bunched as in varying forms of statement, presenting two propositions of law and fact:

(a) The plaintiff had no right to rescind the contract, and because of this, no right to recover for partial performance.

(b) The plaintiff committed a breach of its contract, and defaulted thereon, by reason of which default the defendant was entitled to recover from the plaintiff its damages thereby sustained.

[1, 2] In presenting the point sought to be made at the time of the trial and as urged during the argument at bar, and as reiterated in the paper books, the defendant insists upon and persists in the statement that the plaintiff had refused deliveries wholly and solely upon the ground of the expiration of the time limit for deliveries provided in the contract. The discussion of the legal merits of this defense and the defensive strength of defendant's position is uncalled for, and would be out of place for the reason that the point turns upon a partial statement of the fact situation. The right of the plaintiff to recover is not based upon this right to refuse deliveries after the expiration of the time limit, but upon a denial of the right of the defendant to insist upon performance of the contract on the part of the plaintiff while it (the defendant) was refusing performance on its part; this refusal being based upon the undenied assertion and proof of the fact that it had refused to pay as it had agreed to pay. The position of the plaintiff is supported by the principle expressed in the familiar adage that "he who insists upon having his cake must pay his penny." There is a like fatal failure to recognize the presence of the fact which is embodied in defendant's assertion of its right to enforce a counterclaim against the plaintiff. The merits of this counterclaim as presented by the defendant are also outside of the pale of discussion, because it is founded upon the averment of a breach of contract by the defendant which had not in fact been committed, but was one which had merely a prophetic existence, born of the fact that the defendant thought it foresaw and therefore anticipated would

be committed, and because of this anticipated breach in futuro it itself committed a breach in fact by refusing to make payment for the lumber which had been delivered.

This expresses all which need be said, because it gives full and adequate expression of the theory of fact and law upon which the charge to the jury was based. For the purpose of disposing of the present motion, we see no occasion to follow the subject further than to state that in the view of this court there was no error in this respect in the charge delivered to the jury.

The rule for a new trial is discharged, and the plaintiff has leave to enter judgment on the verdict.

CONLEY v. CONSOLIDATION COASTWISE CO.

(District Court, S. D. Maine. May 1, 1917.)

No. 393.

1. SHIPPING ⟸84(2)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.
   The duty of a ship to a stevedore is to exercise reasonable care in providing him with a safe place to work, and in keeping the premises where he has a right to be secure against danger to life and limb. While the deck of a ship is not a highway, it must be made reasonably safe for workmen who are invited to render service to the ship, and who are in the exercise of ordinary prudence.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 351.]

2. SHIPPING ⟸84(3, 5)—INJURY TO STEVEDORE—LIABILITY OF VESSEL—CONTRIBUTORY NEGLIGENCE.
   Libelant, with others, was employed as a stevedore by an independent contractor in discharging a coal barge. On coming from the hold at night, he went across the deck for his coat, passing over one side of No. 2 hatch. He recovered his coat, and in starting for the dock side of the barge stepped upon the other side of the same hatch cover, and fell through into the hold, and was injured. It was the custom of the crew, as soon as a hatch was discharged, to replace and secure the covers. This custom libelant knew, and also that No. 2 hatch had been discharged; but he did not look to see whether the covers had been secured. They had been put in place and secured on one side, but not on the other. *Held*, that the vessel was negligent in leaving them in such condition, without marking them by a light, or otherwise to give warning of the danger, but that libelant was also chargeable with contributory negligence in not looking, where he knew there was likely to be danger.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 350.]

In Admiralty. Suit by Michael Conley against the Consolidated Coastwise Company. Decree for libelant.

Richard E. Harvey, of Portland, Me., for libelant.
Gerry L. Brooks, of Portland, Me., for libelee.

HALE, District Judge. This is a libel in personam against the owners of a barge to recover damages for personal injuries alleged to have been sustained in consequence of negligence of the master and those intrusted with her management.

The libelant was a stevedore, and at the time of the injury was in the employ of the A. R. Wright Company, and engaged, with others, in discharging coal consigned to that company, out of the hold of barge No. 23, then lying at the company's wharf, port side to the wharf, starboard side offshore. When the libelant went to work on the morning of March 16, 1916, it being bad weather, he hung his coat under the mainsail; the main boom being then offshore. He worked in the hold of the barge all day, until nearly 7 o'clock in the evening, when he came on deck, on the starboard side of the barge. He found the main boom had been changed over from its offshore position, and had been trimmed fore and aft. He was compelled to go across No. 2 hatch to get his coat. He started across, secured his coat, put it on, and, going under the boom, started to cross the hatch on the inshore or port side. He stepped upon the hatch covers, which had not been securely placed, and which tilted under his weight; he was thrown into the hold of the barge, a distance of some 23 feet, breaking his left leg and three ribs.

The proofs show that the duty of taking care of the hatches devolved upon the master and crew of the barge; that the custom aboard the barge was, as the various hatches were discharged, the crew of the barge followed up the work by at once replacing the hatch covers, beginning forward, on the starboard side of such hatches as had been discharged, and working aft. The process was to put the strongbacks in place, after which the hatch covers, in sections of about 3 feet in width and 8 feet in length, were pushed temporarily up on the strongbacks, in such a position that the outer end extended some 8 inches beyond the outer edge of the hatch coaming, after which two men fitted them into their places by the use of hooks, completing one side of the hatch before anything was done on the other side. The proofs show that, on the day of the injury, Nos. 2 and 3 hatches had been fully discharged, and the hatch covers on the starboard side of these hatches had been replaced and securely fitted by Lewis, the engineman, with two deck hands, who had then proceeded to cover the port side of the hatches. The strongbacks had been put in place, and all of the hatch covers placed upon the strongbacks, as usual. Beginning at the after part of the port side of the hatches, part of the hatch covers had then been fitted into place; but some of them had not been so fitted. Among them were those on the forward bay of the port side of No. 2 hatch. These had not been fitted into their position, for the reason that the crew had not had sufficient time before the hour came for quitting work. There is some evidence tending to show that the presence of ice upon some of the covers made the fitting of them more difficult. Upon these hatch covers on the port side of No. 2 hatch the libelant stepped, and fell. He had climbed up on the starboard side over the hatch coaming, which was some 3 feet 10 inches high. He had gone across the starboard side of the hatch to the boom, had taken his coat, and put it on. He had then set out to go ashore, starting to cross No. 2 hatch on the port side, or inshore side, when he fell, as I have described. He said the hatches were right there in front of him, and that he did not look to see if the covers were on all right; that, in coming from the hold of the vessel, he had found the offshore side of the hatch

covered; that he received no warning to indicate that the inshore side was uncovered; that no guard or lantern was there, to indicate that there was any trouble before him from the insecure placing of the hatch covers; and that he had stepped upon the inshore covers without making examination, and was injured.

The libelant alleges that he had been working on barges for the last 16 years; that he had been accustomed to find the hatches covered as soon as the coal was discharged. The proofs on the part of the barge tend to show that, while the barges were being discharged, the booms were thrown offshore; that, as soon as the hatches were discharged, the booms were swung around between the rail and the hatch coaming, so as to enable men to get the covers on the hatches; that the hatch covers were immediately put on, and the booms hauled fore and aft, over the center of the barge.

The learned proctor for the respondent urges that, so far as this libelant is concerned, the duty of the barge ended when it provided him with a reasonably safe place to work and a reasonably safe passageway to and from his work; that the barge was under no duty to keep the hatches covered for him while he was on board, or to keep the hatch covers and appliances in their proper place, or in any way to aid him in getting his coat, which he had left on the main boom; that the barge owed no duty to him, or to other independent contractors, to provide lights for their convenience, or to guard them against risk resulting from an open hatch. The respondent relies upon the line of cases in which the federal courts have said that the deck of a ship is not a highway, that hatches are well-known sources of danger, and that to leave them open is not, in itself, evidence of negligence. Dwyer v. National S. S. Co. (C. C.) 4 Fed. 493; The Willowdene (D. C.) 103 Fed. 678; The J. W. Taylor (D. C.) 92 Fed. 192; The Santiago, 137 Fed. 323, 69 C. C. A. 653; The Saranac (D. C.) 132 Fed. 936; Anderson v. Scully (D. C.) 31 Fed. 161.

[1] It is well settled that the duty of the ship to the stevedore is to exercise the care of a reasonably prudent man in providing a safe place for him to work; in keeping the premises, where he has a right to be, secure against danger to life and limb. This duty arises out of the necessity of the stevedore's services to the ship. The deck of a ship is not a highway; but it must be made reasonably safe for workmen who are invited to render services to the ship, and who are in the exercise or ordinary prudence. The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; Gerrity v. The Kate Cann (D. C.) 2 Fed. 241, affirmed (C. C.) 8 Fed. 719; The Frank and Willie (D. C.) 45 Fed. 494; The Martha E. Wallace (D. C.) 151 Fed. 353; Id., 158 Fed. 1021, 86 C. C. A. 673; Frederick Leyland Co. v. Holmes, 153 Fed. 557, 82 C. C. A. 511; Pioneer Steamship Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49.

[2] The libelant was not in the employ of the barge. He was in the employ of an independent contractor, doing a necessary service in discharging her. He was there, then, at the invitation of the barge. He was entitled to have the premises, where he would properly be, made reasonably safe and secure for him. Conley was an experienced steve-

dore. He had been accustomed to find that, as soon as cargo had been taken out of the hold, the hatch covers would be securely placed upon such hatches as had been discharged. I find nothing unreasonable in his conduct in leaving his coat where he did, when he went to work, or in going after his coat at the time he did, when he was injured. The proofs show that a great part of the deck of this barge was covered with hatches; that, although there were passageways between the hatches, men were accustomed to go across the hatches in the performance of their duties. Lewis, the engineman who superintended the placing of the hatch covers, says he knew that people were accustomed to cross the hatches. Conley, then, was doing nothing unusual in crossing the hatches.

Upon the evening in question the libelant knew that the cargo had been discharged out of hatches No 2 and No. 3. When he went on deck he had reason, from his experience and his knowledge of the custom of the ship, to believe that the hatch covers had been properly placed on those hatches. It is clear that he left his work having such assurance. It appears from the proofs that the starboard side of No. 2 hatch had, in fact, been properly covered, and that, upon the port side of this hatch, the covers had been lightly thrown, but had not been securely fastened in place, and that no warning had been put upon them to call attention to their insecurity. Under all the circumstances of the case, I think it was negligence on the part of the ship to leave the covers of this hatch as they were left, at a time when the stevedores were about to leave the ship. If, for any reason, the crew were compelled to leave the hatch, for a time, insecurely covered, they should have placed some lantern or other warning upon it. I am constrained to find the respondent at fault, in that those in charge of the barge were negligent in failing to securely cover the port side of No. 2 hatch, or in failing to place a suitable warning upon it, and that such negligence contributed to the injury of the libelant.

Was the libelant in the exercise of due care? I think, as I have said, that Conley acted prudently in leaving his coat where he did, and in seeking to recover it. When he came upon the starboard side of the deck, and found that the main boom had been run fore and aft, and that his coat was over No. 2 hatch, he acted with due care in going across the starboard side of the hatch and recovering his coat. After he had secured his coat, however, he knew that a safe passage was provided for him if he retraced his steps across the starboard side of No. 2 hatch. But the direct way ashore was across the port side of the hatch. He, accordingly, went under the boom, in order to take the nearest way to the wharf. His testimony shows that he did not look where he was going. He says distinctly that he "did not look to see if the hatches were all right." He evidently refers to the hatch covers. He did not exercise the care of a reasonably prudent man, under all the circumstances of the case. On a dimly lighted deck he cannot be held free from fault, in stooping down, going under a boom, and proceeding across hatch covers, without looking, and without paying any heed to his steps. The case, in my opinion, falls within the decision in The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586. There was fault on the part of the barge. There was contributory fault, also, on the

part of the libelant. In a case of personal injuries, although the damages are often divided equally, as in collision cases, the question of any other equitable division is now said to be open to the court. In The Max Morris the Supreme Court sustained the action of Judge Addison Brown in departing from the ordinary rule of dividing damages, although the court did not find it necessary to pass authoritatively on the question. Hughes on Admiralty, § 116; Benedict's Admiralty (4th Ed.) § 233; Pioneer S. S Co. v. McCann, 170 Fed. 873–880, 96 C. C. A. 49; The Victory, 68 Fed. 395, 400, 15 C C. A. 490; The Lackawanna (D. C.) 151 Fed. 499–501; The Serapis (D. C.) 49 Fed. 393–397.

The case is referred to George C. Wheeler, Esq., assessor, to report the full amount of damages sustained by the libelant. On the coming in of the assessor's report, I will pass upon all questions relating to damages.

The libelant recovers full costs.

In re ZARTMAN.

(District Court, M. D. Pennsylvania. June 2, 1917.)

No. 2959.

1. BANKRUPTCY ⟸351—CLAIMS—PRIORITY—PARTNERSHIP AND INDIVIDUAL CREDITORS.

Under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (Comp. St. 1916, § 9589), providing that the net proceeds of partnership property shall be appropriated to the payment of partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts, a creditor of a former partnership had no preferential right to payment out of property formerly belonging to the partnership, where prior to bankruptcy the partnership was dissolved in good faith and the property turned over to the continuing partner, the bankrupt, on his promise to pay the debts of the partnership.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564.]

2. BANKRUPTCY ⟸228—REFEREE—REVIEW OF PROCEEDINGS.

Where the referee awarded a fund derived from the sale of property of the bankrupt to the trustee in preference to the claim of a creditor, and such creditor merely excepted to the conclusions and order of the referee, without petitioning for review, the matter was not formally before the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387.]

In Bankruptcy. In the matter of William P. Zartman, bankrupt. On review of the referee's order awarding funds to the trustee. Affirmed.

James G. Hatz, of Harrisburg, Pa., for claimant.
H. S. Knight, of Sunbury, Pa., for trustee.

WITMER, District Judge. The court is requested to review the decision of the referee, awarding the fund derived from the sale of certain personal property to the trustee in bankruptcy in preference to

the claim of James G. Hatz, who sought to follow, and subject to the payment of the partnership debt, this property, which formerly belonged to the partnership, having since been transferred by the retiring partner to his copartner, the bankrupt, close to a year prior to the filing of the petition.

There is little, if any, controversy respecting the facts. On November 26, 1913, and for some time prior thereto, C. I. Tressler and Wm. P. Zartman were associated as copartners under the firm name of C. I. Tressler Lumber Company, and were operating their plant in Dauphin county on the lumber operation known as the Fishing Creek Valley or Heck operation. They jointly had title to certain real estate and to personal property, consisting of horses, wagons, mill, camp equipment, etc. On the day named, the C. I. Tressler Lumber Company executed and delivered to James G. Hatz a judgment note, amounting to $2,000, payable to his order, for money loaned by Hatz to the Lumber Company. The note was signed by the Pine Creek Lumber Company, W. P. Zartman, C. I. Tressler Lumber Company, C. I. Tressler, Manager, and C. I. Tressler, and was afterwards entered of record on July 20, 1914, in the court of common pleas of Dauphin county, Pa., to No. 318, December term, 1914. Subsequently, to wit, on or about October 6, 1914, the partnership between Zartman and Tressler was dissolved; the former taking over all of the assets of the partnership, and the latter retiring, with the understanding and agreement that Zartman was to continue the operation of the lumber business, and to assume the payment, and actually pay, all of the debts of the C. I. Tressler Lumber Company.

Zartman afterwards continued the business of the lumber operations, formerly conducted by Tressler, until May 26, 1915, when an involuntary petition in bankruptcy was filed against him, resulting in his adjudication as a bankrupt on July 16, 1915. At or about the time the petition in bankruptcy was filed, an execution was issued on the Hatz judgment, in pursuance of which the sheriff of Dauphin county levied upon the personal property contained in and about the Fishing Creek or Heck operation, most of which property was among the assets of the partnership taken over by Zartman on the dissolution of the partnership, and was levied as the property of Wm. P. Zartman. On application of the bankrupt's receivers, the court, on August 6, 1915, granted an order restraining the parties interested from proceeding any further on certain executions, and at the same time ordered the receivers, who had been authorized to sell said property, to impound the proceeds derived therefrom pending the determination of the question as to whether or not said money should be given to the bankrupt estate or be applied to the Hatz judgment.

It is contended by Hatz that distribution should be made in accordance with the well-settled principle that "when there are two classes of creditors and two funds, and one class of creditors can only go against one fund, while the other class of creditors can go against both, the court will marshal the assets, restricting the creditors who have a double security from touching the fund applicable to the payment of the first class of creditors until they are paid in full," in so

far as the same has been incorporated into the present Bankruptcy Act, § 5f, as follows:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

It is Hatz's contention that we have here two funds, partnership and individual, and correspondingly two classes of creditors, and that this is a case for the application of the doctrine of marshaling of assets. On the other hand, it is contended, and the referee ruled, that by virtue of the dissolution agreement and transfer of the interest of Tressler to Zartman the latter became the sole owner, and that there is now no partnership fund to be administered. The dispute, it will be seen, largely hinges on the validity of the dissolution and transfer. It was said by Mr. Justice Strong, in delivering the opinion of the court in Case v. Beauregard, 99 U. S. 124, 25 L. Ed. 370:

"No doubt the effects of a partnership belong to it, so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. Rice v. Barnard et al., 20 Vt. 479 [50 Am. Dec. 54]; Appeal of the York County Bank, 32 Pa. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in custodiam legis. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless. So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any preferential right of the creditors that there shall be property

owned by the partnership when the claim for preference is sought to be enforced. Thus, in Ex parte Ruffin, 6 Ves. 119, where from a partnership of two persons, one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not mala fide. Kimball v. Thompson, 13 Metc. (Mass.) 283; Allen v. Center Valley Company et al., 21 Conn. 130, 54 Am. Dec. 333; Ladd v. Griswold, 4 Gilman (9 Ill.) 25, 46 Am. Dec. 443; Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Robb and Others v. Mudge and Another, 14 Gray (Mass.) 534; Baker's Appeal, 21 Pa. 76, 59 Am. Dec. 752; Sigler & Richey v. Knox County Bank, 8 Ohio St. 511; Wilcox v. Kellogg, 11 Ohio, 394."

[1] Nor does it appear that section 5f of the Bankruptcy Act materially differs from the general rule of equity stated by Justice Strong. It creates no specific lien upon partnership property which continues after the property has ceased to belong to the partnership. It does not forbid bona fide conversion of the partners of the joint property into rights in severalty, and it relates to partnership property alone, and gives a rule for marshaling such property between creditors. True, it gives to joint creditors a privilege while the property belongs to the partnership; but when such joint ownership has ceased there is no subject remaining upon which it can operate. In the argument, Mr. Hatz attempted to impeach the bona fides of the shifting of the relations between the partners, in which he has not succeeded. There is nothing in the record that discloses want of good faith, or an intention to hinder and delay; nor could such inference be deduced from the showing made of the financial condition of the partnership, or of the conduct of the several partners. The bankrupt, Zartman, after taking final and exclusive possession of the partnership property, in attempting to comply with his promise in writing, attempted to pay the partnership debts, and succeeded in liquidating the same in excess of the value of the personal property turned over to him. Now, conceding that the disposition of the property was bona fide on the part of both parties, and without any intent to hinder and delay, the property yielding the fund for disposition ceased to belong to the partnership before the interposition of the court, and, having become the several property of Zartman, the equities of the several partners were extinguished, and the derivative equities of the creditors are at an end. Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971.

[2] It may also be suggested that the matter is not formally before the court on exceptions to the conclusions and order of the referee without petition for review.

The order of the referee, awarding the fund to the trustee, is affirmed.

In re AMERICAN BEAVER CO.

(District Court, D. New Jersey. June 12, 1917.)

1. BANKRUPTCY ⟸262(1)—SALES—MODE OF SALE.
Under Bankr. Act July 1, 1898, c. 541, § 70b, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers, and shall, when practicable, be sold subject to the approval of the court, and not otherwise than subject to the approval of the court for less than 75 per cent. of the appraised value, an appraisal by persons appointed by the court will be assumed honest and accurate, and while the approval of the court is unnecessary, if the property be sold for 75 per cent. of the amount of the appraisal, the court is bound, if a less sum be bid, to use its best discretion in the matter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 363.]

2. BANKRUPTCY ⟸268—SALES—EFFECT OF.
A bidder at a sale under such section does not, where his bid is less than 75 per cent. of the appraised value, acquire the equitable title to the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379.]

3. BANKRUPTCY ⟸264—SALES—CONFIRMATION.
The property of a bankrupt corporation was sold for much less than 75 per cent. of its appraised value, which amount was greatly under the estimate in the schedules. Thereafter one of the creditors filed a bond, conditioned that he would bid $1,500 more at a resale than the amount bid at the original sale. The referee refused to approve the sale. *Held*, that as, under Bankr. Act, § 70b, the approval of the court is necessary where the amount of the bid is less than 75 per cent. of the value of the property, the refusal of the referee to approve the sale was not an abuse of discretion; the bidder having the burden of showing that the property would not bring a greater sum on resale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 368, 369.]

In Bankruptcy. In the matter of the American Beaver Company. Petition to review referee's order refusing to approve sale of real estate and personal property by trustee in bankruptcy. Petition dismissed, and order affirmed.

Samuel I. Kessler, of Newark, N. J., for trustee.
Edwin G. Adams, of Newark, N. J., for petitioner.
Bilder & Bilder, of Newark, N. J., for Hatters' Fur Exchange and others.
Cecil H. MacMahon, of Newark, N. J., for Lazar Jacobson.
Addison Ely, Jr., of Rutherford, N. J., for Bowne & Webber.

DAVIS, District Judge. [1] This case is before the court on petition to review referee's order refusing to approve the sale of real estate and personal property by the trustee in bankruptcy in the above stated cause. It is provided in section 70b of the Bankruptcy Act that:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and

report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

In refusing to approve the sale, did the referee abuse the discretion vested in him by the Bankruptcy Act? This is the sole question to be determined. In using the language that "it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value," Congress must have intended that the court (referee) should use its best discretion in approving sales in bankruptcy. The act requires that the appraisers shall be "disinterested." The purpose of this requirement evidently was to secure an honest and accurate appraisement. With self-interest eliminated, the best and unbiased judgment of the appraisers is represented in the appraisement. They are appointees of, and must report to, the court. Under such conditions, the court assumes that the appraisement is both honest and accurate, though it might not be mathematically correct as to the exact value. The approval of the court is unnecessary, if the property is sold for 75 per centum of the appraisement. Twenty-five per centum of the appraised value is allowed for honest mistakes, bad judgment, etc., without requiring the exercise of discretion on the part of the court. Bankruptcy sales and the administration of the bankruptcy law generally afford such subtle temptations and unusual opportunities to defraud creditors that Congress provided a protection for them by requiring that the appraisers be disinterested and by subjecting trustees' sales for less than 75 per centum of the appraised value to the scrutiny of the court. In substance, Congress said that it was time for the court to take notice when a sale was made for less than that per centum.

[2, 3] The referee refused to approve the sale of either the personal property or the real estate, and the purchaser in each case filed a petition for review of the order of the referee. This was a judicial sale under a statute requiring the approval of the court, without which the bidder does not acquire an equitable title to the property, if the bid is not for 75 per centum of the appraised value. Brandenburg on Bankruptcy, § 1266; Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608; Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 116 C. C. A. 523, 28 Am. Bankr. Rep. 258; In the Matter of Burr Manufacturing Co., 217 Fed. 16, 133 C. C. A. 126, 32 Am. Bankr. Rep. 708; In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 3 Am. Bankr. Rep. 618. The personal property was sold for $7,600. The same property was appraised at $31,213.20, and was estimated in the schedules to be worth $104,722.04. The real estate was sold for $19,900. It was appraised at $34,350, and was estimated in the schedules to be worth $42,493.75. Brandenburg on Bankruptcy (4th Ed.) § 1290, says:

"No sale for less than seventy-five per cent. of the appraised value ought to be confirmed, unless good reasons are shown why a better price would not be obtainable on a resale, and the burden of proof rests upon the trustee, who brings such report to the court for confirmation, to make such showing, rather than upon the creditors to make good their objections thereto."

The Circuit Court of the Fifth Circuit in determining whether property was sold for a grossly inadequate price said: "The sworn value of the property fixed by the appraisers appointed by the court controls," in the absence of reliable evidence impeaching it. There is nothing in the record to show that the price was adequate. In order that the creditors might not lose anything on a resale, one of the creditors filed a bond conditioned that he would bid $1,500 more at a resale than was bid in the first place. Counsel for the purchasers assume in their argument that this $1,500, added to the price for which the property sold, fixes its true value, and therefore they allege that the price for which the property was sold was only 5½ per cent. below the true value, and the referee should have approved it. It is claimed in reply that the additional offer was made for the sole purpose of indemnifying the creditors against loss on acount of a resale.

Among others, I have been referred to the case of In re Metallic Specialty Mfg. Co. (D. C.) 193 Fed. 300, 27 Am. Bankr. Rep. 408, of the Third Circuit, and it is urged that the order of the referee is contrary to the decision in that case. I cannot agree with that conclusion. In that case there is no mention of any appraisement. As stated by the court:

"The whole question before the court [is] whether an advance bid of $3,000, or 17 per cent., in excess of the price paid at public sale, is sufficient evidence of inadequacy of price at the public sale to justify my having ordered a resale."

As a principle of law applicable to judicial sales generally, without regard to the provisions of section 70b of the Bankruptcy Act, the case is correctly decided, and is in accord with the cases therein cited. Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803, and many others.

In the case of the Metallic Specialty Mfg. Co., there was no contention that the price was grossly inadequate. The court said:

"But it [the sale] could be set aside only for cause, properly shown, and sufficient to move the conscience of the court. One such case is gross inadequacy of price, but there is no contention that the bid in question was grossly inadequate."

In the instant case the referee expressly found, as to the bids on both the real estate and personal property:

"That each of said bids is grossly inadequate, and that it is not for the best interests of said estate that said bids be accepted, and said sales confirmed."

The appraisers were disinterested, and two of them are practical hatters, and know the value of hats, which composed, to a large extent, the personal property. There is no testimony, not a word, impeaching the sworn value placed upon the property by the appraisers, or showing that the referee erred in finding that the price "was grossly inadequate." The burden of proof to make a showing that a better price would not be obtainable on a resale rested upon the trustee or bidders. Brandenburg, supra. No testimony whatever was submitted on that

point. The trustee, who brought the report to the court, has not borne the burden.

I do not, therefore, find that the referee abused his discretion, and the petition is accordingly dismissed, and the order of the referee affirmed.

In re THOMPSON.

(District Court, W. D. Washington, S. D. May 23, 1917.)

No. 2175.

1. FRAUDULENT CONVEYANCES ⟸182(5)—SALES IN BULK—GRANTEE AS TRUSTEE FOR CREDITORS.

Under the Washington Sales in Bulk Law (Rem. & Bal. Code, §§ 5296–5299), requiring any person purchasing any stock of goods in bulk before paying therefor to demand and receive from the seller a verified list of the seller's creditors, and making sales and transfers without complying therewith fraudulent and void, the purchaser becomes a trustee for the creditors named in the verified list, and if the trust is executed before notice that there are other creditors the purchaser is protected, but where a large number of creditors is omitted from the list furnished, and notice of such fact is brought home to the purchaser before the money is paid, he holds it in trust for all of the creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 575, 576.]

2. FRAUDULENT CONVEYANCES ⟸47—SALES IN BULK.

Under the Washington Sales in Bulk Act, when a transfer of a stock of goods is not accompanied by a verified list of creditors, or where a large number of creditors is omitted from the list furnished, and the purchaser has notice thereof before the purchase price is paid, the transfer is fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34.]

3. BANKRUPTCY ⟸142—PROPERTY VESTING IN TRUSTEE—PROPERTY FRAUDULENTLY CONVEYED.

Under Washington Sales in Bulk Act and Bankruptcy Act July 1, 1898, c. 541, § 70, pars. 4, 5, 30 Stat. 565 (Comp. St. 1916, § 9654), providing that the trustee becomes vested with the title of the bankrupt of property transferred by him in fraud of his creditors, and property which might have been levied upon and sold under judicial proceedings against him, and Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1916, § 9651), providing that all conveyances within four months which are void by the laws of the state shall be void and the property shall pass to the assignee and be by him recovered for creditors, where the purchaser of a stock of goods in bulk was furnished a verified list of the vendor's creditors, which omitted a number of creditors, and the purchase price had not been paid when bankruptcy intervened, the trustee was entitled to the purchase price for the benefit of all the creditors as against those creditors named in such list.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 222.]

In Bankruptcy. In the matter of Peter Thompson, bankrupt. On review of an order of the referee. Order confirmed.

W. W. Keyes, of Tacoma, Wash., for trustee.
Nelson R. Anderson, of Seattle, Wash., for petitioner.
E. R. York, of Tacoma, Wash., for purchaser.

NETERER, District Judge. The bankrupt and wife transferred their entire stock of merchandise and attached to the bill of sale a verified list of creditors, in compliance with the Sales in Bulk Act of Washington (sections 5296–5299, Rem. & Bal. Code; Laws 1901, chapter 9, page 222), omitting eight creditors from this list. Thereafter an order of adjudication in bankruptcy was entered, and at the first meeting of creditors 8 creditors not included in the list of creditors attached to the bill of sale and 15 creditors included in the list, participated and elected a trustee. The trustee, after qualification, made demand upon the purchaser of the stock of merchandise for the proceeds of the sale, $7,619.47. Payment not being made, an order to show cause was issued by the referee, to which answer was made by the purchaser that Thompson and wife "sold and by their bill of sale in writing, for the express consideration of $10 and other considerations, granted and conveyed to Rhodes Bros., Incorporated, certain stock of goods and merchandise located in said city of Tacoma, then owned by the grantors herein and attached to said bill of sale was a duly verified statement giving the names, addresses, and amount of the creditors of the said Peter Thompson and Alma Thompson, his wife, as required by the Sales in Bulk Act of the state of Washington, being sections 5296–5299 of Rem. & Bal. Annotated Codes and Statutes of Washington, and said bill of sale, with the attached verified statement of creditors was on March 8, 1917, filed for record in the office of the auditor of Pierce county, Washington; * * * that under and pursuant to said sale of said goods and merchandise said stock of goods was delivered by said vendors to and was taken into the possession of said vendee and has since been sold in the regular course of trade; that the actual and agreed consideration for the sale of said stock of goods and merchandise was the sum of $7,619.47, which sum has not yet been paid; that certain persons, firms, and corporations, other than and in addition to those named in said verified statement of creditors, have asserted and notified said Rhodes Bros. that they are, and at the time of sale of said stock of goods were, creditors of said Peter Thompson, and claimed the right to share in the proceeds of the sale of said stock of goods; that said Rhodes Bros. is ready and willing to pay the agreed purchase price of $7,619.47 for said stock of goods to whoever may be lawfully entitled thereto as soon as it can be ascertained and adjudged to whom said sum should rightfully and lawfully be paid"—and then pray that all parties interested in the said stock "may be brought into this court, and that such proceedings may be taken herein as shall lawfully adjudge and determine to whom said money should be paid and as shall fully protect it from any further liability to the said vendors and their creditors. * * *"

The Western Dry Goods Company, a creditor named in the verified list of creditors, made a special appearance and filed an answer denying the court's jurisdiction, and that the trustee had no right or in-

terest in the proceeds, but that the proceeds are the property of the creditors named in the verified list of creditors attached to the bill of sale, and prays that the order be quashed. The prayer was by the referee denied, and the purchaser ordered to pay the proceeds to the trustee, and the matter is now before the court upon a petition to review such order.

Under the provisions of the Bankruptcy Act the trustee, upon qualification, became vested by operation of law with the title of the bankrupt of "property transferred by him in fraud of his creditors" (paragraph 4, § 70), and "property which prior to the filing of the petition * * * might have been levied upon and sold under judicial process against him" (paragraph 5, § 70, Bankr. Act, supra). "All conveyances * * * made * * * within four months * * * while insolvent, which are held null and void * * * by the laws of the state, * * * shall be deemed null and void under this act * * * if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him * * * recovered * * * of the creditors of the bankrupt." Section 67e, Bankr. Act, supra. And for such purpose federal courts have jurisdiction.

[1, 2] Upon the sale of the property the purchaser became a trustee for the creditors named in the verified list, and, if the trust had been executed before notice that there were other creditors, would have been protected. Friend v. Rosenfeld-Rovig Co., 87 Wash. 329, 151 Pac. 776. The unexecuted trust created by the sale and verified list of creditors was extended into a general trust for all creditors, of which the purchaser obtained notice. Friend v. Rosenfeld-Rovig Co., supra. The purpose of the Sales in Bulk Act of Washington was not to protect an insolvent and assist him in carrying out a scheme to defraud by operation of law, and prefer some creditors, but was to protect a purchaser and all creditors. By the provisions of the act, if the affidavit is not taken, or the purchaser does not see that the purchase price is applied to the payment of the claims of the vendor's creditors, such sale "shall be fraudulent and void." When a transfer is not accompanied by a verified list of creditors, or where a large number of creditors is omitted from a furnished list, and notice of such fact is brought home to the purchaser before the money is paid, the transfer must be held fraudulent, and the purchaser must be held to hold in trust for all the creditors the proceeds of such sale or transfer.

[3] This transfer was made within four months. The verified list of creditors omitted eight creditors, and as to them the sale was fraudulent and can be avoided by notice to the purchaser. Friend v. Rosenfeld-Rovig Co., supra. The purpose of the statute being to protect the creditors of the vendor, its language must be construed to effectuate the purpose intended. Kasper v. Spokane Merchants' Ass'n, 87 Wash. 451, 151 Pac. 800. The Western Dry Goods Company, the appearing creditor, has no standing in this court as against the trustee in this proceeding. It has no interest in, title to, or lien upon the funds in issue (Kasper v. Spokane Merchants' Ass'n, supra), and hence may not be heard. The Sales in Bulk Act, supra, does not purport to vest title in the creditors of the vendor to property conveyed; nor does it give to such creditors a specific lien upon such property. The

purchaser is the only interested party as against the trustee, and it has in writing consented to an adjudication of the issue in this proceeding by the relief prayed for.

The answer of the Western Dry Goods Company is dismissed, and the order of the referee confirmed.

WEST v. EMPIRE LIFE INS. CO.

(District Court, W. D. Washington, N. D. May 4, 1917.)

No. 4.

1. BANKRUPTCY ⟸299—SUITS BY RECEIVER IN BANKRUPTCY—INTERVENTION.
Where a receiver in bankruptcy appointed in New Jersey, claiming that the bankrupt estate owned 80 per cent. of the capital stock of a Washington corporation, brought suit in a District Court of Washington to wind up the affairs of such corporation, persons claiming that they were fraudulently deprived of stock in such corporation held by the receiver could not intervene and have their right to such stock adjudicated, as the stock was in the possession of the bankruptcy court, through its receiver, and any issue concerning it must be determined in that court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448.]

2. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURTS OF BANKRUPTCY—ANCILLARY JURISDICTION.
The filing of a petition in bankruptcy and an adjudication brings the property of the bankrupt, wherever situated, into the custody of the bankruptcy court, and a court in which ancillary proceedings are pending has nothing to do but collect the assets and transmit them to the bankruptcy court for distribution.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411.]

3. CORPORATIONS ⟸129—TRANSFER OF STOCK—NECESSITY OF REGISTRATION.
The transfer of stock by a shareholder passes title, though not registered on the books of the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 479, 480, 482, 492.]

4. CORPORATIONS ⟸65—SHARES OF STOCK—NATURE OF PROPERTY.
The property of shareholders in their shares and the property of the corporation in its capital stock are distinct property interests.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 165–171.]

In Equity. Suit by Henry J. West, as receiver in bankruptcy for the Columbus Securities Company, against the Empire Life Insurance Company. On motion to dismiss petition in intervention. Motion granted.

Donworth & Todd, of Seattle, Wash., for plaintiff.

Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for interveners.

NETERER, District Judge. This case was before the court in 237 Fed. 303, in which it was held that the situs of a corporation is the proper forum to determine the right to ownership of its capital stock, provided jurisdiction can be obtained of the party having the stock, and that, since the purpose of the action is to wind up the business

and affairs of the defendant company, the issue between the contending stockholders with relation to ownership might be determined in this action, to the end that distribution can be adjudicated to the proper parties, and the receiver, holding the stock of the Columbus Securities Company, being before this court upon the authority and direction of the bankruptcy court, the court obtained jurisdiction of the stock, and denied a motion to dismiss the petitions in intervention.

[1, 2] Since that hearing, the Supreme Court, in Knauth, Nachod & Kuhne v. Latham & Co., 242 U. S. 426, 37 Sup. Ct. 139, 61 L. Ed. —, decided January 8, 1917, had before it practically the same issue that is before this court, and the receiver in the instant case, by the court's permission, has again attacked the right to intervene in substantially the same manner, and a re-examination of the issue and of the authorities, I think, is conclusive that this court may not entertain the proceedings in intervention. The bankrupt's estate, from the filing of the petition, is regarded as in custodia legis. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Jones v. Springer, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. 161. The filing of the petition and adjudication in the bankruptcy court in New Jersey brought the property of the bankrupt, wherever situate, into custodia legis of the District Court for the District of New Jersey. Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305. The purpose of the Bankruptcy Act is to establish a uniform system of bankruptcy throughout the United States, and place the bankrupt's property, wherever situate, under the control of the court, for the purpose of determining the status of the bankrupt and the settlement and distribution of such estate. Acme Harvester Co. v. Beekman Lumber Co., supra. And upon adjudication title to such property becomes vested in the trustee, under section 70 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]), and in the custody and control of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. The ancillary court may act summarily in aid of the court of original jurisdiction, when such court could have compelled an act by summary proceeding. Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. But for all substantial purposes of administration the court of original jurisdiction, which is in control of the bankrupt estate, is regarded as in charge, and the ancillary court has nothing to do but collect the assets and transmit them to the bankruptcy court for distribution. In re Brockton Ideal Shoe Co. (D. C.) 194 Fed. 233. A party may not intervene in an ancillary suit brought by the trustee or receiver, the sole purpose of which is to collect assets of the bankrupt for transmission to the bankruptcy court for administration. Knauth, Nachod & Kuhne v. Latham & Co., supra. In this case the court said:

"Manifestly such a proceeding could not be entertained in the Southern district of Alabama. The estate was being administered in another court."

[3] In this action the receiver appointed by the bankruptcy court in the Northern district of Alabama brought an action in the Southern district of the same state to set aside an alleged preference, and in-

tervention was sought for the purpose of impressing a lien upon the fund. In the instant case the receiver claims that the bankrupt estate is the owner of 80 per cent. of the capital stock of the defendant corporation, the affairs of which he seeks to wind up. The interveners allege they were fraudulently deprived of stock now held by the plaintiff receiver, and pray this court to adjudicate the right to the stock. The transfer of stock by a shareholder passes title, even though not registered on the books of the corporation. Port Townsend National Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

[4] It is well settled by the Supreme Court that the property of shareholders in their shares and the property of the corporation in its capital stock are distinct property interests. New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198, 30 L. Ed. 411. The controversy raised by the petition in intervention does not involve any act or right of the defendant corporation, or of the plaintiff receiver as such, but rather a dispute between the receiver, as a shareholder of the bankrupt estate, and the interveners, claiming some of the same stock; and, the shares being in the possession of the bankruptcy court in the district of New Jersey, through its receiver, this ownership and right of possession is sought to be contested by the intervener. But by the decision of the Supreme Court in Knauth, Nachod & Kuhne v. Latham & Co., supra, this may only be done in the bankruptcy court, and, this being an ancillary suit, the petitions in intervention may not be entertained.

The cases cited by the petitioner do not apply to the facts in this case. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, decided before the 1903 and 1910 amendments, held that under section 23b (Comp. St. 1916, § 9607) controversies of independent suits brought by the trustee in bankruptcy to assert title to money or property as assets of the bankrupt against strangers to the bankruptcy proceedings can only be brought in the United States court by the consent of the defendant. Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, was an application for summary proceeding on the part of the court to require the payment of moneys on deposit before the commencement of the bankruptcy proceedings, and the court held that under section 23, supra, the District Court was without jurisdiction. In Lovell v. Newman, 227 U. S. 412, 33 Sup. Ct. 375, 57 L. Ed. 577, the question for decision was whether an action on a bond given by third parties for the release of certain cotton claimed by the trustee was a proceeding under the Bankruptcy Act, so as to give the federal court jurisdiction, or whether jurisdiction must be determined by diverse citizenship; while in the instant case the issue between the receiver and the interveners is clearly concerning property now in the custody of the bankruptcy court, and that court must determine the rights between the contending parties.

ORR v. BALTIMORE & O. R. CO.

(District Court, S. D. New York. February 16, 1914.)

No. 92.

1. REMOVAL OF CAUSES ⇐12—RESTRICTIONS AS TO DISTRICT IN WHICH SUIT MIGHT BE BROUGHT.

An action in which the jurisdiction of the federal court, if any, depends upon the fact that it arises under a law of the United States, could not be brought in a district other than that of which defendant was an inhabitant, and therefore cannot be removed by defendant against plaintiff's objections to the District Court of a district other than that of which defendant is an inhabitant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33.]

2. REMOVAL OF CAUSES ⇐102—REMAND—DOUBT AS TO JURISDICTION.

Where it is doubtful whether a cause arises out of a law of the United States, so as to give jurisdiction to a federal court under Judicial Code (Act March 3, 1911, c. 231) § 24, subd. 8, 36 Stat. 1092 (Comp. St. 1916, § 991[8]), the case will be remanded to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 224.]

At Law. Action by Orton G. Orr against the Baltimore & Ohio Railroad Company. On motion to remand. Motion granted.

Tipple & Plitt, of New York City, for plaintiff.
Cravath & Henderson, of New York City, for defendant.

WARD, Circuit Judge. [1] This is a civil suit, in which the jurisdiction of the court, if there be any, depends, not upon the citizenship of the parties, but upon the fact that it arises under a law of the United States, viz., Interstate Commerce Act, Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (Comp. St. 1916, § 8592). As such it could not have been brought in this court, because the defendant, being a corporation of Maryland, is not an inhabitant of this district. Therefore it cannot be removed by the defendant against the objections of the plaintiff. Western Union Telegraph Co. v. Louisville & Nashville R. Co. (D. C.) 201 Fed. 932.

[2] Furthermore, the decisions make it very doubtful whether the suit, assuming that it does depend upon section 20 of the Interstate Commerce Act, does arise out of a law of the United States within the meaning of section 24, subd. 8, of the Judicial Code, and in case of doubt it has always been the practice of this circuit to remand.

Motion granted.

UNITED STATES v. JONES.

(Circuit Court of Appeals, Ninth Circuit. June 16, 1917.)

No. 2809.

1. PUBLIC LANDS ⟸35(3), 135(2)—HOMESTEADS—RESIDENCE—ALIENATION.
Under the homestead law the entryman must in good faith claim the land for his own benefit, and can make no agreement for alienation, and must reside upon the land continuously for the time that the law requires and must make it his home.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 74, 353, 354.]

2. PUBLIC LANDS ⟸123—FRAUD—RIGHT OF ACTION FOR VALUE OF LAND.
Where defendant caused certain honorably discharged soldiers to make homestead entries under Act August 15, 1894, c. 290, 28 Stat. 286, for his benefit, and procured them to make false and fraudulent representations and affidavits in their application and final proofs respecting alienation, residence, cultivation, and improvements, and these representations were relied upon, and in reliance upon them patents were issued, the government had a right of action against defendant for the value of the land, though, due to the erroneous holding of the land department that the entrymen were entitled to deduct from the required period of residence the periods of their respective military service, the authorized showing as to residence, etc., by the entrymen did not entitle them to the issue of patents.

3. LIMITATION OF ACTIONS ⟸11(1)—SUITS BY GOVERNMENT.
Though suits to avoid or annul patents procured by fraud would be barred under Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114) requiring such actions to be brought within six years, the government could sue to recover the value of the land procured from it through mistake or fraud, waiving any right of action it might have had for annulment of the patent, as the government is not bound by any statute of limitations unless Congress clearly manifests its intention that it shall be so bound.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35, 36.]

4. PUBLIC LANDS ⟸35(3)—COMMUTATION OF ENTRY—RESIDENCE.
Act Aug. 15, 1894, provides for the disposition of certain lands within the Siletz reservation under the Town-Site and Homestead Laws, and requires three years' actual residence to be established as a prerequisite to title or patent. Rev. St. § 2301, as amended by Act March 3, 1891, c. 561, § 6, 26 Stat. 1098 (Comp. St. 1916, § 4589), provides that nothing therein shall prevent any person availing himself of the benefits of section 2289 (Comp. St. 1916, § 4530) from paying the minimum price for the land entered after the expiration of 14 months, and obtaining a patent therefor upon making proof of settlement and residence and cultivation for such period of 14 months. *Held*, that a commuted entry by one entering land under the act of 1894 is controlled by section 2301, and proof of settlement, residence, and cultivation for 14 months is required, but the requirements as to the character of residence are not as strict as under the act of 1894, calling for actual residence.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 74.]

In Error to the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Action by the United States against Williard N. Jones. Judgment for defendant on the pleadings ([D. C.] 232 Fed. 218), and the government brings error. Reversed and remanded, with directions.

See, also (D. C.) 218 Fed. 973.

The United States brought action against the defendant, Jones, for damages for alleged fraud and deceit committed by Jones in securing the issuance of patents to certain lands within the Siletz reservation in Oregon. The substance of the complaint is that between August, 1900, and February, 1901, Jones, intending to defraud the United States, caused certain named persons (honorably discharged soldiers of the Civil War) to make fraudulent homestead entries on land within the Siletz reservation in Oregon, and thereafter to make false and fraudulent final proofs required by law. By an act of August 15, 1894 (28 Stat. 286–326), provision was made for disposition of certain lands within the Siletz reservation. Three years' actual residence was required where the settler made entry under and in accordance with the provisions of the homestead laws of the United States. Thereafter, by an act of May 17, 1900, c. 479, 31 Stat. 179, Congress relieved the entryman from having to pay $1.50 per acre as a prerequisite to obtaining patents, as had been required by the act of August 15, 1894, just heretofore referred to.

It is alleged that, in order to carry out the fraudulent design to acquire title and to procure the entrymen to make false and fraudulent applications, and pursuant to an agreement entered into between Jones and each of the entrymen, Jones gave notice, as required by law, of the intention of the respective entrymen to make homestead proofs upon the lands involved, and thereafter each entryman made formal proof at the land office; and in carrying out the plan each entryman, with witnesses, falsely swore that he had established residence upon the land, and resided thereon until the time of proof, and had made substantial improvements thereon, had only been temporarily absent, had cultivated portions of land, and had not conveyed any part thereof, and had made no contract of any kind whereby the title which he might acquire should inure in whole or in part to the benefit of any person except himself; that he was acting in good faith in perfecting the entry, when in truth and fact he had not lived on the land and had not made improvements and had not cultivated any part of it, as stated in his proof, and that if any portion was cultivated it was done by Jones, and that any improvements were made by Jones and not by any of the entrymen; that none of the entrymen acted in good faith, and that each was making the entry for speculative purposes and not for a home; that none ever lived upon the land, and that no improvements were made upon any of the lands during the life of the homestead entries; that Jones paid all the money to the United States officers for the entries, and furnished proof witnesses, paid their expenses, and that in ignorance the officers at the land office at Oregon City, Or., issued certificates to each of the entrymen entitling him to receive a patent upon presentation of the certificate to the Commissioner of the General Land Office; that shortly thereafter each entryman made a mortgage to Jones; that thereafter the United States officials in Washington, in ignorance of the fraudulent character of the proofs, issued patents to the respective entrymen; that all the fraudulent representations made by the entrymen and their witnesses were made with the knowledge and at the solicitation of Jones, and with intent to deceive and defraud the United States out of the title and possession of the lands described, and that the United States relied upon the fraudulent representations, and was deceived in the premises, and unlawfully and wrongfully was induced to issue patents and part with the title; that the lands were worth $133,000, and that by reason of the fraudulent representations of Jones, and relying upon them, patents were issued.

The defendant, by answer, put in issue the allegations of the complaint and made four affirmative defenses: He set up good faith; that the cause of action accrued more than six years next prior to the filing of the complaint; that no one of the entrymen in his final proof represented or testified that he had resided upon the land for a period of three years. The fourth affirmative defense avers that one entryman named Wells paid $240 to the government in commutation of his entry. There is, too, a defense to the effect that several tracts described in the complaint were, before the beginning of the action, sold to certain named purchasers for full value, and who bought in good faith without notice of the alleged frauds or deceits.

The District Court sustained a demurrer to the defendant's plea of the

statute of limitations, overruled the demurrers as to the other defenses, expressing no opinion upon the question of damages presented by the fourth defense. Replication was filed, and thereafter the District Court granted defendant's motion for judgment on the pleadings, and after judgment was entered accordingly, the United States sued out this writ of error.

Clarence L. Reames, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or.

Fulton & Bowerman and Schwartz & Saunders, all of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The entries described in the complaint were made under an act of Congress (28 St. 286, 326) and the amendments thereto (31 St. 179, 740) requiring, among other things, that three years' actual residence on the land "shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent." But the land department of the United States, acting under what is now conceded to have been a mistake of law, permitted eight of the entrymen to make proof of residences of from one to one and one-half years, respectively, and to deduct times of their respective military services from the required three-year period of residence. This error arose by applying to the entries upon lands within the Siletz reservation the provisions of sections 2304 and 2305, Revised Statutes (Comp. St. 1916, §§ 4592, 4593), and the act of January 26, 1901, c. 180 (31 St. 740), which relate to commutation of homestead entries made by honorably discharged Union soldiers.

Inasmuch, then, as the requirements of the statute under which the proofs were taken and the patents issued could only have been properly met by proof of three years' actual residence on the land, the question arises: Is the United States precluded in this action from recovering damages although the entrymen in their final proofs did not say that they had actually resided on their lands for the required period of three years, yet did falsely swear that they had actually resided on the lands for certain times, though for less than the three years required; that they were making the entries for themselves when in fact they were making them for the benefit of the defendant, Jones; that they had made certain improvements which in fact they had not made; and that they had made their entries for the purpose of actual settlement and cultivation, when in fact they had not made them for those purposes.

By section 2290, Revised Statutes of the United States (Comp. St. 1916, § 4531), a person applying for an entry of a homestead shall make affidavit that his application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person.

In Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272, the Supreme Court said:

"The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person.' And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight,' which section provides for alienation for 'church, cemetery, or school purposes, or for the right of way of railroads.' The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet under them the homestead right cannot be perfected, in case of alienation, * * * without perjury by the homesteader. Section 2304 makes provisions for homesteading by soldiers and officers who served in the army of the United States during the recent war: but that section makes no substantial change, except in respect to the time of occupation. Under this section Anderson perfected his homestead right; but the question of the length of occupation required to perfect such right in no manner affects the controversy. The same affidavits in respect to alienation are required from federal soldiers as in other cases of homesteads."

In Adams v. Church, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769, the Supreme Court, referring to the oath required from the entryman that he has not alienated any interest in the land, except as provided in section 2288, R. S. 2291 (Comp. St. 1916, §§ 4535, 4532), said that the policy of the government in requiring such affidavit under the homestead law was to make it a condition precedent to granting a title.

In McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590, the United States brought suit to cancel a patent to one Ward and a deed made by Ward and wife to McCaskill & Co. upon the ground that the proofs of settlement, cultivation, and improvement made by Ward were false, fraudulent, and untrue. The court, among other things, said:

"It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the 'application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person'; that applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses. Residence and cultivation of the land are the price that is exacted for its payment."

United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, held that in every instance the settlement or residence for a given time upon the land, the actual cultivation of a part of it, and building a house on it, were required of the claimant, who must have intended to acquire real ownership for himself and not for another, nor for a purpose to sell to another. It is true that in that case all of the requirements of the law were set at naught, but the court said "that the one stupendous falsehood" included all the requirements on which the right to secure the land rested; that fraud and the misleading

effects on the officers of the government were shown, and that equity would give relief. The reasons given for the view expressed were that with the enormous domain of public land opened to homestead, preemption, and public and private sale, the government must rely upon officials who could not always visit the lands, and who are obliged to accept statements of parties asserting claims together with such ex parte affidavits as might be produced. Justice Miller used this language:

"The United States is passive. It opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

The court adverted to its steady holding that though, in the absence of fraud, the facts were concluded by the action of the land department, yet a misconstruction of the law, by which alone the successful party obtained a patent, might be corrected in equity much more when there was fraud or imposition.

In Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637, the court restated the general rule that:

"Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the government, and of thus obtaining public lands without compliance with the requirements of the law, while the patent is not void or subject to collateral attack, it may be directly assailed in a suit by the government against the parties claiming under it."

In United States v. Morehead, 243 U. S. 607, 37 Sup. Ct. 458, 61 L. Ed. 926, the court cited sections R. S. 2304, 2290, and the requirements thereof; that the applicant for a homestead must make actual entry, settlement, and improvement, and must make and file the affidavit, as provided in R. S. § 2290, that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, and said that in addition to this requirement, "in order to obtain a certificate or patent, he must, under R. S. 2291, make proof of his residence for the full period, and an affidavit 'that no part of such land has been alienated.'"

[1] We might cite many other cases, but those referred to clearly state the principle which controls in construing the homestead law; that the entryman must in good faith claim the land for his own benefit, and can make no agreement for alienation, and must reside upon the land continuously for the time that the law requires residence thereon, and must make it his home.

[2] Now the complaint herein alleges fraud and deceit by defendant in that he procured the entrymen named to make false and fraudulent representations in their applications and final proofs respecting alienation, residence, cultivation, and improvements; that these representations were relied upon by the United States, and that in reliance upon them patents were issued. Plainly, if the entrymen did make false

and fraudulent representations and affidavits with respect to these matters or any of them, and if the authorities relied upon the proofs with respect to them, they deceived the United States, and through their deception procured patents. It is said, however, that inasmuch as the representations as to residence did not bring the entrymen within the statute, no ground was furnished upon which deceit could be predicated, because, if the alleged representations had been true, the entrymen did not make the showing necessary to the issuance of patents. This contention would eliminate intentional misrepresentation and falsehood as to agreements of alienation and as to continuous residence for the time sworn to in the final proof and as to cultivation of the lands embraced within the entries and occupancy thereof for home purposes. But these several requirements cannot be looked upon as immaterial and irrelevant, because they are of the essence of the homestead law.

And if there was perjury committed by the entrymen in respect to them, and if the United States relied upon the statements made concerning them in final proof, and was deceived, and issued patents for the lands, the government is not estopped from asserting that it was defrauded. Furthermore, even though the period of residence falsely sworn to was less than that demanded by the law, if defendant knowingly and corruptly entered into a collusive arrangement with the entrymen for the purpose of aiding in such misrepresentation and deceit, with intent to acquire title and possession of the lands for himself, and did directly aid in inducing the United States to part with title to lands with the purpose of acquiring them for himself, we believe he is liable in this action for the value of the land.

In Gilson v. United States, 185 Fed. 484, 107 C. C. A. 584, in a suit to cancel patent on the ground that the entryman had not entered the land under the homestead law in good faith, in that he had not made the entry for himself, but had acted as an instrument of one Gilson, to acquire title for Gilson's benefit, this court affirmed a decree canceling the patent upon the ground that the evidence showed that Gilson had induced one Landis to make the entry for him, had paid the money for commutation, had taken a mortgage therefor, and had received a deed as soon as patent was issued, and that the defendant had known that the proof of improvement and cultivation was false. On appeal the Supreme Court affirmed these views. Gilson v. United States, 234 U. S. 380, 34 Sup. Ct. 778, 58 L. Ed. 1361. In affirming United States v. Southern Pacific R. Co. (C. C.) 117 Fed. 545, this court said in Southern Pacific R. Co. v. United States, 133 Fed. 651, 66 C. C. A. 581:

"The railroad company had received patents for lands under an erroneous interpretation of the law. It was a clear mistake, and conveyed no rights or title whatever to the railroad company to any of the lands in question. The company sold a portion of the lands to bona fide purchasers, in many cases receiving more than the government price therefor. Not having any title to the lands, and having received the money for the lands it sold to bona fide purchasers, it must be held responsible to pay the amount specified in the act therefor."

To like effect is United States v. Oregon & C. R. Co. (C. C.) 133 Fed. 954, where Judge Bellinger in the District Court for Oregon held

that the United States could maintain action to cancel patents for lands where the patents were erroneously issued under a railroad grant, and could recover from the grantee the price paid for the lands so patented which were sold to bona fide purchasers. This ruling was affirmed in Oregon & C. R. Co. v. United States, 144 Fed. 832, 75 C. C. A. 486. In Williams v. United States, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026, the Supreme Court considered a bill where the allegations set out fraud and wrong, and showed inadvertence and mistake in the certification to the state of Nevada with respect to the title to certain lands. It was held that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby, the court saying that this was equally true in transactions between individuals as in those between the government and its patentee. Justice Brewer, for the court, said:

"If through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings attending this transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and, if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established."

In Southern Pacific Railroad Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, the court affirming this court in Southern Pacific R. Co. v. United States, supra, held that where a tract of land has been conveyed by mistake, and the vendee prior to the discovery of a mistake conveys to a bona fide purchaser, the original owner is not limited to a suit to cancel the conveyances and re-establish his own title, but may elect to confirm the title of the innocent purchaser, and recover of his own vendee the value of the land up to at least the sum received by him.

From these authorities the rule is not to be doubted that equity will afford relief by sustaining bills charging mistake on the part of the land officials of the United States in issuing patents, and fraud on the part of the entrymen of public lands to whom patents have been issued under circumstances such as are alleged in the present case. We fail to perceive why the government may not elect to ratify the patents and to sue at law for the value of the lands. Safford v. Grout, 120 Mass. 20; 12 R. C. L. p. 297; Bigelow on Fraud, vol. 1, p. 544; United States v. Pitan (D. C.) 224 Fed. 604; United States v. Koleno, 226 Fed. 180, 141 C. C. A. 178; Bistline v. United States, 229 Fed. 546, 144 C. C. A. 6.

Our conclusion is therefore that whether the alleged fraud and deceit and misrepresentation was practiced, and whether they were the inducing causes for the issuance of the patent, and whether the United States relied upon the representation and was deceived, and whether defendant intentionally did the wrongs charged against him, involved issues of fact to be decided upon a consideration of the evidence as well as the law.

[3] It is contended by the defendant that under section 8 of the act of March 3, 1891, c. 561, the action is barred. That section reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The patents involved in this action were issued in 1902, but the action was not instituted until 1912. It is said that because there is no contention that the government failed to discover the alleged fraud within six years next preceding the commencement of the action, the right to institute a suit to avoid or annul the patents is barred, and the government is without remedy in any form of action for the alleged fraud. We agree with the District Court in holding that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, and that the government may sue to recover the value of land procured from it through mistake or through fraud, waiving any right of action it may have had for annulment of the patent. United States v. Chandler Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; State of Louisiana v. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92; United States v. Pitan (D. C.) 224 Fed. 604; Bistline v. U. S., 229 Fed. 546, 144 C. C. A. 6; United States v. Koleno, 226 Fed. 180, 141 C. C. A. 178.

[4] In addition to the entries made by the entrymen particularly included in what has been said, the record shows an entry made by one Wells. Wells made application October 1, 1900, and commuted May 20, 1902, by a payment of the original price of $1.50 per acre (Act of January 26, 1901). Under the provisions of section 2301, R. S. U. S., as amended act of March 3, 1891, Wells was entitled to commute his entry upon making proof of "settlement and of residence and cultivation" for a period of 14 months. It is to be noted that the statute did not use the word "actual" residence. But the act of August 15, 1894, did require "actual" residence, and, inasmuch as the proofs submitted by Wells concerning his residence showed actual presence upon the land for not more than 10 weeks, the contention is made that, as a matter of law, the patent should not have been issued to Wells, and that the government had no right to rely upon the representations as to residence, and therefore that no action for fraud and deceit can be maintained with respect to the entry. Section 2301, as amended March 3, 1891, reads as follows:

"Sec. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months."

We think that a commuted entry such as Wells made is brought within the purview of this section, and is not controlled by the act of 1894, heretofore referred to (28 St. 286–326). Therefore proof of

settlement and residence and cultivation for the period of 14 months was required; although, as applied to the Wells entry, the requirements as to the character of residence are not as strict as those which should govern the cases heretofore considered, where the statute called for actual residence. Nevertheless there was an issue as to whether or not Wells was a bona fide entryman, and whether he made the land his home to the exclusion of any other home, and whether the government relied upon his representations in respect to these matters and in reliance upon them issued patent, and whether or not the defendant aided Wells in making the alleged false statements charged to have been made by him in his proofs, all as alleged in the complaint.

The District Court having expressed no opinion upon what should be the standard of value which may be recovered by the government in the event of any recovery, we express no opinion upon the point.

The judgment is reversed and the cause remanded, with direction to overrule the motion for judgment on the pleadings.

MEMPHIS ST. RY. CO. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1917.)

No. 2789.

1. STREET RAILROADS ⊜88—COLLISION BETWEEN CARS OR TRAINS—RAILROAD CROSSINGS.

Where, from the first operation of the trains of a steam railroad across the tracks of a street car company, such trains had the right of way, and had been accustomed to proceed without stopping or slackening their speed, while it had been the uniform custom for the street cars to come to a full stop, and for the conductor to go forward to ascertain whether a train was approaching, and then signal the motorman, and the street car company had instructed its conductors to pursue this course, it was the duty of a conductor, before signaling the motorman, to go upon the track and look for trains, and it was also his duty to see an approaching train, unless it was so obscured by smoke and dust that he could not see it, in which event it was his duty to delay signaling the motorman for a reasonable length of time to allow the smoke and dust to clear away.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 188, 189.]

2. TRIAL ⊜295(7)—CONSTRUCTION OF CHARGE AS WHOLE—CONTRIBUTORY NEGLIGENCE.

In an action by a steam railroad against a street car company for damages in a collision, an instruction that, if there was no smoke or dust to obscure the street car conductor's vision, he was chargeable with seeing what was to have been seen in the exercise of reasonable care, and that if a train was approaching, and he signaled the street car to come forward, and the collision occurred, defendant was negligent, and liable to plaintiff, was not erroneous, as permitting a finding for plaintiff, without consideration of plaintiff's claimed acts of contributory negligence, where the court further charged that, even if defendant committed an act which proximately caused the collision, there could be no recovery, if plaintiff was also guilty of negligence proximately contributing thereto, that if plaintiff was guilty of negligence in the operation of its train, no matter how slight, that contributed to the accident, there could be no recovery, although defendant's employés were negligent, and that it was

plaintiff's duty in the exercise of reasonable care to ring the bell or blow the whistle, keep an outlook on the engine for obstructions on the track, and, if an obstruction appeared, to apply the brakes and do all that could be done to stop the train, and to do such other things to avoid the collision as a reasonably prudent person would have done under like conditions and circumstances, since the charge is not to be considered with reference to isolated portions, but as an entirety.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

3. STREET RAILROADS ⊜98(11)—COLLISIONS BETWEEN CARS OR TRAINS—CONTRIBUTORY NEGLIGENCE.

Where, from the first operation of the trains of a steam railroad across street car tracks, it had the right of way, and had been accustomed to proceed without stopping or slackening the speed of its trains, while it had been the custom for the street cars to come to a stop, and for the conductor to go forward and look for trains, the street railroad, by consenting that the railroad trains might operate over the crossings without reducing their speed, thereby impliedly agreed that such operation should be attended with no danger to itself, and, in an action by the steam railroad for damages sustained in a collision, could not rely on the rate of speed of the railway train as contributory negligence.

4. TRIAL ⊜250—INSTRUCTIONS—APPLICABILITY TO CASE.

Where instructions were inapplicable to the situation disclosed by the record, error might not be predicated on their refusal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586.]

5. APPEAL AND ERROR ⊜978(3)—REVIEW—DISCRETION—DENIAL OF NEW TRIAL.

If a plain prejudicial error is committed in the denial of a new trial on account of a juror's disqualification, such error may be considered on appeal, notwithstanding the established rule that the granting or refusal of a new trial rests in the sound discretion of the trial court and cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3895.]

6. NEW TRIAL ⊜56—DISQUALIFICATION OF JURORS—PREJUDICE.

In an action by a railway company, the jurors on their examination were asked collectively whether they were directly or indirectly interested with plaintiff, or had any contracts with it that would cause them to incline favorably toward it, and all remained silent, indicating that they answered in the negative. One juror in fact owned one share of stock in the railway company, but such ownership had passed from his mind. He was the foreman of the jury and the last to vote, and made no attempt to influence his fellow jurors, and did not make his views known before voting. At the same term he had sat in several cases against the railway company, and had voted for verdicts against it. If the verdict had been apportioned among the stockholders, his share would have been slightly more than one-third of a cent. *Held*, that prejudice was not shown, and his ownership of stock was not cause for granting a new trial, especially as a juror whose examination is so conducted as to not bring his attention to a disqualifying circumstance, or cause him to refresh his memory touching it, is not required to know or surmise that something more is intended than is clearly expressed by the questions asked him.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 116–119.]

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

Action by the Illinois Central Railroad Company against the Memphis Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Roane Waring, of Memphis, Tenn., for plaintiff in error.
Charles N. Burch, of Memphis, Tenn., for defendant in error.

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

SATER, District Judge. The Illinois Central Railroad Company as plaintiff, recovered a judgment against the Memphis Street Railway Company as defendant, for damages sustained by its engine, tender, tracks, roadbed, cars, and freight contained in its cars, in a collision which occurred between its train and the defendant's car at Binghamton, Tenn., about dusk, September 17, 1914. The cases of the passengers, Bobo, Moore, and McCoy, against the defendant, decided by this court and reported in 232 Fed. 708, 146 C. C. A. 634, arose out of that mishap. The jury found that the damages of which complaint was made were caused by the defendant's sole negligence.

It is claimed by the defendant that the trial court erroneously told the jury as a matter of law (1) that it was the duty of its conductor, before signaling the motorman to cross the railroad tracks, to wait until the smoke or dust caused by the south-bound train, which had just passed, had cleared away, for the reason that his attitude toward the plaintiff is the same as if he was the injured party against whom the defense of contributory negligence was interposed on account of his conduct; and (2) that, if the conductor directed the motorman to proceed after the south-bound train had cleared the crossing, without waiting for the dust and smoke to rise, settle, or float away, he was guilty of negligence and the defendant liable, the effect of which it is alleged was to pretermit entirely the questions of contributory negligence and proximate cause. These criticisms necessitate a consideration of the state of the evidence touching the situation of the conductor, the condition of the atmosphere produced by the south-bound train, and the language employed by the court in charging the jury concerning such matters.

It is shown by the proofs, and finally by the defendant's admission of record, that from the first operation of plaintiff's trains in the spring or summer of 1908 across the defendant's tracks, the plaintiff's trains had the right of way and had been accustomed to proceed without stopping or slackening their speed, and that the uniform custom had been that the defendant's cars came to a full stop before entering upon the railroad tracks, at which time the conductor went forward upon the tracks to ascertain whether a train was approaching and then signaled the motorman forward, providing there was no oncoming train. Aside, however, from the existence of such uniform practice, the defendant's instructions to the conductor were that, when his car reached the crossing, he should pursue a course in precise accord with such custom. The conductor had been operating over the defendant's track at the point of collision, was making one of his regular trips, and was familiar with the established custom and defendant's instructions. If the jury found, notwithstanding some division in the evidence, that the south-bound train left behind a trail of smoke and dust, its conclusion was supported by a clear preponderance of the evidence upon that

subject; nor can complaint be justly made, if it further found that the smoke and dust were not so dense as seriously to obscure the view of the approaching north-bound train, for the reason that there is disinterested evidence coming from passengers on the motor car that, before the approaching locomotive cleared the south-bound train, they saw its smokestack, the smoke issuing from it, a flashing light such as occurs when a fireman is firing his engine, and a light cast forward by the headlight before the headlight itself could be seen. The headlight, consisting of an oil lamp within a reflector, was burning. The lamp either exploded or was broken in the collision, and the fire caused thereby was extinguished by the trainmen. The only difference between the parties regarding the headlight is that the defendant says it was dim and the plaintiff claims it was bright. There is evidence from the defendant's employés that the conductor, before signaling the motorman forward, looked southward along the plaintiff's tracks (which were straight), but two of the passengers on his car say he did not look in that direction at all. The vision of the engineer, who was seated on the right-hand side of his engine, was so obscured by the boiler as to prevent his seeing objects on the track unless they were distant about 300 feet or more. The fireman, who was on the lookout as well as the engineer, at some point within that distance of the crossing saw the defendant's conductor, standing on or near the north-bound track, signal to the motorman to go forward. He immediately notified the engineer, who shut off the throttle, applied the emergency brakes, and "put the straight air on the engine and opened the air side." There is no evidence that the engineer did not promptly call into action every means and appliance at his command to check the speed of and stop his train. A pronounced majority of the witnesses testified that the speed per hour of the north-bound train was from 15 to 20 miles, although one witness fixed it as high as 35 or 40 miles and another, when interrogated before the trial, fixed it as low as 8 miles. A number of witnesses stated positively that they heard the oncoming engine whistle, and the same number either say it did not whistle, or that they did not hear it do so. The evidence is conflicting as to whether the engine bell was ringing or not, the trainmen stating that it had been made to ring continuously and automatically from a crossing a mile south of the point of accident.

[1] In view of the existing established custom and the defendant's instructions to the conductor, the court very properly said to the jury that it was the conductor's duty, before he signaled the motorman to go forward across the plaintiff's tracks, to go upon them and to look southward along the north-bound track, to see whether a train was approaching. But the charge in that connection did not, however, end with that statement. The jury was further told that if there was an approaching train, it was the conductor's duty to see it, unless it was so obscured by smoke and dust produced by the south-bound train that he could not see, in which event it was his duty to delay signaling the motorman for a reasonable length of time, to allow the smoke and dust to clear away so as not to obscure his vision of the track. This instruction, which embodied the rule of ordinary care, was warranted by the state of the evidence, would have been proper had the conductor

been the injured party confronted with the charge of contributory negligence, and is in accord with reason and authority. McCrory v. Chicago, M. & St. P. Ry. Co. (C. C.) 31 Fed. 531; Memphis St. Ry. Co. v. Roe, 118 Tenn. 601, 102 S. W. 343; Memphis St. Ry. Co. v. Cavell, 135 Tenn. 462, 474, 475, 187 S. W. 179; Memphis St. Ry. Co. v. Bobo, 232 Fed. 708, 146 C. C. A. 634 (C. C. A. 6); New York S. & W. R. Co. v. Thierer, 209 Fed. 316, 318, 319, 126 C. C. A. 242 (C. C. A. 2); Chicago & N. W. Ry. Co. v. Andrews, 130 Fed. 65, 73, 64 C. C. A. 399 (C. C. A. 8); Chicago, R. I. & P. Ry. Co. v. Pounds, 82 Fed. 217, 219, 27 C. C. A. 112 (C. C. A. 8); Elliott on Railroads, § 1170.

[2, 3] The court further told the jury that if there was no smoke or dust to obscure the conductor's vision, and if he looked southward along the north-bound track, he was chargeable with seeing what was to have been seen in the exercise of a reasonable degree of care and caution under such circumstances, and then added that if the plaintiff's train was approaching and the conductor signaled the street car forward and the collision occurred, the defendant was in that event guilty of negligence and liable to the plaintiff. The statement in effect that even if the conductor could see and ought to have seen the approaching train and nevertheless ordered the motorman to proceed, the defendant was negligent and liable for damages, is alleged to be erroneous on the ground that it left the jury free to reach a conclusion without considering the claimed acts of contributory negligence on plaintiff's part urged by the defendant. But the statement made by the court was not absolute. It was qualified not only by the immediately preceding statement, but by the next following independent sentence, in which the jury was instructed that, even if the defendant committed an act which proximately caused the collision, there could be no recovery against it, if the plaintiff was also guilty of negligence which proximately contributed thereto and the damages resulting therefrom. A further broad instruction was given at the defendant's instance that if, from the whole of the evidence, the jury found that the plaintiff in the operation of its train was guilty of negligence, "no matter how slight," that contributed to bring about the accident, there could be no recovery, although it further found the defendant's employés likewise guilty of negligence; nor did the court fail to allude to the specific acts on which the defendant might rightfully rest its charge of exculpating contributory negligence. It directed that it was plaintiff's duty in approaching the crossing, in the exercise of reasonable caution and care, to ring the bell or blow the whistle, to keep a lookout on the engine for obstructions on the track, and, if an obstruction appeared, to apply the brakes and do all that could be done to stop the train and to do "such other things to avoid the collision which a reasonably prudent person would have done under like conditions and circumstances," and that if the defendant gave the hereinbefore mentioned instructions to its employés, and if the practice of its employés was to observe them, and if such practice was known to and relied on by the plaintiff, and if it was the custom of the plaintiff, to the knowledge of defendant, to operate its trains at the crossing without checking their speed, it then was not negligence in the plaintiff to run its train over the crossing without stopping or slackening its speed.

There was a still further instruction that it was the duty of the plaintiff's trainmen, when about to reach an obstructed crossing, to use under the circumstances reasonable and ordinary care in operating their train to prevent injury to persons seeking to cross the track. The question of ordinary care in the operation of the train necessarily involved the rate of speed, if reliance could be had on it as a defense. The thought is present in the charge that the jury, having regard to all of the evidence, should determine all the issues. The defendant, by consenting that the railroad trains might operate over the crossing without reducing their speed, thereby impliedly agreed that such operation should be attended with no danger to itself, and was not therefore in position to rely on the charge of contributory negligence on plaintiff's part due to the rate of speed. Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 60 Fed. 993, 996, 9 C. C. A. 314 (C. C. A. 6). The charge is not to be considered with reference to isolated portions, but as an entirety, and when so considered it did not fail fully to cover every phase of the case made by the evidence.

That portion of the charge is assailed in which the court told the jury that contributory negligence on the part of the plaintiff was not made out, if, in the exercise of reasonable care and caution, it did certain things, such as ringing the bell or blowing the whistle, keeping a lookout on the engine, attempting to check the train by the use of all available means as soon as the obstruction on the track was seen, and the like. It is alleged that the speed of the train and its manner of operation, in view of the presence of smoke and dust, which the defendant contends existed, were negligence, and that the jury should have been left to say what the plaintiff should have done and whether its acts were negligent or not. In view of what has already been said, it is clear, we think, that the court did not err as alleged.

[4] There are several assignments of error based on the court's refusal to instruct as requested by the defendant. There was no exception taken to any of the refusals, but waiving that omission and considering the inclusion, in some instances, of impertinent and the exclusion, in other instances, of pertinent matter, and their inapplicability to the situation disclosed by the record, error may not be predicated on their rejection. A discussion of them would not be profitable.

In support of the motion for a new trial the defendant filed the affidavit of a juror, a leading merchant of the city of Memphis, from which it appears that as the result of a direct inquiry made of him several days after the verdict had been rendered, he discovered that he owned one share of the plaintiff company's stock. Having had no occasion to refer to it for many years, his ownership of it had passed from his mind until the above-mentioned inquiry was made. As the chosen foreman of the jury, he was the last to vote on the verdict to be returned. He did not attempt to influence any of his fellow jurors, did not know how any of them would vote, nor did any of them know his views of the case. He had at the same term sat in several cases brought against the plaintiff and had voted for verdicts against it. On examination of the jurors before they were sworn, they were asked collectively whether any of them were directly or indirectly interested with the plaintiff or had any contracts with it that would cause them

to incline favorably toward it. The plaintiff remained silent, as did all the other jurors, which silence was understood as and intended to be an answer in the negative to the queries propounded. The juror believed the purpose of such queries to be to ascertain whether he sustained any contractual relations with the plaintiff. He was not asked whether he was one of its stockholders. If the amount of the verdict ($4,000) were apportioned among the stockholders, his share would be a fraction more than one-third of a cent. Error is predicated on the court's rejection of the claim that the verdict should be set aside on account of the juror's stock ownership.

[5, 6] Notwithstanding the established rule that the granting or refusal of a new trial rests in the sound discretion of the trial court and cannot be made the subject of review upon a writ of error, if, as the defendant claims, a plain prejudicial error was committed in the denial of a new trial on account of the juror's disqualification, justice requires that such error be considered. United States v. Tennessee & Coosa R. R. Co., 176 U. S. 242, 256, 20 Sup. Ct. 370, 44 L. Ed. 452; United States v. Bernays, 158 Fed. 792, 794, 86 C. C. A. 52 (C. C. A. 8); New York Life Ins. Co. v. Rankin, 162 Fed. 103, 108, 89 C. C. A. 103 (C. C. A. 8.). Authority for considering a kindred motion is found in Spreckels v. Brown, 212 U. S. 208, 213–215, 29 Sup. Ct. 256, 53 L. Ed. 476. When an examination of a juror is so conducted as not to bring his attention to a disqualifying circumstance or cause him to refresh his memory touching the same, he is not required to know or surmise that something more is intended than is fairly expressed by the terms of the questions addressed to him. Swarnes v. Sitton, 58 Ill. 155; Thompson & Merriam on Juries, p. 343, note; Kenrick v. Reppard, 23 Ohio St. 333; Watts v. Ruth, 30 Ohio St. 32. In Missouri, K. & T. Ry. v. Munkers, 11 Kan. 223, 232, Judge Brewer held that when a trial is complete and the verdict returned, the verdict ought not to be disturbed by reason of the possibility of prejudice in the mind of a juror towards the losing party, and that the proof of prejudice should be clear, otherwise great injustice might be done to the successful party as well as the juror. See, also, Baylies, New Trials (2d Ed.) 586, and authorities cited, and 29 Cyc. 765. The law governing such situations as the one now under consideration is comprehensively stated adversely to the plaintiff in Kohl v. Lehlback, 160 U. S. 293, 300, 301, 16 Sup. Ct. 304, 40 L. Ed. 432, and Thompson & Merriam's above-mentioned work, at pp. 338–340. See, also, Hollingsworth v. Duane, 4 Dall. 353, Fed. Cas. No. 6,619, and Morse v. Montana Ore-Purchasing Co. (C. C.) 105 Fed. 337. The Tennessee rule also coincides with the above-mentioned authorities, as appears from Judge Hammond's exhaustive opinion in Brewer v. Jacobs (C. C.) 22 Fed. 227, 234–236, and Judge Brewer's opinion in the Munkers Case, which touches on the decisions of that state. Prejudice on the part of the juror is not shown and under the circumstances presented his stock ownership did not constitute cause for granting a new trial.

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

THE STADACONA (two cases).

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

Nos. 2890, 2891.

1. ADMIRALTY ⊂⊃118—APPEAL—REVIEW.

An appellant in admiralty, as in equity, is confined to the limits he voluntarily imposes when he appeals, and the appellate court is not called upon to review in his interest such findings of the trial court as he has not challenged by his appeal or assignments of error.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794.]

2. COLLISION ⊂⊃71(2)—FAULT—VESSELS MANEUVERING IN SLIP.

The steamship Stadacona, lying in a slip, on request moved astern to the end of the slip to permit the Onoko, farther in, to move out between her and another vessel on the opposite side of the slip. When the Onoko passed out, she was swung by the wind and current against the Stadacona's propeller, and one of the blades punctured her hull, causing a leak which compelled her to beach after proceeding a distance on her voyage, and also damage to her cargo. *Held*, on the evidence, that the primary fault was that of the Onoko in failing to take measures to prevent swinging against the Stadacona, and that the fact that the latter's propeller was moving slowly at the time was not such a contributory fault as rendered her liable to the Onoko or to the cargo owner.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101.]

3. COLLISION ⊂⊃17—CONTRIBUTORY FAULT.

Where the danger has been created by the fault of one vessel, the other will not also be condemned, unless her fault appears clearly and satisfactorily.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 16.]

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

Suit in admiralty for collision by the Nicholas Transit Company, owner of the steamship Onoko, and by Alexander D. Thomson, against the steamship Stadacona. Decrees for respondent, and libelants appeal. Affirmed.

In October, 1912, the steamer Onoko, fully laden, was about to leave the Great Northern slip in the harbor at Duluth. The steamer Stadacona lay, along the same (east) side of the slip just astern of the Onoko. The Stadacona was light and was waiting to load; her stern was about 100 feet from the outer end of the slip; both vessels were heading into the slip. The width of the slip was 150 feet. Just as the Onoko was preparing to back out between the Stadacona and the west pier, or was engaged in so doing, the steamer Rochester backed into the slip along the west side and made fast opposite the Stadacona. The Onoko then undertook to back out between the two other vessels, but the space was too narrow. At the Onoko's request, the Stadacona moved astern about 50 feet. The Onoko tried again, but was still unable to get through. The Stadacona again went back until her stern was about even with the end of the east pier. The space to get through being still insufficient, the Rochester moved further into the slip. The Onoko then came out, but the wind and the current, both from the west across the end of the slip, joined with the fact that the Onoko was low, while the Stadacona was high, in the water, operated to swing the Onoko under the stern of the Stadacona, so that one of the latter's propeller blades punctured the Onoko's hull 4 feet below the water line on the port quarter. The happening of the injury was known to both boats, a piece of the propeller blade being broken

off; but such examination as the Onoko made disclosed no considerable injury, and she started down the lake. After about six hours, it became evident that water was coming in dangerously, and no harbor being accessible, the captain thought it was prudent to, and did, run her on the beach. Later she made some repairs, was drawn off, and was able to proceed on her voyage. It turned out that the damages, approximately, were: To the cargo, $12,000; to the Onoko, $3,000; and to the Stadacona, $125.

In the court below, Thomson, the cargo owner, filed a libel (No. 2891) against the Stadacona, alleging that the latter's wheel was working when it should not have been, and that this was negligence which was a cause of the damage. The Stadacona vouched the Onoko into the case under the fifty-ninth admiralty rule (29 Sup. Ct. xlvi), and also filed a cross-libel against the Onoko to recover the $125 damage. In a separate earlier proceeding (No. 2890), the Onoko had libeled the Stadacona to recover its $3,000 damage. The District Court came to the conclusion that there was no actionable fault on the part of either boat of which the other could complain, and dismissed all the libels and proceedings. The Nicholas Transit Company, owner of the Onoko, appeals, because it failed to recover its damages, and Thomson, the cargo owner, appeals, because the Stadacona was not held in fault.

In Case No. 2890:

F. S. Masten, of Cleveland, Ohio, for appellant.

H. D. Goulder and R. G. McCreary, both of Cleveland, Ohio, for appellee.

In Case No. 2891:

T. Catesby Jones, of New York City, for appellant.

H. D. Goulder and R. G. McCreary, both of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] In so far as Thomson's libel became, through the operation of the fifty-ninth rule, an assertion of a claim against the Onoko, there is no issue for this court to review. Neither by his petition for appeal nor by his assignments of error has Thomson challenged the rightfulness of the trial court's seeming conclusion that there was no liability from the Onoko to Thomson. He prosecutes his appeal solely as against the Stadacona. The question whether the Onoko was in fault is therefore not before us, excepting as it may be incidentally involved in determining the fault of the Stadacona or the proximate character of the resulting damages; but in either of these aspects it may be important and may demand decision. We are not called upon to consider how far an appellee may be heard as against the decree from which he has not appealed; and we do not read Reid v. Fargo, 241 U. S. 544, 548, 36 Sup. Ct. 712, 60 L. Ed. 1156, as being inconsistent with the rule that the appellant, in admiralty as in equity, is confined to the limits he voluntarily imposes when he appeals.

[2] It is clear to us that the primary fault was on the part of the Onoko. While we are not permitted to pass judgment upon her management from the standpoint of what was apparent after the accident, and while the situation must be judged as it should have appeared to competent men at the time, yet from that standpoint it is difficult to see any justification for what was done. There was nothing necessarily

blameworthy merely in attempting to squeeze through between the Stadacona and the Rochester; such things must sometimes be done in a crowded slip; but it must have been apparent that the wind and current would strike the Onoko's stern as soon as it emerged from the slip, and would swing it strongly to port, and that this tendency would be increased by backing. There is no satisfactory foundation for the claim that the wind and the current materially increased during the short time occupied in getting out. When the maneuver started, the stern of the Stadacona was so far inside the slip that the almost inevitable swing of the Onoko would have carried her against the corner of the east pier; and around this corner she could very likely have swung as upon a pivot without injury to herself; but before the critical time came the Stadacona, acting at the request of the Onoko, had moved out so that her stern would necessarily be substituted for the corner of the pier as the pivot of this motion, and, considering the respective heights of the two vessels, collision between the hull of the Onoko and the propeller of the Stadacona was highly probable. Not only was this the natural result of an attempt of the Onoko to get out with her own wheel, under these conditions, but the safe and simple means of avoiding any danger were equally obvious. A line from the Onoko's starboard quarter to the west pier, to hold her up against the wind until she could get far enough out to be safe, or to be used in working her stern around the end of the west pier, was so certainly the safe and simple method of getting out that no plausible reason for not adopting it is suggested. The Rochester had just come in along this pier with the aid of a line. The use of a tug—the means finally employed after the accident had happened—was another safe, though less simple, method.

The only reason alleged for not using a stay line is that the Rochester was in the way, or that it was too far; but this is no excuse, for, if it was not feasible to pass the line to or over the Rochester, there is no reason to doubt that she would have moved forward out of the way, as she later did, seemingly as soon as requested; and if it was too far to throw a line, the Onoko's stern could have been worked closer, as was later done, by a port bow line and a forward movement. It is said also that the Stadacona made no objection to the effort of the Onoko to go out as she did, and that, hence, we should infer that the method appeared safe enough. Even if the Stadacona should be charged with knowledge that the Onoko had not put out any line and did not intend to, we do not see that the Stadacona owed any such duty of warning as to raise the suggested inference. The time which elapsed after the Stadacona had moved back to her last position was short, her officers were interested in the scraping of the Onoko alongside, the Stadacona was not about to encounter the cross wind and current, and the fact that they did not quickly apprehend what these elements would do to another boat, with the navigation of which they were not charged, does not go very far in excusing similar inattention on the part of those who did carry the duty.

Our conclusion that the trouble was caused by the Onoko's neglect of ordinary care in observing her duty as the moving vessel not

to injure one which was stationary, in a crowded slip, is but an application of a familiar rule, which is exemplified by many cases from which the following may be selected as more or less closely analogous to the one before us: Humphrey v. Warner (D. C.) 45 Fed. 270, 272; The Michigan (C. C.) 52 Fed. 501; The Miller (C. C. A 1) 76 Fed. 877, 22 C. C. A. 597; The Rhein (C. C. A. 2) 204 Fed. 252, 122 C. C. A. 520. This leaves, as the only question for consideration, whether the Stadacona so contributed to the ultimate result that she is liable to the cargo owner. The claim of such contribution (although made as a claim of primary fault) consists in the charge that the Stadacona's wheel was wrongfully moving at the time of the collision, and that it was because of this wrongful motion that the propeller blade cut a hole through the Onoko. Many of the physical facts render it extremely doubtful whether the wheel was in motion at the moment of collision, but we cannot think this a controlling matter. There is no claim that its rapid motion caused suction, or that it influenced the action of either boat. If moving at all, it was very slowly, and many other facts must be considered in that connection. The Stadacona was fast to the dock by both bow and stern lines. In compliance with the Onoko's request, she determined to move back. This was naturally to be accomplished by releasing the bow line and hauling in that on the stern. To aid this stern pull, the wheel was started in reverse; but this was for only a few turns, and then the wheel was stopped. The same thing was repeated for the next backward motion, also taken at the Onoko's request, except it may be that this time, after the extreme position was reached at the end of the pier beyond which the Stadacona would not go, the engine was not stopped, and the wheel continued to revolve. All agree that the motion (if any) was as slow as possible, so that it was barely turning over and was stopped within half a turn after the blow.

We are unable to see that this kind of motion so substantially increased the risk to the Onoko that it could, in any event, and under the situation here present, be considered as a negligent act which contributed to the result. If the propeller had been at rest, no one can say that the same result would not have happened. The force of the blow came almost negligibly from the revolution of the blade, but mainly from the momentum of the heavily laden Onoko. If the propeller had been at rest, and the two nearest blades had happened to be at the most favorable angles, extending upwardly and downwardly, they might have been bent over or broken without penetrating the hull; but, if not, there would have been two punctures, instead of one. If a single blade had been caught pointing toward the hull, penetration was sure. The most that can be said is that any existing slow revolution of the wheel somewhat increased the degree of that danger into which the Onoko had put herself.

[3] It is a familiar principle that, where the danger has been created by the fault of one vessel, the other will not be also condemned unless her fault appears clearly and satisfactorily (The Victory et al., 168 U. S. 410, 422, 18 Sup. Ct. 149, 42 L. Ed. 519; The Chicago [C. C. A. 2] 125 Fed. 712, 714, 60 C. C. A. 480; The Lans-

down [D. C.] 105 Fed. 436, 443; The Saratoga [D. C.] 180 Fed. 620, 623); and while, perhaps, this rule cannot be applied in full force when it is the innocent cargo owner who sues, yet he carries at least the ordinary burden of proof; and when we find that the defendant boat was intending to comply with the request of the cargo carrier, that the act which is criticized as a fault would have been natural and harmless, except for the mishandling of the cargo boat, and that it is left in doubt whether this act, if it occurred, did contribute in the least to the damage suffered, we must conclude that the cargo owner has not successfully carried his burden.

The decree below is affirmed.

YEE LING et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 222.

1. ALIENS ⊂=21—DEPORTATION OF CHINESE—EXCLUSIVENESS OF CHINESE EXCLUSION ACT.

Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904 (Comp. St. 1916, §§ 4269, 4270), providing that any alien who shall enter the United States in violation of law shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after his entry, and that in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of that act, or is subject to deportation under that act, or any law of the United States, he shall cause such alien within three years to be taken into custody and returned to the country whence he came, authorized the deportation of Chinese laborers found in the country in violation of the Immigration Act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 74.]

2. ALIENS ⊂=32(10)—DEPORTATION OF CHINESE—COUNTRY TO WHICH PARTY SHOULD BE DEPORTED.

Under Immigration Act, §§ 20, 21, persons of Chinese birth, coming to this country from Canada, should be deported to Canada, where there is no evidence that they came to this country from China.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92.]

Hough, Circuit Judge, dissenting.

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

Habeas corpus by Yee Ling and another. From an order (225 Fed. 335) dismissing the writ, petitioners appeal. Reversed, and relators ordered returned to Canada.

This is an appeal from an order of the United States District Court for the Western District of New York dismissing a writ of habeas corpus issued on the application of the appellants alleging that they were unlawfully held under restraint by the immigration inspector in charge at the port of Buffalo, N. Y., for the alleged reason that they are Chinese persons and aliens not lawfully entitled to be in the United States. The District Judge found that the appellants were in this country in violation of section 21 of the Immigration Act and that the

Acting Secretary of Labor was not prevented from invoking the provisions of the Immigration Act because the warrant charged a violation of the Chinese Exclusion Act (Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1916, §§ 4315–4323]).

Dilworth M. Silver, of Buffalo, N. Y., for appellants.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. Judge Hazel found the following facts: First: That the petitioners are Chinese laborers. Second: That they were accorded a fair hearing by the immigration inspector. Third: That the warrant of deportation was regular and in proper form.

He found as conclusions of law: First: That the petitioners were accused of being unlawfully in the United States in violation of sections 6 and 7 of the Chinese Exclusion Act (Comp. St. 1916, §§ 4320, 4321) and not of the Immigration Act, but that this statement in the warrant did not vitiate the proceedings. Second: That the Acting Secretary of Labor had full power and authority under section 21 of the Immigration Act to determine the right of the petitioners to remain in this country.

[1] The questions of law involved in the present appeal were set at rest by the Supreme Court in United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. Mr. Justice Holmes, who delivered the opinion of the court, says:

"By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

[2] We think, therefore, that there can be no doubt that the Immigration Act is applicable to the present case. It provides as plainly as possible that the alien, pursuant to the provisions of the act shall be deported to the country whence he came. Act Feb. 20, 1907, 34 Stat. at Large, § 20, p. 904.

Section 21 provides that the alien "shall be taken into custody and returned to the country whence he came." Nothing can be plainer than the twice asserted provision that the alien shall be sent back to the country "whence he came." There is not a particle of direct evidence that these parties came from China, there is evidence that they came to this country from Canada. We have recently had occasion to consider this question in U. S. v. Sisson, 206 Fed. 450, 124 C. C. A. 356; and U. S. ex rel. Haum Pon v. Sisson, 230 Fed. 974, 145 C. C. A. 168, and reached the conclusion that the country from which the Chinese person comes is the country from which he comes to this country. The fact that he was born in China does not make China the country from which he came to the United States. He may have lived for years in Canada, Mexico, Cuba or any of the South American republics, in which event he should be sent back to the country from which he came, which does not necessarily mean China and may mean any country in the world from which he came to the United States.

The order dismissing the writ should be reversed and the relators ordered to be returned to Canada.

HOUGH, Circuit Judge (dissenting). It seems to me that the reasonable inference, from testimony meager in volume, and much of it palpably false, is that the relator came to Canada from China, intending to enter the United States, promptly did enter, and was arrested before he had time to leave the frontier; i. e., Buffalo. This brings the matter within Ung Bak Foon v. Prentis, 227 Fed. 406, 142 C. C. A. 102, and Lewis v. Frick, 233 U. S. at 303, 34 Sup. Ct. 488, 58 L. Ed. 967.

The difficulty of reaching any conclusion on such testimony is, however, recognized; and the opinion of the court holds, in effect, that unless the United States can affirmatively prove that relator arrived in this country from China, without tarrying for any substantial time in any other foreign land, he must go back to the country from which he is known to have most recently departed. This is too rigid. Hearings under the Immigration Acts do not require even sworn testimony (Lee Sim v. United States, 218 Fed. 432, 132 C. C. A. 232); they are not trials, nor governed by ordinary trial rules (Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501); a fair and unbiased investigation is all that is necessary. In habeas corpus the proceedings are summary by statute (Rev. Stat. § 761 [Comp. St. 1916, § 1289]). In my opinion findings may in such matters be properly based on evidence (even negative) which would not support a verdict at law. This is the method which should be used here, and I think it results in the holding first above suggested.

The previous decisions of this court (since Lewis v. Frick, supra) show that, where it appeared that the Chinaman had remained some considerable time in Canada, he was ordered back there (Hen Lee v. Sisson, 232 Fed. 599, 146 C. C. A. 557), where nothing was known of him, except that he had crossed the boundary from Canada, the same result was reached (Haum Pon v. Sisson, 230 Fed. 974, 145 C. C. A. 168); but where it was shown that he had traveled across Canada, tarrying at way stations less than two weeks, he was remanded to China (Lee Sim v. United States, supra). Distinctions such as these leave each case for decision on narrow differences of fact.

I think this case falls under the Lee Sim category, and cannot therefore agree with the majority.

MISSOURI FIDELITY & CASUALTY CO. et al. v. ART METAL CONST. CO.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1917.)

No. 4700.

CORPORATIONS ⟸657(3)—FOREIGN CORPORATIONS—ACTIONS—ILLEGAL CONTRACT.

A construction company, which contracted to supply and install furniture for a courthouse in Missouri, purchased the furniture from plaintiff, a foreign corporation, and, when the work was completed, plaintiff agreed

to an extension of time for payment, accepting a note secured by a bond executed by defendant, which was surety on the bond of the construction company. The construction company was dominated by defendant, which received the contract price. A second extension was allowed; a new bond and note being given. *Held*, that recovery on the bond and note could not be defeated on the ground that plaintiff, having, at the time of the original contract, been doing business in the state of Missouri without having complied with the Missouri statutes relative to foreign corporations doing business therein, could have maintained no action on the original contract, for plaintiff could make out a cause of action without reference to the original contract, and defendant, having received the benefit of plaintiff's goods, could not set up the invalidity of the original contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2537–2540.]

In Error to the District Court of the United States for the Western District of Missouri; Wilbur F. Booth, Judge.

Action by the Art Metal Construction Company against the Missouri Fidelity & Casualty Company and the Southern Surety Company. There was a judgment for plaintiff, and defendants bring error. Affirmed.

John P. McCammon, of St. Louis, Mo., for plaintiffs in error.

Matthew H. Galt and Frank B. Williams, both of Springfield, Mo., for defendant in error.

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

AMIDON, District Judge. The Frank W. Hunt Construction Company contracted with Greene county, Mo., to supply and install the furniture for its new courthouse. The Missouri Fidelity & Casualty Company, one of the defendants below, became the surety upon a bond for the faithful performance of this contract. The plaintiff below, the Art Metal Construction Company, a corporation organized under the laws of Massachusetts, and having its principal place of business at Jamestown, N. Y., sold the Hunt Construction Company the furniture necessary to fulfill its contract. When the job was completed, the purchase price was still unpaid, and the Construction Company asked for an extension of time, offering to give its promissory note, secured by a bond executed by the Missouri Fidelity & Casualty Company. The accommodation was granted. The note was payable at Jamestown, N. Y. At the maturity of this note a further extension was allowed upon the request of both the Construction Company and the Fidelity Company, and a new note and bond taken. This second note was not paid at its maturity, and suit was brought upon it by the plaintiff in the state courts against the maker, and judgment obtained. The defendant Casualty Company had requested that the note be put in judgment as a condition of its being required to pay on its bond, and was notified of the suit.

The Hunt Construction Company was at all times dominated and controlled by the Casualty Company. After the job was completed, it gave that company an order on the county for the amount due for the furniture and the contractor's additional profits, and the Casualty Company received payment in full upon that order.

The present suit is brought upon the bond given by the Casualty

Company to secure the second renewal note. The answer pleads the statute of Missouri, which forbids under a penalty of $1,000 a foreign corporation to do business in the state until it has filed with the secretary of state its articles of incorporation, and paid certain fees. The answer charges that the plaintiff had for some time prior to entering into the contract with the Hunt Construction Company been engaged in business in the state, maintaining a warehouse for that purpose, and that the sale of the furniture for the courthouse was a part of that business. It urges that under the statute, as interpreted by the highest court of the state, the contract for the furniture was unlawful, and is so connected with the cause of action here sued upon as to defeat the right of recovery. A motion was made by plaintiff to strike out this part of the answer, for the reason that the facts therein alleged are not sufficient in law to constitute a defense. The motion was granted, and that ruling is the only error presented to this court.

This court has had occasion so frequently to state the law in regard to illegal contracts, and to point out the features which separate a new and independent contract from an original illegal transaction, that no good purpose would be served by reviewing the subject in the present case. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 167 Fed. 496, 93 C. C. A. 132; Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873; Hanover National Bank v. First National Bank, 109 Fed. 421, 48 C. C. A. 482; Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; Dunlap v. Mercer, 156 Fed. 545, 86 C. C. A. 435; Jefferson v. Burhans, 85 Fed. 949, 29 C. C. A. 481. We think this case falls within the rule first stated in Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468, and subsequently applied in many cases in the Supreme Court and in this court, namely, that when a contract is only remotely connected with an unlawful transaction, and rests upon a new and independent consideration, and the plaintiff can make out his case without any reliance upon the unlawful transaction, the new contract is valid and should be enforced. It will be observed from the statement of facts that the defendant here occupies the meanly dishonest position of having received the full purchase price of plaintiff's goods, and then refusing to pay for them, although it has given repeated contracts upon new and independent considerations binding it to make the payment. As observed by Mr. Justice Holmes, when a member of the Supreme Court of Massachusetts, in Graves v. Johnson, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355, in fixing the degree of proximity to the illegal transaction necessary to taint a new contract, the moral turpitude involved in the original transaction will be given some weight by the court. As the only moral turpitude here is that which is implied from failure to comply with a penal statute, there is no justification for an extension of the effect of the illegality to collateral undertakings resting upon a new consideration.

The judgment below was eminently just and is affirmed.

TRACK SPECIALTIES CO. v. BARNETT.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917.)

No. 2297.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—RAIL ANCHORS.

The Pope patent, No. 656,470, the Laas and Sponenburg patent, No. 720,362, and the Vaughan and Vaughan patent, No. 1,021,387, each for a device to prevent creeping of rails were not anticipated, and each discloses a patentable improvement over the prior art. Each also *held* infringed by the device of the Bodkin patent, No. 1,015,129.

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

Suit in equity by Otto R. Barnett against the Track Specialties Company. Decree for complainant, and defendant appeals. Affirmed.

Dwight B. Cheever, of Chicago, Ill., for appellant.

Otto R. Barnett, of Chicago, Ill., pro se.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. This is an appeal from the decision of the District Court enjoining the manufacture, sale, and use of the Superior rail anchor, made pursuant to letters patent No. 1,015,129, granted January 16, 1912, to John A. Bodkin, as being in infringement of claims 1 and 2 of letters patent No. 656,470, granted August 21, 1900, to John L. Pope, claim 3 of letters patent No. 720,362, granted February 10, 1903, to Edward Laas and Hiram H. Sponenburg, and claim 2 of letters patent No. 1,021,387, granted March 26, 1912, to David F. and David L. Vaughan.

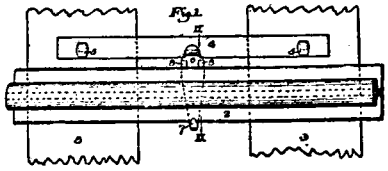
The following drawings from the patent in suit, the Bodkin patent, and certain alleged anticipating patents to be considered, together with the claims in suit, will help to clarify the situation.

Pope's claims are:

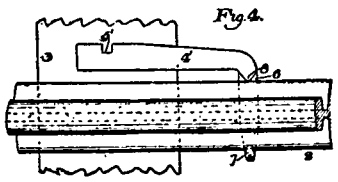
1. A device for preventing creeping of rails, comprising a crossbar extending transversely under the rail and having rigid abutments thereon bearing against the opposite edges of the rail flange and adapted to clamp the same, substantially as described.

2. A device for preventing creeping of rails, comprising a holder extending under the rail and bearing against the opposite edges of the rail flange, said holder being set between the ties and having a connection extending laterally therefrom to a tie, substantially as described.

POPE, FIGURE 1.



POPE, FIGURE 4.



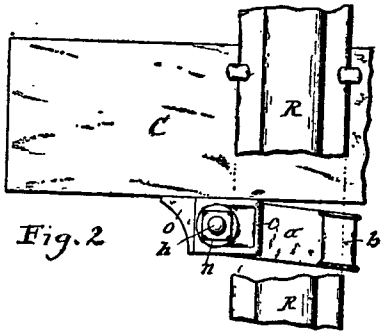
Laas and Sponenburg's claim 3 reads:

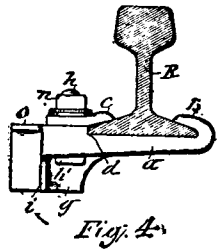
A railstay consisting of a bar extending across the under side of the rail and provided with jaws gripping said rail, and a flange depending from one

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

end portion of the bar and bearing on the side of the tie and disposed at an angle in relation to the length of the bar to hold the opposite end portion of the bar normally out of contact with the tie as and for the purpose set forth.

LAAS & SPONENBURG, FIGS. 2 and 4.



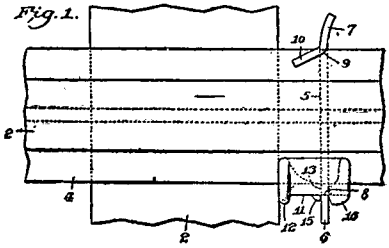


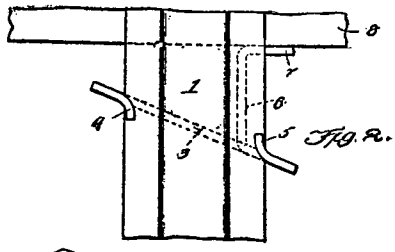
Vaughan's claim 2 reads:

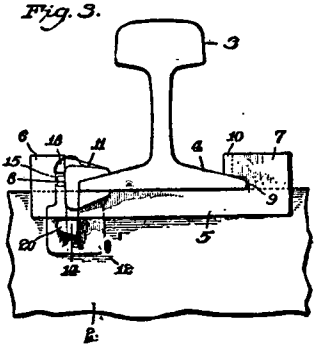
The combination, with a cross-tie and a railroad rail having a base flange, of an anticreeper comprising a flat bar extending beneath the base flange and having flat upwardly extending end portions provided with inner edges facing the side edges of the base flange, said bar being provided with means for supporting it on the base flange, and maintaining its side faces and the side faces of its end portions substantially in vertical position, and means acting on the cross-tie and on one end of the bar and maintaining the other end of the bar in spaced relation to the cross-tie, one of said end portions having a lateral bend therein.

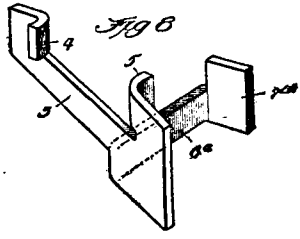
D. F. AND D. L. VAUGHAN, PATENT No. 1,021,387.

BODKIN, FIGS. 2 AND 8.

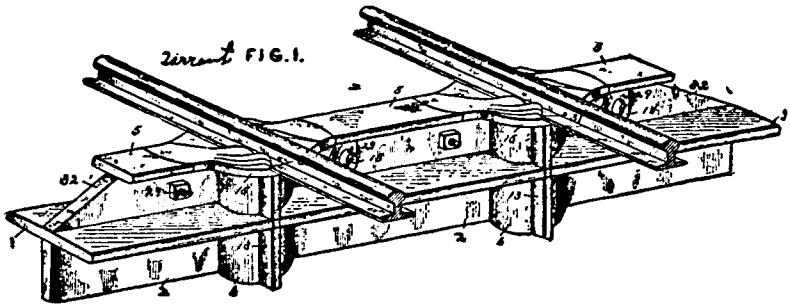




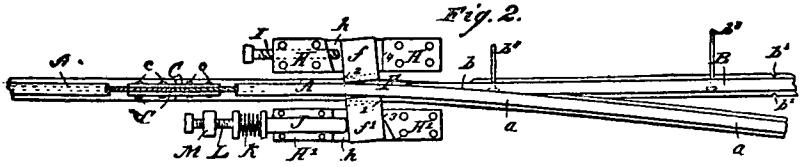




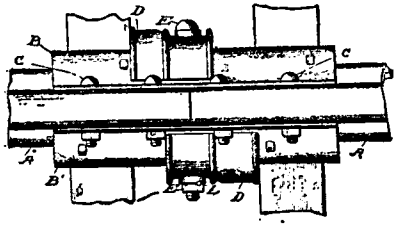
TARBANT, FIG. 1.



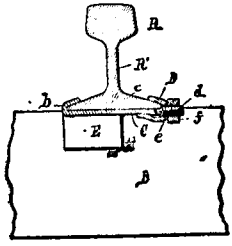
NOONAN, FIG. 2.



BROWN, FIG. 7.



SPONENBURG PATENT, NO. 668,423, FIG. 2.



Rail creeping, which offers a most perplexing problem to railway engineers and which rail anchors are designed to prevent, is due to several causes—primarily, to the wave motion of the rail induced by the passage of engines and cars thereon. Under the weight of the train or wheel load, the rail is deflected downwards causing a small though appreciable rise in the rail immediately in front of the on-coming wheels which, in their forward thrust, tend to force the rail in the direction of the traffic. Another cause of this longitudinal movement of the rails is the continued or excessive use of brakes when approaching stations or grades. The shock transferred to the rails by the frictional gliding of the heavy wheels over the rails tends in a marked degree to drive them forward. When heavy rails are laid upon a carefully tamped rock ballast and the traffic does not preponderate in either direction, there is comparatively little creeping. When, however, the rails are light and the roadbed not well ballasted or when the traffic is entirely, as in the case of double tracks, or preponderantly, in one di-

rection, the problem of rail creeping becomes serious. If the movement of the rails is not checked, the ties will skew and the roadbed will become weak and unsettled; the space always left between the adjacent rail ends to allow for the longitudinal expansion and contraction of the rails under extremes of temperature will close and in consequence the rails will be likely to bend or buckle laterally and vertically.

A feature common to practically all rail anchors is that one part of the anchor is clasped upon the rail and another part is attached to or abuts the tie, so that the longitudinal movement is communicated to the tie, which, being embedded in the ballast, is better able to resist that motion.

The development of the art, shown by the patents in suit and by the testimony, reveals the discovery of and adherence to certain principles and general features as highly desirable, if not indispensable, in an efficient rail anchor, and the rejection of others as inadequate and impracticable. Many of the early anchors were applied only at the rail joints; but anchors spaced so far apart were not strong enough to hold the rail and increased the tendency of the tie to skew at the rail joint. The early devices were bolted to the rail and spiked to the tie. This bolting not only weakened the rails by the drilling therein of holes to receive the bolts, but necessitated continual inspection to keep the nuts tight on the bolts. No less weighty are the objections to spiking the anchor to the tie. A reverse movement, caused by a temporary reversal of traffic, by the expansion or contraction of the rails, or by the reaction from the wave movement, must either carry the tie with it, thus weakening the ballast, or cause the spike to work loose in its hole in the tie. The loosening of the spike from the tie destroys the advantage of a firm and secure connection sought to be obtained by its use. Moreover, it allows moisture to enter the spike hole and thus counteracts in part the effect of the chemical treatment to which softwood ties, now in increasing use because of the growing scarcity of hardwood ties, are subjected in order to render them capable of resisting the elements. To avoid these difficulties, the more recent devices are so constructed as to keep a firm grip on the rail, even as against a reverse movement, and by supplanting bolts with wedges or springs, and by dispensing with spikes by abutting instead of fastening the anchor to the tie, the maintenance inspection is reduced to a minimum.

In 1900, the date of the Pope patent, the art was in a crude and undeveloped state. In his specifications, two devices are described. In Figure 1, a crossbar *6* extends transversely under the rail at a point between two ties. Rigid abutments thereon, *7* and *8*, bear against the edge of the flange on either side. One end of the bar is provided with a lug which fits into a notch on the bar *4*; this bar extends between two ties to which it is spiked. Figure 4, a modified form, is primarily involved in this suit. There the holding device *6*, with its abutments *7* and *8*, is made integral with the bar *4*. When the device is hooked over the rail base, it is rocked horizontally in either direction until the rail is firmly clamped between the abutments, and then spiked to the tie.

Pope thus led the actual development of the rail anchor by not restricting the use of his anchor to the rail joint and by making the relation of the gripping jaws to each other rigid. Furthermore, while he

may not have been aware of it, the cross bar of his device shown in Figure 4 would probably tend to rotate after it had been spiked to the tie; there would seem to be a lateral skewing about the spike as a center when the longitudinal force acting upon the rail is communicated to the anchor. Pope's device, while a distinct step forward, nevertheless had all the shortcomings of a spiked anchor; it could not adequately meet the situation arising from a reverse movement of the rail.

The defendant has urged strongly and at length the Edmonston patent, No. 141,478, issued in 1873 for a scaffold support, as fully anticipating the Pope and the other patents in suit. With this contention we cannot agree. Edmonston discloses the use of the shackle grip, an old mechanical expedient. Its specific application is, however, entirely different in a scaffold support and in a rail anchor. In the one, it is used to obtain a firm hold upon a stationary support, such as the pole or post of a scaffold, in order to sustain the ledgers and putlogs over which the platform is built; in the other, it aims to arrest and prevent the movement of a rail which cannot, by its own resistance, maintain its stationary position. Especially in view of the fact that for several decades after the patent to Edmonston, the most astute and thoroughly trained railway engineers in this country and abroad grappled without success with the problem of rail creeping, the contention of the defendant that Edmonston more than 40 years ago revealed to the public a device substantially similar, not only to the primitive Pope, but to the Laas and Sponenburg, the Vaughan, and the Bodkin anchors, is wanting in merit.

Tarrant patent, No. 492,446, and Noonan patent, No. 349,447, are also strongly relied upon as anticipations. The Tarrant patent is for a combination railway tie and chair. The chair has a holder extending transversely under the rail and rigid jaws or abutments thereon engaging the rail flange. The chair is rotated on its pivot in the tie to produce the desired engagement and is then secured in place by a bolt *29* inserted in each side of the tie at opposite ends. While one of the purposes of the structure is to prevent rail creeping, Pope differs from Tarrant in this: The Tarrant chair must set upon a tie, specially designed to receive it, while Pope's device is constructed to set between the ties; the latter is more easily constructed, more readily applied to the rail, and more economically maintained in proper condition. For these reasons, the progress made by Pope represents a patentable advance over Tarrant's combination tie and chair.

Nor does the Noonan patent, No. 349,447, for a railway track system, satisfactorily rebut the novelty of the Pope claims. This cumbersome device has a pair of blocks *H, H'*, each of which is bolted to two adjacent ties; a grip, resting upon these blocks and extending transversely under the rail, comprised a metallic plate *F* bent downwardly in its center to form a recess in which the rail fits. The opposite end parts *f, f'*, of the grip lie loosely in transverse recesses of the blocks *H, H'*. A block on one side of the rail is provided with a threaded bolt which bears against the edge of one flange of the gripping plate; the other block is provided with a pin and spring arrangement whereby the pin bears against the opposite flange of the plate. The recess of the grip *F* in which the rail rests is slightly wider than the rail base so that

when the pin is forced inwardly the grip *F* will be canted or inclined horizontally to cause the diagonally opposite edges *1*, *2* of the grip to bite on the opposite sides of the rail thus preventing a backward while allowing a forward movement of the rail. Although the elements of this device come close to those of Pope, the structure is based upon a different conception and designed to achieve a different result. By the grip arrangement, Noonan sought, not to prevent the movement of rails in the direction of the traffic, which he sought to absorb in another way, but to lock the rail against any backward movement. In his system, the grip is normally loose, offering no obstruction to the free forward movement of the rail; in Pope, it is normally fast and unyielding. Noonan's grip, moreover, must rest upon two bars, one on each side of the rail and running parallel with it, which bars span the space between two successive ties to which they are spiked. In Pope and the later anchors, one connection with the tie and on one side of the rail suffices.

Brown patent, No. 630,444, for a rail joint, likewise fails to anticipate Pope. This device fills in the entire space between two ties. It has two jaws gripping the opposite edges of the base flange of the rail and connected thereunder by means of a bolt which runs transversely beneath the rail base. Assuming that this bulky contrivance can be applied at any point along the rail and not merely at the joint, it fails to anticipate Pope, because the jaws are not rigid or integral with respect to the bar extending beneath the rail base, but are held together by nut and bolt.

Schauman patent, No. 328,616, Trude patent, No. 329,867, and Griffin patent, No. 556,667, are for tie plates, the base of which is designed to form a protecting plate upon which the rail rests. The overlapping lips or jaws secure the rails to the plates without the use of spikes for this purpose and prevent the lateral displacement or buckling of the rails. When installed the devices are rotated until the lips overlap the rail, and then are firmly spiked to the tie on both sides of the rail. While the spiking aims to prevent a creeping of the plate on the tie, there is no suggestion that these devices are capable of preventing or retarding the longitudinal movement of the rail itself.

We conclude that the Pope patent is not anticipated and shows patentable novelty.

Infringement of claims 1 and 2 is clear. While the defendant's spring lugs are so located with reference to the rail flange that they must engage its upper surface rather than its edges, and while this is admittedly an improvement upon the device shown in Pope's drawings, this modification must be deemed to be within the fair range of equivalents to which Pope's claims are entitled in view of the prior art. Furthermore, Pope's "rigid" abutment of claim 1 does not exclude defendant's spring metal used to accomplish the same function; and defendant's flange is none the less a connection because integral with the rest of the device.

In the Laas and Sponenburg anchor, under patent No. 720,362, a metal bar *a*, placed flatwise, passes transversely under the rail and is formed at one end with a jaw which grips one edge of the rail flange. The rail flange on the opposite side is engaged by a detachable jaw *c*,

which is bolted to the bar *a*. To hold the bar laterally on the rail *R*, a shoulder *d* abuts directly against the opposite edge of the rail base. This shoulder is formed, integral either with the bar *a* or with the detachable jaw. The bar *a* has a flange *g* depending therefrom at one side and disposed to bear upon the tie *C*. The specifications further provide:

"In order to allow the described rail-gripping jaws to increase their hold on the rail in proportion to the resistance required to prevent the rail from creeping, we form the flange *g* at an angle in relation to the length of the bar *a*, so as to cause the opposite end portion of the bar to be normally out of contact with the tie, and thus yield to some degree to the longitudinal strain of the rail, and by said yield of the bar the jaws *b c* thereof are caused to more effectually pinch the rail *R*."

In view of Sponenburg's patent, No. 668,423, and Brown's patent, No. 630,444, Laas and Sponenburg cannot claim the broad conception of an anchor self-sustaining on the rail base and without tie engagement. Their invention is found in the construction of such an anchor having the tie abutting face on one side, while the opposite end remains normally out of contact with the tie. This construction enables the device to rotate on the rail and thus to strengthen automatically the grip of the anchor upon the rail in relation to its longitudinal movement. The prior art shows no anticipation.

Edmonston has been fully considered in discussing Pope.

Noonan merely provides a lock against a reverse movement of the rail, and is not calculated or designed directly to prevent the longitudinal movement of the rail in the direction of the dominant traffic. Even if Noonan's device were reversed, the rotary action or shackle grip would be obtained by means of a metal plate that engages the rail and rests upon blocks which must be spiked or bolted to the ties; Laas and Sponenburg's forward step was in obtaining an effective shackle grip action on a rail anchor without spiking or bolting it to the tie. It is clearly a substantial and patentable advance over the primitive Noonan device.

The defendant relies upon Figure 7 of Brown patent, No. 630,444, as showing a shackle grip anchor that is not spiked or bolted to the tie. Figure 7 is a modification of a structure described at length in the specifications. The principal embodiment of Brown's patent discloses a device filling up the entire space between two ties, and broad flat abutments extending the entire length of the anchor are in contact with both ties at both sides of the rail. In the modification shown in Figure 7, a section of the casting is left off, so that one of the depending flanges bears upon a tie on one side of the longitudinal axis of the rail and the other flange bears upon another tie on the other side of the longitudinal axis of the rail. While the specification suggests no reason for the modification, the only apparent object was economy of metal. The modified form, like the principal embodiment, fits snugly between the two ties, and allows no play for a rocking or rotating movement that would affect in any substantial degree the grip upon the rail. Moreover, Brown's device is a rail joint; it was not designed to be used at any other point, and because of its size and form it could not practically and commercially be applied at several points along a single rail.

If Pope's anchor as represented in Figure 4 is rotated to obtain a firm grip before it is spiked to the tie, it may have a slight leverage after it is fastened to the tie, resulting from its tendency to rotate upon the spike. But Pope's leverage is not only less effective than Laas and Sponenburg's; it is obtained by virtue of the attachment of the device to the tie—that is, at a cost and a sacrifice which the teachings of the art oppose, and the avoidance of which constitutes Laas and Sponenburg's merit. Their device, under a reverse movement, cannot injure the tie or become loose; the flange will merely tend to withdraw from contact with the tie.

Sponenburg, in his patent No. 668,423, shows no grasp of the shackle grip conception; in Figure 2 the tie abutting face extends beyond the longitudinal axis of the rail, so that there is only the slightest leverage, a practically negligible tendency, in the device to skew laterally.

The Bodkin structure responds fully to claim 3 in suit; that Laas and Sponenburg's drawings and specifications show a detachable jaw, does not limit this broader claim to the preferred construction; defendant's integral jaw does not enable it to avoid the charge of infringement.

The device under the Vaughan patent, No. 1,021,387, consists of a spring steel bar or yoke *5* extending across and under the rail base and a malleable iron shoe *11*. The yoke is formed from a flat blank of sheet steel arranged with its side or flat faces in a substantially vertical position. On each end it has an upwardly extending portion. One of these *7* is hooked over one edge of the rail flange, the other *6* is straight and fits into a slot in the shoe, which engages the other edge of the base flange. Two vital features of the yoke are thus specified:

"It will be readily understood that in employing the flat bar *5* with its end portions *6* and *7* arranged with their side faces in vertical position, as shown in the drawings, that the strain upon the end portions *6* and *7*, as well as the tension on the body of the bar *5*, is in the direction of the flat faces of the parts of the bar in preventing the rail *3* from creeping, thus giving us the maximum strength for a given quantity of metal employed in the bar. This forms an important feature of our invention."

"The lateral bend in the end portion 7 of the bar *5* * * * is provided for the purpose of stiffening that end of the bar."

The yoke and the shoe are held together by a spring action. The bar *5* is made of spring steel, and when the parts are assembled in their proper positions, the spring action of the bar in tending to assume a position from which it was sprung by the torsional twist given to it in fitting it into the shoe—

"exerts a forward and a downward pressure upon the end portion 7 and the part *10*, pressing the part *10* against the upper face of the base flange, and a reverse or rearward pressure upon the end portion *6* pressing the rearward face of the end portion *6* against the projection *16* and the forward face of the bar *5* against the rearward face *13* of the shoe."

The result of this torsional twist or spring action is to cause the parts of the anticreeper to grip firmly the rail flange without any bolts. The shoe *11* has a tie-abutting face *11*, about which the anchor will tend to rock, so that the tendency of the rail to creep will increase the wedging action. This shackle grip action, quite similar to that found in the Laas and Sponenburg device, is thus described:

"When the parts of the anticreeper are assembled upon the base flange *4* of the rail *3* with the abutments *12* of the shoe *11* engaging the cross-tie *2*, as shown in Figs. 1, 2, and 3, the end of the bar *5* opposite to the shoe *11*, is maintained in spaced relation to the cross-tie *2* by the shoe *11*. Should the rail *3* attempt to creep forwardly or in the direction of the arrows shown in Figs. 1 and 2, forward movement of the shoe *11* will be prevented by the cross-tie *2*, and the rail in creeping forwardly will carry with it the end of the bar *5* opposite to the shoe *11*; and immediately upon the initial creeping movement of the rail *3*, the bar *5* will tend to assume a diagonal position beneath the base flange *4*, thereby forcing the inner edge *9* of the end portion 7 firmly into engagement with one side edge of the base flange *4*; and at the same time forcing the inner edge *9* of the end portion *6* against the outer face of the body of the shoe *11*, and consequently forcing the shoe *11* against the other side edge of the base flange *4*, thus firmly gripping the rail and preventing it from creeping."

At the time the Vaughan patent in suit was applied for, an anchor self-sustaining upon the rail without use of spike or bolt was not new in the art. Leighty (patent No. 809,193, 1906) and Lien (patent No. 816,926, 1906) sustained their devices upon the rail by a wedge arrangement; D. F. Vaughan (patent No. 897,037, 1908) and D. F. and D. L. Vaughan (patent No. 897,038, 1908), prior to their patent here in suit, had constructed an anchor sustainable on the rail by virtue of a spring action resulting from a torsional twist of the base of the yoke. All of these patents, moreover, have a shackle grip similar to that of the Laas and Sponenburg device. Even a lateral bend in the end portion hooking over the rail flange on the side not engaged by the shoe is disclosed in Figure 3 of D. F. and D. L. Vaughan patent, No. 897,038.

Vaughan's advance over the prior art is in the use of flat sheet steel arranged edgewise—that is, substantially in a vertical position—and the employment therewith of a lateral bend in one of its end portions which is likewise arranged edgewise. As the strain upon the end portions, as well as the tension on the body of the yoke, is in the direction of the flat faces of the bar, a maximum resisting strength for a given quantity of metal is thus attained. While in the Vaughan patent, No. 897,038, the lateral bend appears, it is not there used in combination with the flat vertical sides; so used it tends to stiffen the end of the yoke. These improvements justified the grant of letters patent, and defendant has paid them the tribute of copying them.

In defendant's device, the anchor is made from a single piece of sheet steel. A flat strip or yoke *3* arranged edgewise, carrying at its ends hooks *4* and *5* which are adapted to overlie the outer edges of the rail base, passes under the rail. Extending from the yoke at an acute angle is a post or strut *6* which abuts against the tie *2* with its turned end *7*. The parts are so shaped and proportioned that when the yoke is placed beneath the rail at right angles to the longitudinal axis of the rail, the hooks may be slipped over the base flange of the rail.

"The anchor is then," quoting from the specifications, "slipped along the rail until the post engages with the tie in advance of the anchor and then the end upon which the hook is carried is driven forward so as to bring the yoke at an angle to the longitudinal axis of the rail. This causes the hooks to take a firm grip upon the edges of the base flange of the rail, and any tendency of the rail to move forward causes the hook *4* to take a tighter grip, so that it will follow any movement which the rail may have. Since the opposite end

of the yoke is prevented from moving forward by reason of the engagement of the post with the tie, a forward pull upon the hook 4 causes the yoke to assume a still greater inclination to the longitudinal axis of the rail and consequently produces a still tighter grip upon the rail."

Bodkin further states in his specifications:

"In both of the forms which I have just described I prefer to make the angles of the under edges of the hooks somewhat smaller than the angles of the top of the base flanges of the rail; for example, where the angle of the base flange is 13 degrees, the angle of the under edges of the hooks may be made about 12 degrees. This enables me to obtain a very powerful wedging action as the anchors are swung around at an angle to the longitudinal axis of the rails and carry the hooks farther up on the base flanges."

From this description it may be seen that this anchor like Vaughan's is free of bolts and spikes and maintains a firm grip upon the rail even as against a reverse movement; it, too, is so designed that, by reason of the shackle grip action, the greater the tendency to creep, the firmer and more secure the engagement of the hooks with the rail flange becomes. It may be an improvement on Vaughan in being a one piece device; but, as neither the language of Vaughan's claim 2 nor the prior art limit them to two pieces, and as Bodkin's anchor possesses all the features and embodies the principles and conception for which the art is indebted to the Vaughans, it is none the less an infringement.

Assuming that the use of flat steel arranged edgewise is of particular value only where the yoke is given a torsional twist and that the claim in suit should therefore be restricted to devices maintained on the rail by a spring action, the Bodkin anchor infringes; for as Vaughan testified without contradiction, when the end of the anchor spaced apart from the tie is driven toward the tie to take up the slack, the device is put under tension and the inwardly projecting lips are caused to ride upwardly on the rail flange, thereby rocking the lips in opposite directions and twisting the whole device.

The decree of the District Court will be affirmed.

HAZEN MFG. CO. v. WAREHAM.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1917.)

No. 2940.

1. PATENTS ⇐283(1)—SUIT FOR INFRINGEMENT—DEFENSES—LICENSE.

By an oral agreement defendant, which was a manufacturer of kindred articles, was to furnish the material and workmen to build a structure invented by complainant for experimental purposes, and if it proved successful they were to enter into a contract respecting its manufacture. After the experimental work was done and a patent had been applied for, a written contract was made between them to continue for a year, by which defendant was to manufacture and sell the machines and pay complainant a royalty, and a commission on such as were sold by him. *Held* that, in view of such contract, defendant could not set up, in defense to a subsequent suit for infringement, that it was a part of the oral agreement that it should have an exclusive license or a shop right to manufacture under the patent during its full term.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452.]

2. EVIDENCE ⟸442(1)—PAROL TESTIMONY TO VARY WRITING.
Where a written contract appears on its face to be comprehensive and complete, parol testimony is not admissible to prove a prior oral agreement to enlarge or vary its terms.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1882.]

3. PATENTS ⟸210—LICENSES—IMPLIED LICENSE.
An implied license or shop right under a patent rests upon conduct of the patentee which raises an estoppel in pais, and cannot be set up in the face of an express license.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 301, 302.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by Percy Wareham against the Hazen Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

Wm. M. Swan, of Detroit, Mich., for appellant.

S. C. Barnes, of Detroit, Mich., for appellee.

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

WARRINGTON, Circuit Judge. The bill below alleges in the usual form infringement of patent No. 1,058,281, relating to improvements in waste-paper presses, issued to Percy Wareham, appellee, April 8, 1913. The original answer does not in terms deny the charge of infringement, though, after admitting that the articles manufactured by defendant embody "certain ideas and constructions which are illustrated and described" in the letters patent, the answer alleges that some of these "constructions" are "so old and well known in the art as to be public property, available to any one, while other features therein shown are properly the invention of another or others, which said Percy Wareham wrongfully appropriated and falsely claimed as his own in presenting his application for patent," and the names and addresses of four persons are set out from whom it is alleged such appropriation was made. These allegations are made the basis of a charge that "the issuance of said letters patent was wholly void." The answer is otherwise in ordinary form, and prays dismissal of the bill. Later, an amendment was made to the answer, in effect averring anticipation and invalidity of the patent in suit through references to a number of earlier patents, and, by separate paragraph, alleging further:

"That previous to, during, and after the time during which said Percy Wareham's application for said letters patent was made and pending, his relations to defendant were such that defendant was and is now entitled to the outright ownership of any letters patent for which he may have made application, or which may have been issued to him, or to an irrevocable license or shop right therein and thereunder, without cost to defendant or its privies in interest, other than the regular payments to which his contract of hiring entitled him. Wherefore, if for no other reason, though others exist, as stated, this cause is wholly without merit, and defendant prays relief accordingly as though the matters herein set up had been made the subject of a cross-bill or of a separate suit in the premises."

[1] The case was heard and disposed of under this state of pleading, upon proofs (including the letters patent) tending to support the

allegations of the bill of complaint, and also upon evidence in relation to the shop right alleged in the amendment to the answer. The defendant, however, offered no evidence in support of the allegations of its answer or the amendment thereto, except as to its alleged "irrevocable license or shop right." True, the defendant called one, and only one, of the persons named in its answer from whom it is there alleged that Wareham wrongfully appropriated "patentable structural ideas"; but the witness gave no testimony in support of the allegation, and, as will be pointed out later, defendant admitted that Wareham is the inventor of the patented device, and it also appears that defendant had been "selling balers (the device in issue) down to the date of trial, substantially like the patent in suit." The contest at the trial was thus reduced to the issue concerning the alleged "irrevocable license or shop right." Decree of perpetual injunction was entered in Wareham's favor as to claims 1, 2, 3, and 4 of the letters patent, and granting the usual accounting. The defendant company appeals.

It is said in behalf of the company that its evidence was offered "in the nature of a plea in bar under the old equity rules," and on the basis of a claimed "irrevocable shop right" in the company. This at once presents the question whether Wareham's relation to the company, and the course he pursued in respect of his invention, amounted to a consent on his part that the company should have the shop right claimed. The company had been engaged in the manufacture of paper balers and other articles since 1906. About that time Wareham at his own request became a small stockholder in the company, and its shipping clerk; his position was subsequently changed on like request to that of a traveling salesman of wooden paper balers, the only kind of balers the company was then manufacturing. This change in position involved a change in his compensation from a fixed weekly sum to a commission basis, and required him to pay his traveling expenses. While so engaged, and in February, 1912, Wareham conceived the idea of a steel paper baler. He prepared drawings showing his proposed device, and upon securing from the president of the defendant company, Mr. Hazen, and the factory superintendent, Mr. Callender, a conditional pledge of secrecy, presently to be shown, he disclosed his idea and showed his drawings to them. This resulted in the development of Wareham's plan and the construction of the baler in question. The company furnished the materials; some of its employés, particularly its tool maker, worked with Wareham and under his guidance in producing the baler; in working out Wareham's plan it was found necessary to make some changes, and to send him at the expense of the company on several trips to secure patterns and the like; yet all these things appear to have been done under a distinct arrangement made between Wareham and the company that their rights in respect of the baler, in the event of a successful result, should be made the subject of a written contract. Wareham's testimony as to the arrangement was that, when he explained his idea and showed his plans for the baler to Hazen and Callender, as before stated, it was verbally agreed:

"That they would not disclose what I showed them, or make such a baler unless under contract with me, later on. That was the only contract there was, the understanding being that the company was to furnish the material and

back the experimental work on this baler; if it proved a success, we were to have a written contract."

Hazen testified that the verbal agreement required the company to—

"stand the experimental expense of putting the baler on the market, cost of materials, the time of the best workmen in the shop at his (Wareham's) disposal or under his direction, and he on his part agreeing to give the company the exclusive sale of the invention during the life of whatever patent might be taken out on it, if it proved satisfactory. After talking with him along this line, and there were other things, we also discussed at that time the commission that Wareham should have as a salesman of these balers, and I think that we then agreed on the royalty of $1 per machine."

Wareham and Hazen were the only witnesses who testified on the subject of the verbal understanding. The baler so produced proved to be a success; and Wareham, after calling the subject of the contract to the attention of Hazen, prepared a form with Hazen's assent, and, Hazen having made some change in the draft, the instrument as thus changed was executed by the company and Wareham on June 22, 1912. A copy appears in the margin.[1] It is to be observed that Wareham and Hazen are in practical harmony, both as to the existence of an antecedent oral arrangement and its terms, except in one particular; this exception is significant. According to Wareham's recollection of the oral agreement, and according to the written contract itself, no statement is to be found giving to "the company the exclusive sale of the invention during the life of whatever patent might be taken out" on the baler;

[1] "In contract of agreement made this 22d day of June, 1912, between the Hazen Manufacturing Co., party of the first part, and Percy Wareham, party of the second part.

"Whereas, the Hazen Mfg. Co. does hereby agree to manufacture, advertise and use all possible means to place upon the market the paper press known as the Leader steel press, the invention of said Percy Wareham.

"Whereas, the Hazen Mfg. Co. also agrees to pay Percy Wareham a royalty of $1.00 each on each Leader steel press sold or disposed of in any way, except those sold or disposed of by Percy Wareham personally; the payment of royalty to begin with the allowance of the patent as hereinbefore specified, and on all steel presses afterward sold in any way except those sold by Percy Wareham personally.

"Whereas, the Hazen Mfg. Co. agree with Percy Wareham to keep an exact record of such machines sold for his inspection, and to pay said Percy Wareham a commission of $11.00 on all steel presses sold by him and to allow full commission on all sales made by the Hazen Mfg. Co. from names or leads furnished by Percy Wareham; also to construct at least six models for the use of salesmen within the next three months from dating hereon; and to pay said commission in advance on the first and the fifteenth of each month. Said Percy Wareham agreeing that, on all presses returned or not settled for and sold by him, the commissions shall be taken from the semi-monthly payments, upon proof of their return being shown.

"Said Percy Wareham also agrees to make sales only to such people as in his judgment are reliable and worthy parties, and not to sell or handle any other press during the life of this contract of agreement, and to use all means and power at his command to further the sales of this machine or press.

"Signed this 22d day of June, 1912.

"In force until July 1st, 1913. Hazen Mfg. Co., by L. R. Hazen, Pres.

"Percy Wareham.

"Witness:

"Villette Hazen.

"Josephine Lester."

this statement appears only in Hazen's testimony as to the terms of the oral agreement. True, omission occurs in the written contract respecting the preliminary expenses incurred in reducing the Wareham invention to practice, as well as to the exclusive privilege claimed for the company; but there is a marked distinction between these omissions. Wareham and Hazen concur in recollection as to the former, while they are in conflict as to the latter. When the contract was written, the preliminary expense item was a closed transaction and could never recur. The exclusive privilege about which Hazen alone testified was to subsist throughout the life of the patent in contemplation, 17 years. Thus, if the omitted item of expense had been placed in the written contract, the provision would have been in accord with the testimony, and would not have changed the operation and effect of the instrument; but the claimed exclusive privilege cannot be considered as part of the written contract without encountering a serious conflict in the testimony or without materially altering and varying the instrument itself.

[2] The contract appears on its face to be comprehensive and complete, and the feature in question of Hazen's testimony is under well-settled rules inadmissible. McAleer v. United States, 150 U. S. 424, 432, 14 Sup. Ct. 160, 37 L. Ed. 1130; Seitz v. Brewers Refrigerating Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; De Witt v. Berry, 134 U. S. 306, 315, 10 Sup. Ct. 536, 33 L. Ed. 896; Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 917, 38 C. C. A. 553 (C. C. A. 6); Evory v. Candee, 17 Blatchf. 200, 205, Fed. Cas. No. 4,583; Huntington v. Toledo, St. L. & W. R. Co., 175 Fed. 532, 537, 99 C. C. A. 154 (C. C. A. 6). Furthermore, the testimony was permitted below to take a wide range with a view of ascertaining the truth concerning the relations and dealings between Wareham and the company; and in the course of his opinion the trial judge said in respect of the oral agreement and the written contract:

"The parties operated under the oral agreement for a time. The oral agreement was reduced to writing on June 22, 1912, and that contract * * * was the agreement between the parties under which the work was done in the shop of the defendant company and materials were furnished by the defendant company, and the other things were done by the defendant company to develop this machine. It was a definite agreement and the compensation passing to each of the parties was fixed by it. I find that it was the oral agreement made by the parties, except that it was made more definite and more tangible, by being placed in writing. * * *"

With a like view the trial court admitted proofs relative to the dealings of the parties under the contract. These proofs for the most part concerned the observance, and in a number of instances charges of non-observance, of the contract by the respective parties. Here again the impressions that the witnesses made upon the court below are to be found in a statement in the opinion of the learned trial judge that he believed Mr. Wareham. The demeanor of the witnesses and their opportunities to know at first hand the facts about which they testified of course had much to do with their credibility; and it is observable that defendant's factory superintendent, who was present at the time Wareham states the oral agreement was made, was not called to testify. We feel bound to conclude that the written contract was intended to

embrace all parts of the true oral agreement, except the past and immaterial item of preliminary expense, and to express the real relations of the parties to the invention in suit. We may allude to the essential provisions of the contract. It stated that the invention was that of Wareham. The company obligated itself to manufacture, advertise, and use all possible means to place the paper presses on the market; to pay Wareham a royalty of $1 upon each press "sold or disposed of in any way, except those sold or disposed of" by him; and also to pay him a "commission of $11 on all presses sold by him * * * and on all sales made" by the company "from names or leads furnished" by Wareham. Wareham obligated himself to make sales only to such persons as in his judgment were reliable and worthy, not to sell any other presses during the life of the contract, and to use his best endeavors to promote sales of the baler. The instrument bore date June 22, 1912, and was to be "in force until July 1st, 1913."

[3] Stated otherwise: The subject-matter of the contract was Wareham's invention, and both parties undertook to promote its sale; and to this end Wareham in effect licensed the company to manufacture and sell the invented baler for a limited period only and subject to a royalty and sales commission reserved to himself. Manifestly there could be no implied license in the presence of this instrument; an express license and an implied license cannot in the nature of things coexist. As Judge Gray said, in Sanitary Mfg. Co. v. Arrott, 135 Fed. 750, 758, 68 C. C. A. 388 (C. C. A. 3) when disposing of a feature of the case kindred to the present controversy:

"No implied contract of license, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved special contract of license."

The very condition under which Wareham consented to disclose his invention to the company's representatives resulted in the execution and observance of the written contract; and it plainly is not open to the company now to insist that Wareham ever consented, either impliedly or otherwise, to the gratuitous use of his invention (Talbert v. United States, 25 Ct. Cl. 141, 156); such insistence is contradictory alike of Wareham's conduct and the contract itself (McAleer v. United States, supra, 150 U. S. 424, 432, 14 Sup. Ct. 160, 37 L. Ed. 1130). Ever since McClurg v. Kingsland (1843) 1 How. (42 U. S.) 202, 11 L. Ed. 102, the rule has prevailed that an implied license such as is claimed here under the customary name of a "shop right" is to be founded upon conduct of the inventor which gives rise to an estoppel in pais; such cases must of necessity depend at last upon the intention of the parties; and such intention is of course to be ascertained in every case according to the particular facts and circumstances involved. Gill v. United States, 160 U. S. 426, 430, 16 Sup. Ct. 322, 40 L. Ed. 480; Withington-Cooley Manufg. Co. v. Kinney, 68 Fed. 500, 506, 15 C. C. A. 531 (C. C. A. 6); Blauvelt v. Interior Conduit & Insulation Co., 80 Fed. 906, 908, 26 C. C. A. 243 (C. C. A. 2); Barber v. National Carbon Co., 129 Fed. 370, 374, 64 C. C. A. 40, 5 L. R. A. (N. S.) 1154 (C. C. A. 6). These cases are but illustrative of many decisions, and it is not to be doubted that they state the settled rule.

The difficulty with the defense made in the instant case is

that it fails to show the element of consent on the part of the employé (Wareham) which is the distinguishing feature of all decisions holding the employé to be estopped; and hence the citations relied on by the learned counsel are not applicable. It is scarcely necessary to add that estoppel cannot be based upon the fact (already discussed in another connection) that the company bore the expense of reducing Wareham's invention to practice, since this, as well as Wareham's disclosure of his invention to the company, was in pursuance of a proved understanding that the rights of the parties should be fixed by a subsequent written contract; it might be conceded that in the absence of this distinct condition the company would have been entitled to an implied license, a shop right, and that a contract like the one executed should have been treated as a temporary expedient, as indeed defendant claims the present one should be, though in view of the evidence it is apparent that such a question cannot arise here. Nor is the fact important that Wareham, while engaged on the road in his capacity as a commission salesagent, overran to some extent the period fixed by the contract. At most this was the result only of mutual sufferance; the acts of the parties in that period were in observance of the contract, and it is not shown that the company was either misled or prejudiced by the overtime.

One of the assignments is to the effect that the court erred in failing to consider defendant's testimony "as in the nature of a plea in bar under the old equity rules," and in stating in the opinion that defendant would not be permitted thereafter to raise "the question of validity and infringement * * * of the patent in suit, which was expressly abstained from by defendant at the hearing." Although in pursuance of equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) defendant presented this defense by answer, it is not shown that any effort was made in accordance with the same rule to have this portion of the answer separately heard and disposed of before trial of the principal case. It would seem that the case was brought to trial upon all the issues. Plaintiff opened his case at the trial in the usual way, and, in view of the preliminary proofs, we think sufficiently to entitle him to relief. Defendant met the case so made by endeavoring to establish its claimed shop right, and it certainly had a full hearing upon this feature of the answer. It voluntarily refrained from offering evidence in support of the portions of its answer and amendment thereto alleging invalidity of the patent, though, as already pointed out, admission of infringement distinctly appeared.

We therefore see no sufficient reason for disturbing the decree simply because of an expression contained in the opinion that defendant would be denied a trial upon its other defense. The court perhaps had in mind the question whether defendant could split the case into as many parts as there were defenses, and try each of them separately, not only in the court of first instance, but through the appellate courts; but, whatever may have led to the expression to which the assignment of error relates, it seems certain that no application had been made to present evidence under the defense of invalidity, and hence we cannot rightfully pass upon the question.

The decree must be affirmed.

VACUUM CLEANER CO. v. BISSELL CARPET SWEEPER CO.

(District Court, S. D. New York. March 30, 1917.)

PATENTS ⊂=328—INFRINGEMENT—VACUUM CLEANER.

The Kenney patent, No. 847,947, claim 4, for a vacuum 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." *held* infringed by a cleaner having a narrow inlet slot, the ends of which are $^{20}/_{1000}$ and the middle section $^{45}/_{1000}$ of an inch above a plane hard surface, but which depends for its successful operation upon the vacuum principle of the Kenney invention.

In Equity. Suit by the Vacuum Cleaner Company against the Bissell Carpet Sweeper Company. On final hearing. Decree for complainant.

Charles Neave, William G. McKnight, and Frank C. Cole, all of New York City, for plaintiff.

Fred L. Chappell, of Kalamazoo, Mich., and Drury W. Cooper, of New York City, for defendant.

MAYER, District Judge. The validity of the patent is not attacked, and, indeed, cannot be, in view of the recent decision of the Circuit Court of Appeals for the Second Circuit in Vacuum Cleaner Co. v. Innovation Electric Co., 239 Fed. 543, — C. C. A. —. The sole question is whether the two devices of defendant, known as "Bissell's Vacuum Sweeper" and "Bissell's Superba," infringe claim 4; these devices being the same for the purposes concerned in this suit.

Claim 4 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."

This claim, which was discussed in Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 227 Fed. 998, and Vacuum Cleaner Co. v. Innovation Electric Co. (D. C.) 234 Fed. 942, affirmed 239 Fed. 543, — C. C. A. —, relates solely to the cleaning tool. Defendant's tool is mounted on a box provided with two sets of wheels; the rear wheels being utilized to operate bellows inside the box, while the forward wheels are mounted on springs. The cleaning tool, which is carried at the forward end of the box, consists of a curved sheet of metal in the median line of which is cut a narrow slot extending nearly all the way across from one end of the tool to the other. The testimony is that the instructions at defendant's factory are to adjust this cleaning tool or nozzle, so that the ends of the slot are $^{20}/_{1000}$ of an inch above a plane hard surface, and the middle section thereof are $^{45}/_{1000}$ of an inch above such surface. There is no reason to doubt that the manufacture of defendant's device has been undertaken and completed in this way with a view of escaping claim 4 of the Kenney patent, and of

following, according to defendant's contention, the teachings of the art prior to Kenney.

Defendant, for many years, has had and continues to have a very successful business in the manufacture and sale of a hand-operated carpet sweeper. In response, however, to extensive and persistent demands from customers, defendant in December, 1913, undertook the manufacture of its alleged infringing devices, and thereafter began the development in its factory of these devices, until in November or December, 1914, it placed them on the market. See Domestic Vacuum Cleaner Co. v. Bissell Carpet Sweeper Co., 242 Fed. ——, decided March 20, 1917. The exceedingly slight distance which is represented by either $^{20}/_{1000}$ or $^{45}/_{1000}$ of an inch can best be appreciated by observing the marking on an ordinary foot rule, and the result is that one's first impression is that the raising of the slot above a plane hard surface to this trifling extent is merely a colorable expedient for the avoidance of obvious infringement. In view, however, of the elaborate experiments testified to by defendant's expert, and the demonstrations before the court, as well as the careful analysis of the prior art, it soon became evident that the defendant had entered upon the manufacture of its devices with the conviction, or at least the hope, that Kenney's claim 4 had been honestly and actually avoided, and the case is therefore worthy of careful consideration.

The history of previous litigations in this district shows that Kenney's patent took its first commercial form in large installations of the character considered and described in the American Rotary Valve Case, where there was a high vacuum produced by a positive displacement pump; next came the hand electrically operated devices, abundantly illustrated in the Innovation Case, where a lower vacuum was produced by a rotary fan; and finally the small compact pneumatic type of carpet sweeper, with much lower vacuum, exemplified in the three cases recently tried in this court, viz. National Sweeper Co. v. Bissell Carpet Sweeper Co., 242 Fed. 947, M. S. Wright Co. v. Bissell Carpet Sweeper Co., 242 Fed. 950, and Domestic Vacuum Cleaner Co. v. Bissell Carpet Sweeper Co., 242 Fed. 943. Defendant, therefore, was confronted with the problem of manufacturing and marketing a device, efficient for its purposes, which would meet this popular requirement for the "vacuum" idea; and the appreciation of that requirement is well evidenced by defendant's advertisements, in which it refers to its "hand vacuum cleaners," which draw "all the dirt and dust which have been ground into rugs and carpets into an air-tight dust bag," and remove "every particle of dust and grit," and effect "a thorough renovation."

Notwithstanding the vigorous defense industriously prepared, the case really comes down to a single point, because the other controverted questions are either readily disposed of or have been settled by decisions in this circuit and district after sharp contest and searching and detailed consideration. It may very well be that a phrase here and there in previous opinions may be made the subject for elaborate discussion; but, in order to determine what is decided, it is always necessary to ascertain what the vital points of the controversy were, and,

with that guide in mind, it seems quite clear that the following propositions are the established law in this circuit in respect of the Kenney patent, and more especially of claim 4 here in controversy:

1. Plaintiff "is entitled to have a broad interpretation given to the claims of the patent." See opinion in the Innovation Case. See American Rotary Valve Co. Case (D. C.) 234 Fed. at page 943.

2. Claim 4 does not specify nor require that there shall be "projecting" lips. This point, while not discussed in the opinion in the Rotary Valve Case, was, however, so strongly urged in the Innovation Case that it was referred to in the opinion reported in 234 Fed. at page 945, and is carefully dealt with from a somewhat different point of view in the opinion of the Circuit Court of Appeals.

3. While the meaning of "narrow" inlet slot was and may be an important point of controversy in a case like the Innovation Case, there cannot conceivably be any construction of claim 4 of the patent which could transform an obviously "narrow" slot, such as is found in defendant's device, into something which was not a "narrow" slot. In this connection the much-discussed disclaimer of claim 2 may be briefly referred to.

With the word "narrow" omitted from that claim, it was quite clear that the prior art was not escaped. The expression "unobstructed elongated slot" might readily comprehend several patents of the prior art, and more especially Cummings and C. J. Harvey. This seemed so clear that it was called to the attention of counsel from the bench and the point was thereupon practically conceded. To have held this claim valid would have precluded the use of a device such, for instance, as that of Cummings, if anybody were foolish enough at this time to try to give Cummings commercial embodiment.

From the foregoing it will be seen that the single point now requiring discussion is whether the slot of defendant is capable of contact or sealing with the surface to be cleaned in the sense of claim 4, construed, as it must be, in the light of its context; for defendant's device, in any event, comprises (a) a suction chamber, (b) provided with a narrow inlet slot, (c) the slot being bounded and defined by lips which lie in the surface of the cleaner, with the outward mouth of the slot lying in the plane of this surface.

We may at once put out of view models such as those of McGaffey and Hall, because the forward lip is well above the surface, and the theory of these devices negatived contact, and was in direct contradiction to Kenney's teaching. The Howard and Taite patent, with its arc-like shape, likewise clearly negatived contact. In the American Rotary Valve Case there was some dispute as to the correctness of plaintiff's model of Howard and Taite, but the conclusion there arrived at has now been fully confirmed. The view of the court in that case (227 Fed. at page 1001) need be repeated only to call attention again to the statement in the specification that the "inlet" is moved "over and near to the surface. * * *" Without desiring to treat slightingly the earnest argument in respect of the C. J. Harvey patent, I think a reading of the patent and a mere inspection of the model in evidence will demonstrate that it taught nothing whatever, and, in any

event, did not teach the desirability of a sealing contact. In the previous cases the various patents cited were examined, but some were of such small consequence that they were not mentioned in the opinions; for it is neither practicable nor desirable that every patent referred to in a litigation should be discussed or mentioned. So, in this case, reference is made only to those patents or models which seem either to be worthy of discussion or upon which counsel have laid special emphasis.

Thus, finally, we are brought to the consideration of the C. J. Harvey patent. It is said that this patent latterly has had some commercial exemplification in devices used for cleaning small areas, such as the floors of Pullman cars and stairs and passageways. What has been done to make the C. J. Harvey device practicable does not appear, nor is it relevant to this controversy. The question, of course, is what C. J. Harvey had disclosed to the world when Kenney filed his application in the Patent Office. As an entirety, the C. J. Harvey device, as illustrated in the patent and by the model in evidence, is hopeless and impracticable. I doubt whether anybody but a Sandow could operate it continuously for 10 minutes. The question is, then, whether the C. J. Harvey nozzle is the lineal ancestor of defendant's nozzle. If we turn from the model to the patent, we find the answer. In the specification C. J. Harvey states.

"I actuate a pump by the actions of applying and removing the apparatus to and from the articles to be dusted, and I *mount the nozzle or duster* on the movable part of the pump, which may be single or double acting, while the stationary part of the pump serves as a handle, or has a handle fixed to it."

The two claims of the patent carry out this idea, and the drawings and the model show the two rollers on each end of the nozzle adjacent to the slot. In other words, what Harvey taught was the elevation by means of rollers of a nozzle above the surface to be cleaned. This is but another way of saying that he wanted to make quite certain that the nozzle would not contact with the surface to be cleaned, and that he described means which would clearly prevent contact of the nozzle with the surface. He did not point out that the slot should be narrow, although, if that had been his conception, it could readily have been reduced to simple language. In other words, his theory was the direct opposite to that entertained by Kenney, and this was recognized in the American Rotary Valve Case, 227 Fed. at page 1002.

Of course, as has been said many times, the later art can be readily availed of by ingenious men to reduce the imperfections of the prior art to a greater or less extent, and this is illustrated by the C. J. Harvey model in evidence, where the slot is made very narrow, and the rollers only very slightly below the level of the slot, and yet I am satisfied, in view of the then state of the art and the direction towards which inventors' minds were tending, that nobody on July 30, 1900, the date of the C. J. Harvey application, would have thought of making the model in evidence to exemplify the Harvey patent; but, be that as it may, defendant, in any case, does not construct its devices in accordance with this C. J. Harvey model.

From the foregoing it appears that there is nothing in the prior art which can justify the nozzle structure of defendant as against claim 4 of the Kenney patent, if, in point of fact, defendant's device contacts with the surface to be cleaned, and if it be assumed that infringement can be found, notwithstanding that the vacuum attained by defendant's device when in operation is very low and inefficient as compared with the best exemplification of Kenney.

There is no doubt that Kenney had in mind a very effective device, calculated to extract dirt from beneath the surface, and inter alia to force air to penetrate the fabric at the suction nozzle. The history of the art may readily lead to the conclusion that Kenney's attention was especially turned to the use of his system and apparatus in large installations. It is, however, the settled and beneficent principle of the patent law that a patentee is entitled to all the results which may flow from his invention, even though he has not possessed the prophetic vision to forecast all the uses to which it may be put. Indeed, the fact that an invention is used in a larger field and in more diversified directions than the inventor himself contemplated is a high tribute to the character of the invention. Keen-minded men, alive to commercial possibilities, saw how this invention could be utilized for electrically operated devices in the household or the office suite. Equally keen-minded men saw encouraging commercial prospects for the manufacture and exploitation of small hand-operated devices with smaller motive power, where the amount of the vacuum would depend to some extent upon the power of a human being's arm. Kenney, by accident or design, was fortunate enough to frame a claim which had to do solely with the cleaning tool, and the claim must be construed as having been framed in contemplation of the possibility that some one thereafter might be able to devise an instrumentality which would avoid claims 1, 2, and 3, and yet employ an operative cleaning tool, which would not stick, but would so contact as to localize at a narrow slot such vacuum as might be created—and this is what sealing contact means. No device in the prior art is more instructive as to the difficulty of the problem than that of Cummings; for when the Cummings hood was in contact it stuck, and would not work, and when it was not in contact it was capable only of taking up shavings and surface litter. Therefore Kenney was dealing with a problem which concerned, not merely the creation of a vacuum theoretically, but the production of an operative tool. The gist of the invention is stated in the opinion of the Circuit Court of Appeals, as follows:

"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."

Just as, in the Innovation Case, it was not possible within the limits of an opinion to analyze the testimony and experiments of the experts, so in this case it is enough to state that the result of the experiments satisfies me that defendant's device makes contact with the carpet more or less efficiently dependent upon the man power exerted and the yielding or soft character of the carpet. In other words, the testimony and experiments demonstrated that there was contact whereby a low vacuum was localized at "a narrow slot." The slipping of a card under defendant's device when resting on a carpet is an elusive test, and the one experiment, unexpected and accidental, which supported the contention of plaintiff and its expert, in this regard, was that at Warren street, where the card could be slipped under more easily in one direction of the carpet than in another. This illustrated the proposition, insisted upon by plaintiff, that the ability to slip a card in between the lips of the tool and the carpet was not due to lack of contact, but to the depression of the fibers of the carpet; the point being that the nap of the carpet is such that it naturally resists depression when force is exerted in one direction more than when exerted in the other direction. The static experiments of Prof. Reeve showed that defendant's nozzle contacted with the carpet; and the testimony of Mr. Allington was that "the cleaning effect is somewhat beneath the surface, but not very far below; the strength of the vacuum is too weak to go very far below."

Of course, it is very difficult indeed for plaintiff or defendant to prove beyond a reasonable doubt their respective contentions as to the actual working of the device when operated by human hands; but the construction of the forward wheels, with their tendency to sink into the carpet, the vertical thrust, and the selection of a height above the plane hard surface, almost infinitesimal, all combine to resolve any doubt that might be entertained in respect of contact. Indeed, recurrence may be had to the well-worn inquiry: If contact were not necessary for an efficient device, why not raise the slot at a height sufficiently above the carpet to leave no doubt in any one's mind that there could not be contact; or why not widen the slot to an extent where, in relation to the suction means and the power exerted, the action would clearly be on the air current theory, without the suggestion of a vacuum? The answer, of course, is that, if either of these structures and methods were adopted, defendant's device could not live commercially. It is fair to assume that at least part of the period between 1913 and November and December, 1914, was spent by defendant in endeavoring by experiment to ascertain how close to a plane hard surface the slot could go without infringing the claim of the Kenney patent here in issue.

In view of the breadth which the Circuit Court of Appeals has accorded to this patent and this claim, and of the fact that in that court and this it has been held that there is not a limiting requirement of a high vacuum, it follows that defendant's devices infringe, if in point of fact the lips of the slot contact with the surface and such vacuum as is created is the result of the adoption of the same construction and the same means as were employed by Kenney in the cleaning tool set forth in claim 4. As the structure is obviously the same, and on the

evidence the contact takes place in the same way, although, because of the nature of these hand sweeper devices, less efficiently, claim 4 is infringed, and the plaintiff may have a decree accordingly.

Settle decree on five days' notice. As defendant has been successful on one claim, there will be no costs. Owing to the responsibility of defendant, the injunction will be suspended on moderate terms, provided the appeal, if any, shall be promptly taken and prosecuted.

ROUSSO v. CITY TOWEL SUPPLY CO.

(District Court, S. D. California, S. D. September 25, 1916.) No. C-33.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TOWEL CABINET.
   The Rousso patent, No. 1,157,046, for a towel cabinet, was not anticipated by similar devices in the art of paper and card files, but the patented device is sufficiently differentiated from them to show patentable invention, even conceding that to be an analogous art. Claims 1 to 6, inclusive, also *held* infringed.
2. PATENTS ⟸22—INFRINGEMENT—SUBSTITUTION OF MECHANICAL EQUIVALENTS.
   The fact that, instead of a rod in a patented device, a chain is used, does not avoid infringement, where the chain performs the same function as the rod, even though it affords an additional advantage, which would entitle defendant to a patent.
3. PATENTS ⟸27(1)—INVENTION—ADAPTATION OF DEVICE TO ANALOGOUS ART.
   Changes made in adapting a device to use in a different, but analogous, art, although slight in themselves, may be substantial, when they substantially change the method of operation; and the very fact that the needed change is slight may be one of the obstacles to its discovery.

In Equity. Suit by Jacques Rousso against the City Towel Supply Company. On final hearing. Decree for complainant.

Joshua R. H. Potts, of Chicago, Ill., and Frederick S. Lyon, of Los Angeles, Cal., for plaintiff.

Ingall W. Bull, of Los Angeles, Cal., for defendant.

CUSHMAN, District Judge. [1] Complainant has waived his claim of infringement, save as to claims 1 to 6, inclusive, of his patent, No. 1,157,046, for a towel cabinet. It is considered only necessary to quote two of these claims, the first and sixth, being the broadest and narrowest of the claims alleged to be infringed:

"1. In a device of the class described, a towel support, and a retaining member extending upwardly from said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described."

"6. In a device of the class described, a towel support, and a retaining member extending upwardly from adjacent the outer edge of said support, then outwardly and downwardly sufficiently below said support, then inclined rearwardly and downwardly under said support and then downwardly substantially vertically, to constitute a suitable guide for a towel while in use, substantially as described."

Assuming that Cassell's English patent, No. 12,176, for an improvement in boxes for storing and delivering towels, is part of the prior art, although complainant contends that in the absence of evidence as to its utility it is not to be so considered, the unappropriated field in the art was doubtless greatly narrowed thereby. The Cassell patent had a towel support and a member extending downwardly therefrom, con-

stituting a guide for a towel while in use; but a retaining member extending upwardly from the towel support and then downwardly, as described in the claims and specifications of the patent in suit, were new in the towel cabinet art. The important effect of this change in the shape of the retaining and guide member will be pointed out later.

The only other, and the chief, question of importance in the case is the question of whether the patent in suit is not invalid by reason of similar devices in the art of paper and card files, which it is contended by the defendant is a part of an analogous art. Among these are the patent to Slaton for a file or bill book, No. 522,860; the Stahle, for a temporary binder, No. 533,678; the Swank, for a bill file, No. 533,972. Before the original examiner these claims in the patent in suit were rejected upon reference to the foregoing and other patents, but upon appeal to the board of examiners in chief the action of the original examiner was reversed and claims allowed.

I do not consider the fact that paper towels were at the times in question a part of the towel art affects this question, as we are concerned with the towel cabinet art. Paper towels are neither retained in use, nor, after use, for future use. In order to determine whether the bill file art is analogous to the towel cabinet art, it is not only necessary to take into consideration the similarities and differences of the material of towels, cards, and bills used in the towel cabinet and the bill file, and its effect upon the operation, but likewise the operation used and means for accomplishing it. In the bill file, the bill or card is of smooth stiff paper. Ordinarily, the towel is the opposite in both particulars. The bills in the file are to be kept as rigidly and compactly as possible in position, for which purpose most of the files proven have contained two rods, wires, or retaining members, and, if not, with two wires containing another member to bring about the same result. In the operation in the case of the bill or card, the retaining member is made the section of an arc, instead of having the bills or cards either simply swing from an axis, as in the case of the leaves of a book, or placed upon a straight file; and this in order that there might be a break or joint in the retaining member wherein a bill or card could be removed or inserted without taking the other bills or cards from this member.

There is no other intervening manipulation of the card or bill between the positions of the cards or bills, resting upon their original pallet, at one end of the file, or left lying or suspended at the other. There is, therefore, no necessity for freedom of movement in the case of the bill or card, except sufficient to bring it along the wire to this break in the file member and remove it, and the only advantage from the length of the file is to allow of this operation. The necessity for this purpose limits its extent. In the case of the towel cabinet this is not true. It is of considerable benefit to have the dirty towels removed as far as possible from the clean towels, and it is necessary along the guide or retaining member to bring the towel in use to a convenient point for its manual and facial manipulation by the party using it. In the case of the bill or card file, the object is at all times to keep the bills or cards in order; hence the advantage of having two guides. In the case of the towel cabinet, the opposite is true, as in its manual and facial manipulation the greatest freedom possible, necessarily resulting in its

crumpling, is of importance. The gooseneck form of the retaining member in the towel cabinet renders it necessary to remove the towel by lifting against the force of gravity, itself preventing disorder among the towels, then bringing down and forward to the position of use.

[2, 3] The fact that, in the infringing device, instead of a rod a chain is used in the downward course of this guide, does not substantially differentiate the two devices, as in this particular the chain is the equivalent of a rod. It may afford an additional advantage in giving a slight degree of additional freedom in the manipulation of the towel in use; but, while that may be an advantage entitling the defendant to a patent, it is not such a substantial change over the guiding member of the patent in suit as to avoid an infringement. If it were conceded that the bill file art and the towel cabinet art were analogous, yet the change in the device of the patent in suit over the bill file is sufficient to substantially differentiate the two. For this change is in a particular, effecting the use of the towel, which is the main purpose and object of the patent itself; the retention of the clean towels in a convenient position, and the retention of the soiled towels, being but minor associated objects. Changes may be slight in themselves, but substantial, when they substantially affect the method of operation, as these changes certainly do. With analogous arts, the one standing beside the other, the very fact that the needed change is slight may be one of the obstacles to its discovery. For this reason the fact that a change is required becomes important and decisive.

The patent is held valid, not anticipated, and claims 1 to 6 infringed by the defendant.

SCHOFIELD v. BAKER et al.

(District Court, W. D. Washington, N. D. May 29, 1917.)

No. 1-E.

1. COSTS ⇐203—MEMORANDA OF COSTS—TIME FOR FILING—"DECISION"—"VERDICT."

In view of Rem. & Bal. Code Wash. § 368, providing that on a trial by the court the finding of the court upon the facts shall be deemed a verdict, where an opinion filed by the court, directing a decree for plaintiff, was not a mere expression of views upon the question in controversy, but concluded the facts, it was a "decision," within a rule of court requiring the successful party to file a memorandum of costs within five days after rendition of the verdict or notice of the decision of the court, as, under the rule, "decision" bears the same relation to nonjury cases as "verdict" to jury cases, and a "verdict" is a conclusion upon the facts, and in effect a direction for judgment, while a "decision" is an order for judgment, and determines the judgment to be entered.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 768–771, 779.]

2. TRIAL ⇐318—"GENERAL VERDICT."

A "general verdict" is one by which the jury pronounces at the same time on the fact and the law, either in favor of the plaintiff or the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 753, 754, 756.]

Action by John W. Schofield, receiver, etc., against George W. Baker and others. On appeal from the clerk's disallowance of costs. Decision of the clerk sustained.

Bausman, Oldham & Goodale, of Seattle, Wash., for plaintiff.
Grosscup & Morrow, of Tacoma, Wash., and Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for defendants.

NETERER, District Judge. On March 12, 1914, opinion directing decree for plaintiff was filed in this cause. 212 Fed. 504. Decree was entered April 1st following. Plaintiff filed a cost bill, with notice of acceptance of service on April 6, 1914. Objections to cost bill were filed April 9, 1914. The clerk disallowed the taxation of all costs other than the clerk's costs, on the ground that a memorandum of costs was not served and filed within five days after the rendition of the decision of the court, pursuant to rule 70. Appeal from the clerk's disallowance of costs is presented to the court.

[1, 2] Rule 70 provides that a party in whose favor a judgment is rendered, and who claims his costs shall within five days after rendition of the verdict, or after notice of the decision of the court, file a memorandum of costs, and in case of failure to serve and file such memorandum and notice all costs other than clerk's costs shall be deemed waived. In this rule "decision" bears the same relation to a nonjury cause as does "verdict" to a jury cause. A general verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or the defendant. 4 Blackstone's Commentaries, 461. A verdict is a conclusion upon the facts, and in effect a direction for judgment. The findings of the court upon the facts in a nonjury case shall be deemed a verdict under the Washington statute (Remington & Ballinger's Code, vol. 1. § 368). Willey v. Morrow, 1 Wash. T. 478; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364. Verdict and decision bear the same relation to the respective cases. The decision of a court is, among other things, an order for judgment. It actually determines the judgment to be entered. Garr, Scott & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867.

The question at issue to be determined is whether the memorandum filed merely expressed views upon the question in controversy, or whether it was a decision concluding upon the facts. In re Winslow Estate, 12 Misc. Rep. 254, 34 N. Y. Supp. 637; Kidd v. McCracken, 105 Tex. 383, 150 S. W. 885. An examination of the memorandum filed (212 Fed. 504, supra) is conclusive that the decision concludes the facts, and a decree is directed upon the facts accordingly.

The decision of the clerk is sustained.

LANDON v. PUBLIC UTILITIES COMMISSION OF STATE OF KANSAS et al.

(District Court, D. Kansas, First Division. April 21, 1917.) No. 136-N.

1. COURTS ⇐493(2)—SUIT BY RECEIVER—ORDER OF STATE COURT.

Where, at suit of receivers for a natural gas company appointed by a state court, a federal court granted a preliminary injunction, restraining the enforcement of rates fixed by the state Public Utilities Commission, it was appropriate for the state court to make an order establishing temporary rates to be charged by its receivers, and such order does not affect the jurisdiction or power of the federal court to proceed to final decree in the injunction suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1347.]

2. GAS ⇐14(1)—RATES—SUIT BY RECEIVER—GROUNDS FOR DISMISSAL.
Various motions by defendants to dismiss such suit, made on final hearing, considered, and on the facts *held* not well taken.
[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

3. GAS ⇐14(1)—NATURAL GAS COMPANY—REGULATION OF RATES—CONSTITUTIONALITY.
Evidence considered, and *held* to establish that the rates to be charged by the Kansas Natural Gas Company, or its receiver, to consumers in the state, as fixed by Laws Kan. 1911, c. 238, § 30, which were limited to those in force on January 1, 1911, and also the flat rate of 28 cents per 1,000 feet fixed by the Public Utilities Commission by order of December 10, 1915, are both noncompensatory, unreasonably low, and confiscatory, and in violation of the Constitution of the United States.
[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

4. COMMERCE ⇐61(3)—"INTERSTATE COMMERCE"—TRANSPORTATION AND SALE OF NATURAL GAS—STATE REGULATION OF RATES.
Natural gas, procured by a company or its receiver in one state, and piped into and sold in another state, the greater part of its cost to the company at the place of sale being the expense of transportation, is an article of "interstate commerce," and does not lose that character because it is mixed in the pipes with a small quantity of gas procured in the state in which it is sold. The company or receiver conducting such business is engaged in interstate commerce, and although the gas is distributed to consumers through local companies, which receive an agreed share of the proceeds, the enforcement by the state in which the sales are made of any law or regulation fixing the price to consumers, which substantially burdens the business or renders it impossible to conduct it at a fair profit, is an undue interference with interstate commerce, in violation of the commerce clause of the federal Constitution.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–83, 89.
For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Equity. Suit by John M. Landon, as receiver of the Kansas Natural Gas Company, against the Public Utilities Commission of the State of Kansas; Joseph L. Bristow, C. F. Foley, and John M. Kinkel, as the Public Utilities Commission of the state of Kansas; H. O. Caster, as attorney for the Public Utilities Commission of the state of Kansas; S. M. Brewster, as Attorney General of the state of Kansas; John T. Barker, as Attorney General of the state of Missouri; William G. Busby, as counsel for the Public Service Commission of the state of Missouri; the Public Service Commission of the state of Missouri; John M. Atkinson, Edwin J. Bean, John Kenish, Howard B. Shaw, and Eugene McQuillan, as the Public Service Commission of the state of Missouri; John F. Overfield as receiver of the Kansas City Pipe Line Company; the Fidelity Title & Trust Company, a corporation; the Fidelity Trust Company, a corporation; the Delaware Trust Company, a corporation; the Kansas City Pipe Line Company, a corporation; George F. Sharritt, as receiver of the Kansas Natural Gas Company; the Kansas Natural Gas Company; the St. Joseph Gas Company; the Union Gas & Traction Company; the Atchison Railway, Light & Power Company; the Leavenworth Light, Heat & Power Company; the Tonganoxie Gas & Electric Company; the Citizens' Light, Heat & Power Company; L. G. Treleaven, re-

ceiver of the Consumers' Light, Heat & Power Company; the Kansas City Gas Company; the Wyandotte County Gas Company; the Olathe Gas Company; the Ottawa Gas & Electric Company; O. A. Evans & Co.; the Parsons Natural Gas Company; the Elk City Oil & Gas Company; the American Gas Company; the Home Light, Heat & Power Company; the Carl Junction Gas Company; the Oronoga Gas Company; the Joplin Gas Company; the Weir Gas Company; and the Cities of St. Joseph and Weston, Mo., of Atchison, Leavenworth, Tonganoxie, Topeka, Lawrence, Baldwin, and Ottawa, Kan., of Kansas City, Mo., of Kansas City, Merriam, Shawnee, Lenexa, Olathe, Gardner, Edgerton, Wellsville, Princton, Scipio, Richmond, Welda, Colony, Bronson, Moran, and Ft. Scott, Kan., of Deerfield and Nevada, Mo., of Thayer, Parsons, Elk City, Independence, Coffeyville, Liberty, Altamont, Oswego, Columbus, Scammon, Weir City, Cherokee, Galena, and Pittsburg, Kan., and of Carl Junction, Oronogo, and Joplin, Mo. On final hearing. Decree for complainant.

John H. Atwood, of Kansas City, Mo., Robert Stone, of Topeka, Kan., Chester I. Long, of Wichita, Kan., and George T. McDermott, of Topeka, Kan., for plaintiff.

William G. Busby, of Carrollton, Mo., and Alex Z. Patterson and James D. Lindsay, both of Jefferson City, for defendants Public Service Commission of Missouri, its individual members, and John T. Barker, Attorney General of Missouri.

H. O. Caster and Fred Jackson, both of Topeka, Kan., for defendants Public Utilities Commission of Kansas, its individual members, and S. M. Brewster, Attorney General of Kansas.

J. W. Dana and C. E. Small, both of Kansas City, Mo., for defendants Kansas City Gas Co. and Wyandotte County Gas Co.

J. A. Harzfeld and A. F. Evans, both of Kansas City, Mo., for defendant Kansas City, Mo.

William E. Stringfellow, of St. Joseph, Mo., for defendant St. Joseph Gas Co.

T. F. Doran, of Topeka, Kan., for defendants Consumers' Light, Heat & Power Co. and its receiver.

Charles A. Loomis, of Kansas City, Mo., for defendants Ottawa Gas & Electric Co. and other distributing companies.

C. L. Faust, of St. Joseph, Mo., for defendant city of St. Joseph, Mo.

Charles Blood Smith, of Topeka, Kan., for defendant Fidelity Title & Trust Co.

A. M. Baird, of Carterville, Mo., for defendant city of Oronogo, Mo.

E. F. Cameron, of Joplin, Mo., for defendant city of Joplin, Mo.

BOOTH, District Judge. This is a suit in equity, brought by John M. Landon as receiver of the Kansas Natural Gas Company against the Public Utilities Commission of the state of Kansas and numerous other defendants, praying for an injunction against said Commission to prevent the enforcement of an order, commonly known as the 28-cent rate order, made by said Commission December 10, 1915, establishing rates to be paid in numerous cities in Kansas for natural gas

furnished by the plaintiff; also praying for various other relief, partly against the above-named defendant, partly against other defendants. The application for a preliminary injunction was heard before an enlarged court of three judges, pursuant to section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]). A preliminary injunction was granted upon certain conditions. See 234 Fed. 152. The conditions were fulfilled. Thereafter the case was brought on for final hearing, evidence was introduced and submission had upon the issue as to the 28-cent rate, and questions directly involved therein, and the issue as to interstate commerce; the other issues being expressly reserved for future hearing.

A brief summary of the history of the Kansas Natural Gas Company is necessary to a proper understanding of the present case. The company was organized under the laws of the state of Delaware in April, 1904, with a capital stock of $6,000,000. In July, 1905, it obtained a license to do business in the state of Kansas. The principal business of the corporation was the production and sale of natural gas, but it was authorized under its charter to purchase the stock, business, and property of other corporations. Its first gas fields were located in the state of Kansas. Prior to 1912 the company had, by purchase and consolidation with other companies, largely increased its initial holdings. It had by means of various contracts undertaken to supply gas through distributing companies to more than 30 cities in the state of Kansas, as well as certain cities in the state of Missouri, including the cities of St. Joseph and Kansas City, Mo. These contracts were of various types, but, generally speaking, covered a considerable period of years, and provided for increases in the rates at certain fixed dates. They provided, further, for a division of the price paid by the consumers between the distributing company and the Kansas Natural Gas Company, generally on a basis of one-third to the distributing company and two-thirds to the Kansas Natural Gas Company.

For the purpose of completing its lines to Kansas City, Mo., the company had caused to be incorporated the Kansas City Pipe Line Company, and became owner of 50 per cent. of the stock of said company; the other 50 per cent. being owned by the United Gas Improvement Company. Shortly thereafter, in November, 1906, the Kansas City Pipe Line Company leased to the Kaw Gas Company (a subsidiary corporation of the Kansas Natural Gas Company) all of its property for 99 years. In place of this lease a new lease was substituted between the Kansas City Pipe Line Company and the Kansas Natural Gas Company in January, 1908. For the purpose of extending its pipe lines into Oklahoma, the Kansas Natural Gas Company had caused the incorporation of the Marnett Mining Company, and through stock ownership controlled said last-named company. Two issues of bonds had been made by the Kansas Natural Gas Company, first mortgage series and second mortgage series, and one by the Kansas City Pipe Line Company, and one by the Marnett Mining Company. The properties of the three mentioned companies were operated as a unit, and included a continuous pipe line, from the fields in Oklahoma to the two Kansas Citys, with other lines extending to various cities

in Kansas and Missouri. The company, during the year 1912, was supplying natural gas to approximately 150,000 households, and selling for household and industrial uses upwards of 28,000,000,000 cubic feet of gas per annum.

The Kansas Natural Gas Company had, however, in acquiring its properties and extending its system, violated the anti-trust statute of the state of Kansas, and in January, 1912, suit was begun in the district court of Montgomery county, Kan., by the Attorney General of the state of Kansas, against the Kansas Natural Gas Company, the Independence Gas Company, and the Consolidated Gas, Oil & Manufacturing Company. Amongst other relief prayed for was the ousting of the defendants from the exercise of certain corporate powers within the state and the appointment of receivers. The case was heard, and resulted, so far as the Kansas Natural Gas Company was concerned, not in a complete ouster, but in the appointment of receivers, one of them being the plaintiff in the present suit; the order being filed February 17, 1913. Said receivers were to—

"manage the corporate property and business of the said defendant until the perversion and abuses of privileges by said defendant are corrected, so as to protect the rights of all parties, especially all the gas consumers of the defendant company, and all parties interested in the property of the Kansas Natural Gas Company, whether as bondholders, trustees of bondholders, distributers of gas, or otherwise."

Meanwhile, in October, 1912, a suit (No. 1351, Equity) was commenced in United States District Court for the District of Kansas by John L. McKinney, a stockholder and a bondholder of the Kansas Natural Gas Company, alleging the insolvency of said company, and praying the appointment of receivers to take possession of and manage its property and assets. On October 9, 1912, Eugene Mackey, Conway F. Holmes, and George F. Sharritt were appointed receivers. They immediately took possession of the property and began carrying on its business. On February 3, 1913, another suit (No. 1–N, Equity) was commenced in the United States District Court for the District of Kansas by the Fidelity Title & Trust Company, trustee under the first mortgage of the Kansas Natural Gas Company, to foreclose said mortgage, and on the same date the receivership theretofore existing in the McKinney suit was extended to the Trust Company suit, and the same persons were appointed receivers in the latter suit.

Immediately after the appointment of the receivers in the state court, and acting under the suggestion of that court, the Attorney General of the state of Kansas and the receivers appeared in the federal court and urged the prior jurisdiction of the state court, and prayed the federal court for an order directing its receivers to turn the property of the Kansas Natural Gas Company over to the receivers appointed by the state court. Litigation followed, which finally resulted in all of the property of the Kansas Natural Gas Company, whether located in the state of Kansas, Missouri or Oklahoma, being turned over by the federal court to the two receivers of the state court, for the purpose of managing the property and carrying out of the decree of the state court in the anti-trust suit above mentioned. The history of this

litigation may be found in 206 Fed. 772, 209 Fed. 300, 126 C. C. A. 226, and 217 Fed. 187, 133 C. C. A. 181. In the last-mentioned case the court in its opinion said:

"The court below (United States District Court for the District of Kansas) has the right to retain the foreclosure suit and await the progress and disposition of the action in the state court, with power to make such orders and decrees as future exigencies may require."

On January 9, 1915, the United States District Court for the District of Kansas made an order appointing John M. Landon, the present plaintiff, ancillary receiver of the federal court for the properties located in Missouri and Oklahoma. At the present time John M. Landon is the sole receiver of the state court, and is ancillary receiver of the federal court, and George F. Sharritt is receiver under the federal court in the McKinney and Fidelity Trust Company suits; the other receivers having either died or resigned.

By chapter 238 of the Laws of 1911 of the state of Kansas there was established the Public Utilities Commission for the state of Kansas, vested with control over the public utilities and common carriers doing business in the state. Included under the term "public utility" were companies operating plants for the conveyance of oil and gas through pipe lines; also the lessees and receivers thereof. By said act it was provided that the rates charged by public utilities should be published and filed with the Public Utilities Commission. It was further provided that said Commission, either upon complaint of parties or upon its own initiative should have power to investigate such rates, and fix and order substituted therefor other rates, if found necessary. It was further provided that, unless the commission should otherwise order, it should be unlawful for any public utility to collect a greater rate than that fixed on the lowest schedule of rates for the same service on the 1st of January, 1911. The federal court, shortly after the appointment of its receivers in 1912, established a schedule of rates to be charged by the receivers; but this schedule was shortly thereafter suspended by the same court.

In January, 1913, application by the Attorney General of Kansas was made to the Public Utilities Commission to cause an investigation to be made and to fix rates to be charged by the receivers of the Kansas Natural Gas Company. The receivers and numerous distributing companies appeared and asked for changes in the then existing rates. In July, 1913, the Commission made its order denying any increase in rates, and approving and confirming the rates then in effect. Upon a further hearing in July, 1913, the Commission directed the receivers to make certain extensions of the pipe lines into the Oklahoma field, and thereupon the receivers applied to the federal court for directions as to their duties in respect to this order. Upon a hearing the receivers were directed not to comply with the order of the Commission. See 219 Fed. 614. This application and order, it will be noticed, were made prior to the time when the federal court turned over to the receivers of the state court all of the property of the Kansas Natural Gas Company. This was not completely effected until September, 1914.

In December, 1914, various of the parties before the court in the district court of Montgomery county, in the suit brought by the state of Kansas (No. 13476), after consideration and investigation, entered into an agreement, known as the "creditors' agreement," covering certain phases of the financial management of the property of the Kansas Natural Gas Company, while the same should be in the hands of receivers and under the control of the state district court. This creditors' agreement took the form of a stipulation filed in the state district court in case No. 13476. It provided among other things, for the scaling down of the outstanding stock of the Kansas Natural Gas Company from $12,000,000 to $6,000,000. It also provided for the scaling down of certain of the issues of bonds above mentioned. It recited that the opinion of experts, after investigation, was that the life of the gas field would be six years. It therefore provided for the payment of the several bond issues during such period. It provided payment out of earnings for extensions which would be necessary during such period, if the property should be operated at compensatory rates. It provided that application might be made, with the consent of the state court, to the Public Utilities Commission or other public authority, when deemed advisable by the state court. It provided that creditors and lienholders should defer their rights of foreclosure or assertion of liens during the above-mentioned period, provided the agreement was being carried out, subject, however, to the order of the court. This agreement was consented to by the Kansas Natural Gas Company and its auxiliary companies, by the receivers, by the great majority of the bondholders of the several companies, and by the state of Kansas, through its Attorney General.

In April and May, 1915, the receivers, by direction of the district court of Montgomery county, filed a petition with the Public Utilities Commission, requesting the Commission to establish a schedule of joint rates for the distribution and sale of gas by the complainants and the respondents distributing companies. The schedule proposed by the receivers represented a decided advance in rates from the 25-cent rate then in force, and ranged 20, 25, 30, 35, 37, 40 and 45 cents, according to the location of the cities served; distance being one of the elements recognized. A large amount of testimony was taken, and the Commission filed findings July 16, 1915, to the effect that the rate ought to be raised in all markets where the price was 25 cents per 1,000 cubic feet to the flat rate of 28 cents. Included in the evidence before the Commission at that time was the creditors' agreement, and the findings of the Commission were based, to some extent, at least, upon the estimates and figures found in the creditors' agreement. No order was, however, made by the Commission at this time, and the reason given is stated by the Commission itself as follows:

"It developed upon the hearing that more than half the natural gas supplied and marketed by complainants is sold in the state of Missouri. It is conveyed, by means of pipe lines passing through Kansas, to Joplin, Kansas City, St. Joseph, and other cities in our sister state. It would be manifestly unfair to permit complainants to advance the price of gas to their Kansas patrons, unless a corresponding increase were made to consumers in Missouri.

It is conceded that an advance in Kansas, without a similar one in Missouri, would be unavailing for the purposes contemplated by complainants, and they do not desire any advance in Kansas, except as it may be simultaneous with a corresponding one in Missouri. The Commission, therefore, awaits the pleasure and action of the rate-regulating body or bodies of Missouri having jurisdiction of the subject-matter; and if in that state proper and necessary orders be issued, establishing a schedule of rates as herein outlined, an order, effective, if possible, simultaneously, will be issued by this Commission in accordance with the views herein expressed."

Shortly after this decision, the receivers filed in the district court of Montgomery county an application for an injunction restraining the Public Utilities Commission from putting into effect the joint rate proposed in their findings of July 16, 1915. Service having been attempted to be made upon the Commission and the members thereof, special appearance was made on their behalf, and a motion made to quash the summons and the service thereof. Said motion being overruled, a demurrer was interposed by the Commission, also challenging the jurisdiction of the state district court. The demurrer was overruled, and the Utilities Commission elected to stand upon its demurrer. Thereupon testimony was introduced on behalf of the receivers, and on the 27th of August, 1915, the state district court entered its findings to the effect that the 28-cent rate was unreasonably low, and not sufficient to carry out the requirements of the creditors' agreement, and authorized a 30-cent rate to be temporarily established. The court also expressed the opinion that the receivers were engaged in interstate commerce, and furthermore entered an order enjoining the Public Utilities Commission from putting into effect the rates proposed by it in its findings of July 16, 1915. An appeal to the state Supreme Court was taken by the Utilities Commission from the order overruling the demurrer above mentioned. Meanwhile, on August 17, 1915, the Public Utilities Commission filed in the state Supreme Court an application for an alternative writ of mandamus against the judge of the district court of Montgomery county and the receivers of the Kansas Natural Gas Company, praying that said judge be directed to vacate and set aside the order making the Public Utilities Commission a party defendant to the injunction suit, also to set aside the temporary restraining order, also to dismiss the suit itself, and also that the receivers be compelled to perform their legal and public duty in respect to service.

An answer was interposed by the receivers in the mandamus proceedings. These two matters, the appeal of the Public Utilities Commission from the order of the state district court overruling their demurrer, and the mandamus proceedings brought by the Public Utilities Commission in the Supreme Court, were heard together in that court. State v. Flannelly, 152 Pac. 22. On October 4, 1915, the order of the district court overruling the demurrer was reversed; the Supreme Court holding that no jurisdiction had been obtained over the Commission. The writ of mandamus was denied; the court holding that, inasmuch as the Commission had made no order, a writ of mandamus could not properly issue. The court concluded its opinion as follows:

"The demurrer of the Public Utilities Commission to the receivers' petition is sustained, and the injunction against the Commission is set aside. No writ of mandamus will issue at this time. The action in this court is dismissed as to Hon. Thomas J. Flannelly, but is retained as to the defendants John M. Landon and R. S. Litchfield for such orders and judgments as may be hereafter made."

October 7, 1915, the receivers filed with the Public Utilities Commission a petition for rehearing. Further testimony was introduced and the entire matter was considered de novo. December 10, 1915, the Commission filed its findings and order, again finding that 28 cents, with certain exceptions, was a sufficient rate, and authorizing such a schedule to be filed. December 28, 1915, the receivers filed the authorized schedule, which was approved on the same day, and thereafter, on December 29, 1915, the receivers, by direction of the district court of Montgomery county, filed the bill of complaint in this court in the present suit, said suit being designated "136–N, Equity."

On the 3d day of January, 1916, the Public Utilities Commission presented an application in the mandamus proceeding above referred to, asking the state Supreme Court for an injunction restraining the receivers from prosecuting the present suit in the federal court. On January 7, 1916, the receivers filed a petition for removal of the mandamus proceedings from the state Supreme Court to the federal court. On the 3d day of January, 1916, the Public Utilities Commission also filed a supplemental petition in the mandamus proceedings, again asking that the receivers be compelled to perform their official duties and furnish their customers efficient and sufficient service. On January 16, 1916, the state Supreme Court filed a decision denying the petition of the receivers for removal, denying the petition of the Public Utilities Commission for an injunction, and dismissing the mandamus proceedings.

The bill of complaint in the present suit, 136–N, alleges that it is dependent upon and ancillary to the suits above mentioned pending in this court—the McKinney suit, No. 1351, and the Trust Company suit, No. 1–N, Equity. At the hearing upon the application for a preliminary injunction before the enlarged court, the jurisdiction of the court was challenged by the Public Utilities Commission, as well as by other defendants, upon various grounds, set forth at length, either in their answers or in separate motion papers. The court held that it had jurisdiction. Its opinion upon that question is found in 234 Fed. 152, 154. Upon the final hearing the jurisdiction of the court has again been challenged, largely upon the same grounds. So far as the grounds are the same, I do not deem it necessary to make any statement, except the reference to the prior decision already mentioned.

[1] But motions to dismiss on the part of the Public Utilities Commission have also been made from time to time, during the final hearing and upon the final argument, on further grounds, some of them arising since the hearing on the application for the preliminary injunction. Among them are the following:

"That subsequent to the order granting the preliminary injunction an order has been made by the state district court having control of the receivers, in-

structing the receivers as to the rates to be charged by them; that this order changes the basis of the rate-making, and so affects the present suit as to render it impracticable, if not impossible, for the court to proceed to a decision as to the character of the 28-cent rate."

As has been already intimated upon the hearing, it is my opinion that the order of the state district court in question was not of the character attributed to it by counsel for the Commission. It was an order fixing rates to be charged by the receivers temporarily. By the preliminary injunction the rates fixed by the Commission were enjoined, and the rates fixed by the statute of 1911, being the ones in force upon January 1st of that year, were also enjoined. It therefore became necessary for new rates to be temporarily fixed, so that the receivers might continue to carry on business. Upon application by the receiver the court made the order above mentioned. That this course of procedure, suspending the alleged confiscatory rate during the period of investigation and fixing temporary new rates, is proper, see Love v. Railway Company, 185 Fed. 321, 107 C. C. A. 403; Telephone Company v. Utilities Commission, 97 Kan. 136, 154 Pac. 262.

[2] A further ground for dismissal is that, subsequent to the granting of the preliminary injunction, the control of the stock and bonds of the Kansas Natural Gas Company changed hands, and that the new owners entered into certain agreements with the Utilities Commission, amongst others, that the suit in the state district court in which receivers had been appointed should be dismissed, and also that the present suit in this court should be dismissed. It appeared, however, upon the argument, that the new owners of the stock and bonds of the Kansas Natural were not parties to the present suit, nor had application been made by them to be made parties, nor was application made by the Utilities Commission that said owners should be made parties. It further appeared that there was a dispute as to what agreements had in fact been entered into between the new owners and the Utilities Commission. It appeared, further, that no order of dismissal had been entered by the state district court. These facts were deemed sufficient for denying the motion to dismiss the present suit in this court.

Still another ground urged for dismissal was that the evidence showed that the relief really sought by the receivers was not judicial, but administrative, and that they were seeking to be relieved from carrying out their obligations in respect to the character of the service to be rendered, fixed by certain franchise contracts, and that no relief should be granted in equity until the obligations under the franchise contracts were completely fulfilled. In reference to this contention it is to be observed that the extent of the obligations under the franchise contracts referred to is far from clear, and has not been judicially determined; in fact, a judicial determination thereof has been by some of the parties interested studiously avoided, and the Utilities Commission itself has made no order defining the extent of those obligations. Furthermore, in my judgment, the extent of the service

actually rendered by plaintiff is of so large and substantial a character that the failure in some degree to render full and adequate service, especially since this has not been definitely ascertained, ought not, under the peculiar circumstances of the present case, to debar the plaintiff from seeking a determination as to whether the 28-cent rate is confiscatory. To this may be added that it is claimed by the Utilities Commission that never since 1911 has the Kansas Natural Gas Company or its receivers rendered full and adequate service. Nevertheless this has not prevented the fixing of rates by the Commission for such service as has been rendered.

A further ground for dismissal is that the creditors' agreement, above referred to, really provided for an arbitration as to rates by the Utilities Commission, and that this was binding and not subject to review. This contention, in my judgment, is hardly worthy of serious consideration. The most casual reading of the creditors' agreement will show that it is not open to such a construction.

It is also urged on the part of the defendants that the bill should be dismissed for want of equity, because the plaintiffs have not charged for gas in Montgomery county the rate which they were authorized to charge by the order of the Commission, and that the plaintiff cannot be heard to complain of a confiscatory rate so long as they are not charging as high a rate as they are authorized to charge. It is further claimed that the plaintiffs deceived the Supreme Court of Kansas, and led that court to believe that the rate fixed by the order of the Commission of December 10, 1915, had been put into force and effect, when as a matter of fact this was not true, and that the state Supreme Court relinquished its jurisdiction of the mandamus case, being induced, by the deception practiced upon it by the plaintiffs. Counsel for defendant Commission claim that this state of affairs was called to the attention of the federal district court shortly after the present suit was filed, and again at the hearing for the preliminary injunction before the enlarged court, and still again upon the final hearing. If it be true that deception was practiced upon the state Supreme Court, and if that court was led by means of a fraud to relinquish its jurisdiction of the mandamus case, the proper place to make these facts known in the first instance would be in that court itself.

Further, even after the present suit had been begun in this court, the defendants might (at any time before final submission upon the hearing for the preliminary injunction) by proper procedure under section 266 of the Judicial Code have taken action in the state court by mandamus or otherwise, and this court, upon being advised of such action, wouldd have held the present suit in abeyance; but no such course was pursued. Further, the record shows that the rates in question in Montgomery county were competitive rates, and it does not appear that gas could have been sold in that territory by the receiver at a rate higher than 20 cents, the rate then in force; nor does it appear that, if the gas had been brought to Kansas City and sold at 28 cents, there would have been any greater profit for the receiver than by selling it in Montgomery county at 20 cents. Finally, it appears

that the rate in Montgomery county prescribed by the Commission in its order of December 10, 1915, was called to the attention of the state district court shortly after the rates were promulgated, and the district court, upon application of certain cities in Montgomery county, enjoined the receivers from collecting in those cities the rates authorized by the order of the Commission of December 10, 1915. It will be presumed that the state district court in charge of the receivers took the action above mentioned after due deliberation, and that it was duly authorized and for the best interests of all parties concerned, including the financial interests of the receiver.

[3] Passing to the merits. Thousands of pages of testimony and hundreds of exhibits have been introduced, covering almost every possible question that could arise in a rate controversy. Questions involved in the valuation of the plant, questions as to the character and extent of the business, including the available supply of gas and the life of the gas fields, questions as to extensions, questions touching the cost of operation and maintenance, the rate of return proper to be allowed, and the amount of income necessary to meet requirements, have all been covered with great fullness and particularity, both in the evidence and in the arguments of counsel.

It must be borne in mind, however, that this suit is not one for the fixing of a rate to be charged by the plaintiffs for natural gas, but it is a suit to determine whether the 28-cent rate already fixed by the Commission is confiscatory. Bearing this in mind, it becomes apparent that it is not necessary to discuss or determine many of the questions investigated before the Commission and upon which evidence and argument have been offered in this suit. It will not be necessary to determine whether the Commission adopted the best and most scientific method in fixing the 28-cent rate; if that rate is not confiscatory, the method by which it was determined is immaterial here. After determining the value of the plant for rate-making purposes the Commission allocated this value between the states of Missouri and Kansas on a certain percentage basis. The Commission also adopted a flat rate, as distinguished from a distance rate, to cover a great many cities in Kansas. The Commission further divided the valuation of the property into two parts; one covering that portion used for production purposes, and the other that portion used for transportation purposes. Without passing specifically upon the conclusions of the Commission with respect to these several matters, it may be assumed for the purposes of the present discussion that they were justified, but mention of certain matters in connection with some of them will be made later. It will be necessary, however, to consider briefly certain of the matters passed upon by the Commission, in fixing the 28-cent rate.

The value of the property is one of the important elements, and the evidence as to this varied widely, especially as to the value which should be amortized. The evidence shows that the appraisers appointed under the direction of this court in the fall of 1912 found the value of the physical property to be $14,803,200. This did not include

anything for intangibles, going value or working capital. In 1913 Mr. Witt, engineer for the Commission, valued the property as of January 1, 1913, at $10,275,046. This also omitted the above-mentioned items. Mr. Wyer, employed as an expert engineer, by the receivers, fixed the value in 1912 at $14,520,686, excluding the above-mentioned items. In 1915 Mr. Strickler, engineer for the Commission, valued the properties at $8,994,811, excluding the same items. He also valued the properties at $8,602,993, by further excluding the distributing plant at Independence, and the supply lines at Elk City, Independence, and Joplin. Later Mr. Wyer made a reappraisal as of January 1, 1916, fixing the value at $12,000,000, exclusive of the intangibles, going value, working capital, and stock supplies, excluding also the Independence plant and the supply lines at Independence, Joplin, and Elk City.

In July, 1915, the Commission found the value of the physical property to be $8,994,811, and estimated the salvage value as of December 31, 1920, at $2,317,951, which would leave for amortization $6,676,860. In August, 1915, the state district court, in reviewing the figures of the Commission, pointed out certain alleged errors on the part of the Commission in arriving at the salvage value, and estimated that value as of December 31, 1920, at $867,229, which would leave for amortization, $8,127,582. Both of these valuations included the leaseholds. In December, 1915, the Commission fixed the valuation of the property used in transportation (which excluded leaseholds and certain other property) at $7,083,605, amortizing the same on the basis of 12 years, going on the assumption that there would be no salvage at the end of that time. In reference to this matter, the Commission said:

"In providing for depreciation, nothing has been deducted for the salvage value of the property at the end of the estimated life, nor has anything been deducted for the warehouse stock assigned to the transportation branch of the business. In the computations it has been assumed that the entire plant, including the warehouse stock, will be wiped out at the end of the 20-year period. This, of course, is an assumption. At that time it may still be a valuable going concern, or it may be junk."

It would seem that this method of procedure is open to criticism. It is hardly supposable that the property in question could be used and useful in transportation and distribution of gas up to a given date, and then overnight become junk.

Upon a careful consideration of all the evidence bearing upon this question of valuation, I have reached the conclusion that the present fair value of the physical property used in transportation is at least $7,000,000.

Whether anything should be added to the value of the physical property for "going value" is not free from doubt. The term "going value" has been used in many of the reported cases as covering a number of different matters—among them good will; organization costs, such as legal expenses, taxes, and interest during construction; the cost of attaching customers to a completed plant; loss during early

lean years of the business. The expressions "enhanced value" and "development cost" are frequently found in the reported cases, and are helpful in elucidating what is meant by the "going value" for which an allowance has quite properly been made. It will serve no useful purpose to review the numerous cases on the subject; suffice it to say: (1) It seems to be held by the weight of authority that "good will" should not enter into the valuation of a public utility. (2) Overhead expenses during construction period and organization charges are not properly included in "going value," but are a constituent part of the cost of the plant. (3) The other two items mentioned, viz. cost of attaching customers and losses during early years, are legitimate elements of "going value." "Going value," thus understood, might well be added to the physical valuation provided the evidence is sufficiently definite, so that the amount can be fixed with reasonable certainty, and in the absence of countervailing circumstances.

Mr. Wyer, a witness for the receiver, has estimated "going value" at $2,000,000. Mr. Walker, witness for the Commission, has estimated it at $535,000. It appears from the evidence that there was a deficit in the early years; it also appears that no dividends have been paid to the stockholders. But it also appears from the evidence that in the early history of the company upward of $3,000,000 of earnings, instead of being distributed as dividends, was reinvested in the company as capital. Upon a consideration of all the evidence on the subject, I have reached the conclusion that it is very doubtful whether any allowance for "going value" would be justified, and have therefore omitted the same.

Another important element to be considered is the supply of gas. The figures as to this matter which were used by the Commission in December, 1915, in arriving at the 28-cent rate, were approximately the figures for the year 1914, namely, 25,671,445,000 cubic feet. It was considered by the Commission that the receiver would be able to procure the same amount of gas for the year 1915, and thereafter the same figures were adopted as a basis by the enlarged court in the hearing for the preliminary injunction. It is now claimed, however, that the evidence shows that the supply of gas obtainable is very much greater than the figures above mentioned. It is true that the evidence introduced upon the trial has shown the development of new fields having apparently large quantities of gas. Whether these fields will be fairly permanent, or come to a sudden end, no one can foretell. Few of the fields discovered are available to the receiver by the expenditure of a reasonable amount of money; most are available only by the expenditure of a very large amount. The experience of the receiver in making an expenditure of nearly $700,000 under the direction of this court, for the purpose of reaching new fields and increasing the supply, and the results obtained by him, lead to the conclusion that even the best informed men are liable to be sadly mistaken as to future supply. In October the receiver and Mr. Bartlett, who is connected with the Braden interests, both testified as to bright prospects for a

very largely increased supply of gas to be obtained by the Kansas Natural Gas Company within the next 60 or 90 days. At the hearing in February these expectations had given way to certainty; but the certainty was that there would not be an increase, at least to any considerable extent, in spite of diligent efforts.

A consideration of all of the testimony, including the report of this last experience on the part of the receiver, has convinced me that the Commission sitting in December, 1915, and the court sitting in June, 1916, were both justified in taking the figures of 1914 as the maximum supply probably attainable, except upon the expenditure of several times the amount of money they then considered necessary. It is true that Mr. Doherty testified upon the final hearing that he had reasonable grounds for believing that he could furnish a supply largely in excess of the figures of 1914. This expectation, however, was based upon the condition that from $2,000,000 to $2,500,000 should be expended at once in making the necessary extensions, and that further considerable expenditure thereafter would also be made. One of two conclusions appears to be inevitable, either that the supply of 1914 will be the maximum upon the expenditure of such sums as this court in June [1916] thought necessary, or the alternate conclusion that to secure a substantially increased supply will necessitate a very large initial expenditure, followed by others of not inconsiderable amounts.

The life of the fields is also a very important element. This, like the element of supply, is also uncertain. The Commission, in December, 1915, in fixing the 28-cent rate, proceeded upon the assumption that the life of the fields would be 12 years. The experts, upon whose opinion the creditors' agreement was based, estimated the life of the fields at 6 years in December, 1914. In July, 1915, the Commission acted upon the assumption that the life of the fields would be 6 years. The testimony of the experts at the final hearing seemed to be based partly upon known facts and partly upon hopes. Mr. Bartlett, in October, 1916, testified that he thought there was gas enough to last 5 or 6 years, and that possibly the field might exist for 10 years. His testimony was given at a time when he also testified that he, as representing the Braden interests, was expecting to furnish the receiver within the next 30 or 60 days 40,000,000 cubic feet per day. That he was badly mistaken in this latter estimate has been definitely demonstrated within a period of 4 months. Instead of furnishing 40,000,000 cubic feet a day, the average for the past three months has been less than 18,000,000. Mr. York estimated the life of the field under present conditions of use at 4 or 5 years. Mr. Doherty, a man commanding perhaps the fullest information as to gas matters in the Mid-Continent field, testified that he was reasonably certain of being able to furnish the Kansas Natural system a supply of gas very largely in excess of the figures of 1914 for at least 2 years, that he had hopes that it might continue for 3 years thereafter, and that it was not improbable that with further investigations in the Texas and Louisiana fields a supply might be available for even a longer period. Taking

all the evidence together and assuming the present conditions of unrestricted use as between different classes of consumers to continue, the most reasonable conclusion is that the life of the field cannot be fairly estimated at more than 5 years from the present time for a supply equal to that of 1914, and a fortiori not longer for a supply to any considerable extent greater.

As to the cost of gas to the receiver, the Commission, in its investigation leading up to the 28-cent rate, concluded that 4 cents per 1,000 cubic feet would be sufficient. This court, upon the hearing for the preliminary injunction under the evidence then before it, concluded that 6 cents should be allowed. Considerable additional evidence has been introduced touching the price paid for gas in different localities in Kansas and Oklahoma. Mr. Bartlett testified that the price which the receiver would have to pay the Braden interests for gas purchased from them would probably be 7 cents, although it had not yet been definitely fixed. It appears that a royalty of 3 cents exists in the Osage field, where a considerable part of the supply is now obtained by the receiver. While there was evidence that at certain points gas was sold at the mouth of the well for as low as 2 and 3 cents, yet in most, if not in all, of these instances, the wells were not where they were available to the lines of the receiver. It is also in evidence that industrial plants are in active competition at many points with purchasers who are seeking to transport gas to consumers at a distance for domestic purposes, and that in some instances these industrial plants pay as high as 10 or 12 cents for their gas. Viewing the situation as a whole, and taking into consideration all of the evidence bearing upon the matter, the figure of 6 cents adopted by this court in June, 1916, does not, in my opinion, require to be lowered.

As to the rate of return upon investment, the court, upon the hearing for the preliminary injunction, held that 8 per cent. was not excessive, in view of the nature of the business, and the risks, hazards, and prevailing rates in other similar lines of activity. I see no reason for departing from that conclusion, and need not repeat what was then said.

One additional observation may be made. It is conceded by all parties that continued extensions into fields outside of Kansas will be imperative. It has been held that the Public Utilities Commission has no power to order extensions outside the state. It therefore becomes necessary to attract capital to make these extensions. This can be done only upon the basis of a reasonable return in view of the character and risks of the business.

It is to be noted that the 28-cent rate fixed by the Commission was a joint rate; that is, a rate covering both the compensation to the receiver and to the distributing companies, which joint rate was to be paid by the ultimate consumer. Under the contracts made by the Kansas Natural Gas Company with the various distributing companies, a division of the rate to be paid by the ultimate consumer was provided for, which division was generally two-thirds to the Kansas Natural

Company and one-third to the distributing company, although, in a few instances this proportion was different; in the two Kansas Citys it was 62½ per cent. to the Kansas Natural. These contracts between the Kansas Natural and the various distributing companies were never adopted by the receivers appointed by the state court, and the order of the federal court, appointing the original federal receivers, provided that these contracts should not become binding upon the receivers, except by the express order of the court. No such order has ever been made. The receivers, however, continued to distribute gas to the various distributing companies, and to collect therefor upon the ratio of the division of rates fixed by the contracts.

At the hearing before the Public Utilities Commission it was assumed that any joint rate fixed by the Commission would be divided between the receiver and the distributing companies upon the same basis, namely, two-thirds and one-third. At the hearing before the enlarged court, upon the application for a preliminary injunction, the same assumption was made. When the case came on for final hearing, however, the attorneys for the Commission took the position that the assumption would no longer be acquiesced in by the Commission. This, of course, left the question open whether the receiver could reasonably expect to secure a greater percentage of the joint rate fixed by the Commission than the two-thirds. It became necessary to determine this question because, even though it might be established that two-thirds of a 28-cent rate would be confiscatory to the receiver, it would not follow that five-sixths or seven-eighths would be confiscatory. In the absence of an assumption that two-thirds was all that could be obtained, evidence was required as a basis for a finding with regard to the matter. Accordingly, considerable evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating expenses, and other allied matters. This evidence was introduced, not for the purpose of ascertaining with accuracy what would be a just and fair rate to be charged by the various distributing companies, but solely for the purpose of ascertaining whether there were any reasonable grounds for holding that the receiver could obtain more than two-thirds of the 28-cent joint rate. This evidence was taken and the inquiry made on the basis of laying aside temporarily the contracts between the Kansas Natural Company and the distributing companies, and without undertaking to pass upon the validity of those contracts as between the original parties.

Without reviewing this evidence in regard to these various distributing companies, but after a full and careful consideration thereof, I am clearly of the opinion that there is no reasonable basis for holding that the receiver could obtain more than two-thirds of the 28-cent joint rate, in case that rate should be established.

The Commission, in its decision of December 10, 1915, presented a table showing its estimate of the requirements of the receiver for the

year 1915, and the estimated revenue under the 28-cent rate. The table follows:

Table No. 5, Kansas Natural Gas Company.

Statement of Estimated Revenue, and Requirements for the Ensuing Year, Based on 1914 Figures, Revised as Previously Explained, For the State of Kansas.

Requirements.	Transportation.	Kansas.
25,671,445 M cubic feet gas at 4¢	$1,026,857.80	$ 514,045.01
Operating expenses and taxes assigned to transportation	510,536.14	223,245.11
Receivership expenses	32,228.00	14,093.30
Uncollectable gas accounts	12,555.07	6,359.14
Taxes Kansas City pipe line	32,288.27	16,860.51
Taxes Marnet Mining Company	10,497.35	5,316.91
Maintaining organization Marnet Mining Company	690.20	349.59
Total	$1,626,652.83	$780,269.57
Present value of transportation property, $7,083,605.64; depreciation on basis of 12 years	590,300.00	268,468.44
Requirements exclusive of a return on property investment	2,216,952.83	1,048,738.01
[1] Return on present value $7,083,605.64		
Add for working capital 200,000.00		
Total	$ 437,016.35	$ 198,755.00
	$2,653,969.18	$1,247,493.01
Estimated Revenue.		
Gas Sales 1914		$1,192,089.82
[2] Gas used in compressor stations (on basis of use)		31,737.70
Total		$1,223,827.52
Estimated revenue from proposed increased rates		171,513.63
Total estimated revenue from Kansas		$1,395,341.15
Deduct requirements as above		1,048,738.01
Estimated net revenue		$ 346,503.14
Which is equal to a return of 10.46% on the present value $3,312,583.83 which is 45.48% to Kansas of the total of $7,283,605.64 or total estimated revenue for Kansas		1,395,341.15
Less requirements including a 6% return		1,247,493.01
Surplus		147,848.14

The enlarged court, in its opinion in granting the preliminary injunction, pointed out wherein it thought the foregoing table should be revised. It said:

"Turning now to the table of the Commission, quoted above, the result is that, laying aside other considerations, and conceding the substantial correctness of the Commission's other findings for the purpose of the decision of this application for injunction, its estimates of the requirements of the company and of the receiver for the first and the succeeding five years of

[1] The division of these items between Kansas and Missouri has been made on basis of use of property as shown in Table No. 1.

[2] This item is placed here to balance an equal sum included in the expenditures. It is a bookkeeping entry solely.

the life of the gas company as a going concern were too low by the following amounts:

On account of estimating 12 years instead of 6 years as the life of the going concern by	$ 590,300.00
On account of lack of allowance for extensions by	247,916.00
On account of estimate of cost of gas at 4 cents per M cubic feet, instead of 6 cents per M cubic feet by	513,428.90
On account of allowance of 6 per cent. instead of 8 per cent. interest	145,672.10
Total	$1,497,317.00"

Upon the final hearing counsel for the Commission has prepared a table, which is found on page 99 of their brief, which is a revision of the table set forth in the decision of the Commission, based "upon the assumption that the receiver will provide for his consumers 30,000,000,000 cubic feet, instead of 18,000,000,000 cubic feet, of gas per annum. This table thus prepared by counsel is as follows:

	Transportation.	Kansas.
39,863,630 M cubic feet, at 6¢ (Kansas 50.06%), allowing for leakage and difference in pressure basis	$2,391,817.80	$1,197,343.98
Operating expenses and taxes assigned to transportation (increased 66⅔%)	850,859.53	372,060.30
Receivership expenses	32,228.00	14,093.30
Uncollectable gas accounts (increased 66⅔%)	20,924.28	10,598.14
Taxes Kansas City pipe line	33,288.27	16,860.51
Taxes Marnet Mining Company	10,497.35	5,316.91
Maintaining organization Marnet Mining Company	690.20	349.59
Total	$3,340,305.43	$1,616,622.73
Value of transportation property $7,083,605.64 depreciation on basis of 12 years from December 31, 1914	590,300.00	268,468.44
Add for extensions, $1,000,000 to be amortized in 10 years, 45.48% to Kansas	100,000.00	45,480.00
Requirements exclusive of a return on property investment	$4,030,605.45	$1,930,571.17
Estimated revenue on basis of 1914 sales		$1,395,341.15
Add for increase in business, 66⅔%		930,134.38
New estimated revenue		$2,325,475.53
Requirements as above		1,930,571.17
Estimated net revenue		$394,904.36
Value of transportation property	$7,083,605.64	
Add for new capital	1,000,000.00	
Add for working capital	200,000.00	
Total	$8,283,605.64	
Kansas proportion 45.48%		3,767,383.83
On which value estimated net revenue is an annual return of 10.48%.		

For the purpose of summarizing the conclusions reached by me as heretofore stated and putting them in concrete form, in order to show wherein they differ from the conclusions reached by counsel for the Commission, in the revised table above given, the table is again re-

produced, embodying the changes necessary to make it conform to the foregoing conclusions:

	Transportation.	Kansas.
39,863,630 M cubic feet, at 6¢ (Kansas 50.06%) allowing for leakage and difference in pressure basis	$2,391,817.80	$1,197,343.98
Operating expenses and taxes assigned to transportation (increased 66⅔%)	850,859.53	372,060.30
Receivership expenses	32,228.00	14,093.30
Uncollectable gas accounts (increased 66⅔%)	20,924.28	10,598.14
Taxes Kansas City pipe line	33,288.27	16,860.51
Taxes Marnet Mining Company	10,497.35	5,316.91
Maintaining organization Marnet Mining Company	690.20	349.59
Total	$3,340,305.43	$1,616,622.73
Value of transportation property less salvage $7,000,000—$1,050,000=$5,950,000.		
Depreciation on basis of 5 years from April 1917	$1,190,000	541,312
Add for extensions, 2,000,000 one-half to be amortized in 5 years, 45.48% to Kansas	20,000	90,960
Requirements exclusive of a return on property investment	4,730,305	2,248,794
Estimated revenue on basis of 1914 sales		$1,395,341.15
Add for increase in business 66⅔%		930,134.38
New estimated revenue		2,325,475.53
Requirements as above		2,248,794
Estimated net revenue		76,681
Value of transportation property	$7,000,000	
Add for new capital	2,000,000	
Add for working capital	200,000	
Total	$9,200,000	
Kansas proportion, 45.48%		$4,184,160

On which value estimated net revenue is an annual return of 1.8%.

This falls short of producing 8 per cent. on the investment by $258,051. It falls short of producing 6 per cent. on the investment by $174,368. In this re-revised table no allowance for going value has been included, for the reasons heretofore stated. Furthermore, no valuation is included for leaseholds. The Commission made no allowance for these leaseholds in the valuation fixed by it for rate making, but it made an allowance of 4 cents per thousand cubic feet for whatever gas was obtained from wells covered by the leases.

It is claimed on the part of the plaintiff that this method of dealing with the leaseholds was not only unscientific, but also worked a great detriment to the plaintiff. It must, I think, be conceded, if all gas required by the receiver could be bought at the price of 4 cents per 1,000 cubic feet, that it might be fairly argued that the receiver should not make use of gas obtained from the leaseholds upon a higher basis than 4 cents; but if, as the evidence shows, not only all the gas that could be purchased at 4 cents was needed, but also in addition thereto all the gas produced from the leaseholds, then it might or might not be fair and just to allow 4 cents for gas obtained from the leaseholds. If this last increment of gas from the leaseholds was needed to make up

the supply, a reasonable return should be allowed for it, though this return exceeded the price paid for the rest of the gas. In other words, the leaseholds should logically be valued, and this value amortized, and the valuation added to the capital account upon which returns should be figured. In the present case, if this were done and the valuation used which was placed upon the leaseholds by the expert of the Commission, it will be found that the 4-cent allowance for gas from leaseholds was not equivalent to placing the valuation of the leaseholds in the capital account, and amortizing the same, and giving a fair return upon the capitalization. However, when, as in the foregoing table, 6 cents is allowed as the cost price of gas to the receiver, and this is made also the basis of return for gas obtained from the leaseholds, the difference between the two foregoing methods of handling the leaseholds becomes of very little importance. For this reason it is not thought necessary to make a change in the table of the Commission in this respect.

Allowance has been made for salvage at the end of the five-year period—15 per cent. on the present valuation of $7,000,000 and 50 per cent. on the extensions and additions immediately necessary. The estimated cost of these immediate changes has been reduced by the value of new pipe recently bought by the receiver and not yet used, amounting to something over $200,000. The balance of the amount recently expended by the receiver under order of court, amounting to over $400,000, though unsuccessful as an investment, must nevertheless be provided for, either by being placed in capital account and amortized, or by being charged to maintenance; proper allowance to be made in either case for salvage. This would increase the deficit above shown.

It is further to be noted that in the foregoing re-revised table no allowance is included for extensions after the large initial one. This omission is not due to a conclusion that no such expenditure would be necessary. On the contrary, the testimony shows that it would be necessary; but from the evidence I am unable to deduce any definite figure as to amount. Whatever sum would be necessary to be expended would, of course, increase the deficit to a still greater extent.

Extensions to new gas pools do not stand on the same footing as new branch lines of railway. The one is normally short-lived; the other is normally enduring. The former are usually necessary to maintain the present business; the latter are usually built for the purpose of getting new and additional business. Whether extensions in such a business as the natural gas business should be charged to capital account and amount (less estimated salvage at the end of the life of the field) be amortized, or whether they should be charged immediately to maintenance (subtracting, however, from each installment of investment an amount for estimated salvage), makes very little difference, provided a return is allowed on the capital actually invested during the time it is tied up. In the first instance, however, the feasibility of attracting capital into the extensions may be a determining factor as to how the account should be made up.

Finally, the experience of the receiver for the year 1916 is instructive and valuable. During the first 8 months of the year the 28-cent

schedule was in force, the average return to the receiver on gas sold for domestic purposes was 18.27 cents. The total amount of gas sold during the year on the whole system for domestic consumption was 14,170,692,000 cubic feet. Applying the above rate to this amount, we have given an income of $2,608,824. Income derived from sale of boiler gas, gas for engines, etc., gives $523,700—a total income of $3,132,524. Against this were the following:

Gas purchased	$1,203,547
Operating expenses	910,030
Depreciation or amortization, $7,083,605 on six-year basis adopted by court in June 1916	1,180,600
8 per cent. on investment of $7,083,605	582,698
Total necessary revenue	$3,876,868
Total income above	3,132,524
Deficit	$ 744,344

In fairness, owing to the abnormally large expenditures for extensions, the figures for operating expenses, $910,030, might well be reduced by $300,000, thus approximating a normal year, leaving a deficit of $444,344.

The foregoing findings and conclusions, though perhaps containing errors, have nevertheless been reached after the most careful consideration of the evidence and the arguments of counsel that I have been able to give. It is accordingly held that the 28-cent rate is not and will not be compensatory, but, on the contrary, that it is unreasonably low and confiscatory, and violative of the Constitution of the United States.

Interstate Commerce.

[4] The question of interstate commerce remains to be considered. It is claimed by the plaintiff, and by several of the defendants who ask for similar relief, that the transactions carried on by the receiver, namely, the transportation of gas from Oklahoma to Kansas or Missouri, or from Kansas to Missouri, and the sale thereof, at points of destination, constitute interstate commerce, and, further, that under the facts disclosed by the record the Public Utilities Commission of Kansas, in fixing the 28-cent rate, has attempted to directly regulate and control this interstate commerce, and has imposed a substantial burden thereon, and for these reasons the enforcement of its order should be enjoined. On the other hand, counsel for the Commission state their position thus:

"Our position is, however, that the receiver, being a public utility under the laws of Kansas, and actually engaged in a domestic and local business within the state, and employing local franchise in the local sale and distribution of gas, thereby commingling its property with the general property of the state is unquestionably engaged in intrastate commerce, and has unquestionably taken away from the transaction of importing gas into the state and the sale of the same to customers all of the interstate features which might have existed, had the company not employed local agencies for the sale of gas in said state."

It is further claimed on the part of the Commission that the question of interstate commerce is res adjudicata, having been passed upon by

the Supreme Court of the state of Kansas in the case of State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22. This contention on the part of the defendant that the question of interstate commerce is res adjudicata was presented to the enlarged court, and argued at length, upon the application for a preliminary injunction. That court in its opinion took occasion to discuss the matter, and reached the conclusion that the question was not res adjudicata. It is not necessary to repeat what was then said, but it will be sufficient simply to make reference thereto. See 234 Fed. 152.

It is earnestly contended, however, by counsel for the Commission, that sufficient consideration was not given by the court to the fact that the state Supreme Court of Kansas, upon the first hearing in the mandamus matter, No. 20,324, though denying the writ, nevertheless retained jurisdiction. 96 Kan. 372, 152 Pac. 22. The position of counsel for the Commission seems to be that the retention of jurisdiction by the state Supreme Court involved necessarily a finding on the question of interstate commerce, and rendered that question res adjudicata. There are at least two answers to this contention:

First, the retention of jurisdiction by the state Supreme Court in the mandamus matter was not necessarily based upon such a finding as is now claimed, for there was in the mandamus proceeding another independent matter which did not necessarily involve the question of interstate commerce, namely, the character of the service which the receiver should be compelled to furnish. The mandamus petition contained a distinct prayer for relief in regard to this latter matter. On the first hearing the court could grant no relief in respect to this matter, for the same reason that it could grant no relief in regard to the rate matter, namely, that there was before it no order made by the Commission. That the Supreme Court retained jurisdiction in the mandamus proceeding, partly at least on account of this matter of service, is apparent from the opinion of the court rendered on the second hearing. 154 Pac. 235. At this time, also, it appeared that the Commission had made no order in regard to the character of the service. The Supreme Court said:

"Since it is now conceded that the Public Utilities Commission has made no order requiring the defendants to furnish better or more efficient service, the court would not be justified in granting the writ, nor in longer retaining the proceeding."

Second, there was in the mandamus proceeding no "final judgment" entered of such a character as would render any question in the proceedings res adjudicata, or which could be carried by the receiver to the Supreme Court for review. See Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 33 Sup. Ct. 78, 57 L. Ed. 138; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893. Furthermore, the Fidelity Title & Trust Company, trustee under the mortgage made by the Kansas Natural Gas Company, was not a party to the mandamus proceeding, and was not bound by the judgment entered therein; and it might, in subsequent litigation to which it was a party, raise any of the questions involved in the mandamus proceeding. See Keokuk & Western R. R. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 33 Sup.

Ct. 967, 57 L. Ed. 1410; Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Williamson v. City of Clay Center, 237 Fed. 329, —— C. C. A. ——. The Trust Company is a party to the present suit, and has at all stages insisted that the business carried on by the receiver is interstate commerce, and not subject to the regulation or control of the Public Utilities Commission of Kansas.

It is also claimed by the defendant Commission that the plaintiff is estopped, because the propositions of law contended for by him as to interstate commerce, and the authority of the defendant Commission, have been settled in this suit. The case relied upon by counsel for the Commission in support of this contention, is McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226. A careful reading of the decision in that case will show that the questions therein involved and decided were by no means identical with or decisive of the questions involved in the case at bar touching interstate commerce. The questions in reference to this matter of interstate commerce arising in the present case are: (A) Is the plaintiff, in transacting the business of transporting and selling gas, engaged in interstate commerce? (B) If the business thus transacted is interstate commerce, is it nevertheless of such a local character that the state may impose regulations and burdens upon the same? (C) Is the fixing of the 28-cent rate at which gas may be sold in fact imposing upon interstate commerce a burden or a regulation such as the state is not authorized to impose?

(A) In determining the question whether the transactions carried on by the receiver constitute interstate commerce, it will be helpful to have clearly in mind just what those transactions are. The Supreme Court of the state of Kansas in State ex rel. v. Flannelly, supra, has stated the matter as follows:

"The gas sold by the receivers is produced in both Kansas and Oklahoma. It is transported from the wells through pipe lines beginning in Oklahoma, entering the state of Kansas near Coffeyville, at which place gas is first distributed and sold to consumers. The remainder is transported north through pipe lines into which gas from wells in Kansas is conveyed, and the gas from Oklahoma and Kansas is then transported through the same pipe lines and through compressing stations to Independence and north and east throughout this state, and after supplying the consumers in this state it is transported into the state of Missouri, where it is sold to other consumers. After the gas from this state is discharged into the pipe lines with the gas from Oklahoma, it is impossible to distinguish one from the other, or to separate one from the other. About 85 per cent. of the gas sold is produced in Oklahoma, and 15 per cent. is produced in Kansas. About 60 per cent. of the gas sold is sold in Missouri, and 40 per cent. is sold in Kansas. The gas sold in Kansas is delivered to the consumers thereof, in the several cities, by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates to be charged customers for gas. These distributing companies act as the agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers. The gas is consumed as fast as it is sold, and is consumed immediately after passing through the meter measuring the gas to the consumers."

Since the decisions in Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738, West v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, and Haskell v. Cowhan, 187 Fed. 403, 109 C. C. A. 235, it can no longer be open to question that natural gas is a subject of interstate commerce. And it seems to have been admitted by the Supreme Court of Kansas in State ex rel. v. Flannelly, supra, and also seems to be admitted by counsel for the Commission in the case at bar, that transportation of natural gas by the receiver from Oklahoma into Kansas, and thence into Missouri, or from Kansas into Missouri, is interstate commerce; but it is claimed that at some point before the gas reaches the final consumer the transaction has ceased to be interstate commerce, and has lost its character as such. Just at what point this interstate commerce transaction loses its character as such, the Supreme Court of the state of Kansas and counsel for the Commission are not in harmony. The state Supreme Court, in the case above cited, adopted the original package idea, and attempted to apply it to the transaction in question. It said:

"The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce."

And again:

"Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale."

Counsel for the Commission, however, have repudiated the original package idea, and in their brief state:

"There is no original package where the transportation is conducted by means of a pipe line. Gas so conducted is not susceptible of delivery in original package."

The position of counsel for the Commission appears to be that the transaction loses the character of interstate commerce when the gas passes from the pipe lines of the receiver to the lines of the local distributing companies. Nor do counsel for the Commission appear to lay much stress on the fact that about 6 per cent. of the gas distributed in Kansas originates in the same state. In their brief they state:

"We say simply that the character of this service cannot be destroyed or explained away by the fact that any amount, or indeed, all the amount, of the gas distributed locally by the Kansas Natural Gas Company and its agents was obtained in other states than Kansas. Such service is still a local service, not interstate in its character, and is subject to local regulation."

Bearing in mind the character of the business actually carried on by the receiver and the contentions of the parties in reference to the same, let us examine some of the adjudicated cases. Most of the cases which involve the question whether a particular transaction constitutes interstate commerce deal with three separate parties: A shipper, a carrier, and a consignee. The language used in the cases is usually framed in reference to that state of affairs. However, as will be noted later on, the existence of three such separate parties is not essential to an interstate transaction.

The following propositions, which have a bearing upon the instant case, seem to be well established:

(1) Interstate commerce begins when the goods are delivered to the carrier for transit from a point in one state to a point in another state, or are actually started on their ultimate passage. Coe v. Errol, 116 U. S. 517, 525, 6 Sup. Ct. 475, 29 L. Ed. 715; General Oil Co. v. Crain, 209 U. S. 211, 229, 28 Sup. Ct. 475, 52 L. Ed. 754; T. & N. O. R. Co. v. Sabine Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; La. Ry. Com. v. Railway, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; Ill. Cent. Ry. Co. v. La. Ry. Com., 236 U. S. 157, 35 Sup. Ct. 275, 59 L. Ed. 517; McCluskey v. Ry., 243 U. S. 36, 37 Sup. Ct. 374, 61 L. Ed. 578.

(2) Interstate commerce ends when the shipment reaches its intended destination, and, except where Congress has expressly otherwise provided, the protection afforded to an interstate shipment includes the right to sell by the person introducing the goods, at least up to the time when they have become commingled with the general property of the state, and, where the goods are introduced in the original packages, commingling does not take place until the original package is broken. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Am. Exp. Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; Savage v. Jones, 225 U. S. 501, 520, 32 Sup. Ct. 715, 56 L. Ed. 1182.

(3) The intent and purpose of the party making the shipment have an important, if not controlling, bearing upon the question of where the interstate journey ends. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; So. Pac. Term. Co. v. Int. Com. Com., 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Ohio Ry. Com. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; T. & N. O. R. Co. v. Sabine Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; La. Ry. Com. v. Ry., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; Ill. Cent. Ry. v. La. R. R. Com., 236 U. S. 157, 35 Sup. Ct. 275, 59 L. Ed. 517; United States v. Ill. Cent. Ry. (D. C.) 230 Fed. 940.

(4) A change of carriers or plurality of carriers does not affect the status of the interstate shipment. T. & N. O. R. Co. v. Sabine Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; So. Covington Ry. v. Covington, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792; Atchison Ry. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

(5) Change of ownership of the property during transit does not necessarily affect the status of the shipment. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; Gulf Ry. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; Atchison Ry. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

(6) Employment of an agent at the point of destination to effect delivery to the ultimate consignee does not destroy the character of the shipment. Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; Stewart v. Michigan, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786; Davis v. Virginia, 236 U. S. 697, 35 Sup. Ct. 479, 59 L. Ed. 795; Grand Union Tea Co. v. Evans (D. C.) 216 Fed. 791.

(7) The time and place at which the title to the goods passes, as be-

tween the seller and buyer, is not controlling upon the character of the shipment. Norfolk Ry. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; Penn. R. R. v. Coal Co., 238 U. S. 456, 468, 35 Sup. Ct. 896, 59 L. Ed. 1406; Penn. R. R. v. Sonman Co., 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188.

(8) The parties, shipper, carrier, and consignee, may be three separate parties, or a less number. Kelly v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; Ohio R. R. Com. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Stewart v. Michigan, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786; Oil Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459; Kirmeyer v. Kansas, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. Ed. 721; City of Lee's Summit v. Jewell Co., 217 Fed. 965, 133 C. C. A. 637.

(9) Absence of a specific consignee at the time of shipment does not alter the character of the shipment. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; T. & New Orleans R. Co. v. Sabine Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; Grand Union Tea Co. v. Evans (D. C.) 216 Fed. 791.

(10) The exact destination need not be fixed at the time of the shipment, provided the intent and purpose is to continue the journey beyond the limits of the state in which the journey begins. Ohio R. R. Co. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; T. & N. O. R. Co. v. Sabine Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442.

Reverting to the character of the business transacted by the receiver, it is to be noted: (a) That the shipment is started on its journey from one state to another, (b) with the purpose that it shall be delivered to a consumer. (c) That it moves continuously from a point of shipment in one state to the consumer in another state. (d) That it is moved part of the way in the pipe lines of the receiver, and part of the way in the pipe lines of the distributing company, whether as agent of the receiver or as connecting carrier is immaterial. (e) The destination of the shipment is intended at the time of the shipment to be beyond the state, although the name of the particular consumer for any specific portion of the gas shipped is not known. (f) There is no stoppage in transportation. (g) The title to the gas remains in the receiver until delivery to the ultimate consumer.

In substance and effect there are continuing orders by the consumers to the receiver through the distributing company to supply them with gas from the Oklahoma fields. Such transactions have the character of interstate commerce at their inception, and this character continues until final delivery. Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565, and cases cited. Even though the shipment is started before a definite order for a specific amount is given, still, the continuous and usual course of business determines the character of the shipment. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; Grand Union Tea Company v. Evans (D. C.) 216 Fed. 791.

Applying the foregoing principles to the facts in the case at bar, the conclusion follows that the transportation of gas carried on by the re-

ceiver is interstate commerce, and that the character of the business inheres from the beginning of the journey in Oklahoma to the termination thereof at the burner tips in Kansas or Missouri.

(B) It is claimed, however, by the Commission, as above noted, that though the business of transporting gas by the receiver from Oklahoma to Kansas and Missouri may be interstate commerce in its inception, nevertheless it loses that character by reason of the local service in distributing the same in Kansas. This contention cannot be sustained. Local incidental service at the initial point of the journey does not prevent the interstate character from attaching to the shipment; nor does a similar incidental local service at the end of the journey destroy that character. So. Pac. Term. Co. v. I. C. C., 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; United States v. Ill. Cent. (D. C.) 230 Fed. 940; Penn. R. Co. v. Clark Co., 238 U. S. 456, 465–468, 35 Sup. Ct. 896, 59 L. Ed. 1406; So. Ry. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Penn. Ry. Co. v. Sonman, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; Grand Union Tea Co. v. Evans (D. C.) 216 Fed. 791; City Lee Summit v. Jewel Co., 217 Fed. 965, 133 C. C. A. 637. Nor is the business carried on by the receiver, though interstate commerce in character, of such inherent local nature that it is subject to the regulation and control that is sought to be imposed by the state in the instant case. It is not always easy to determine where the line must be drawn between that exertion of state power in reference to interstate commerce, which is allowable on the one hand, and that which is forbidden on the other.

In Leisy v. Hardin, 135 U. S. 100, on page 119, 10 Sup. Ct. 681, on page 687 (34 L. Ed. 128), the court said in its opinion:

"Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

It is true that property, though started as an interstate shipment, may, between the point of shipment and the point of ultimate destination, cease to be the subject of interstate commerce, and become subject to state action. The length and the purpose of the interruption of the transit are to be considered in determining the question. Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 349; Gen. Oil Co. v. Crain, 209 U. S. 211, 229, 28 Sup. Ct. 475, 52 L. Ed. 754. Incidental stoppage is immaterial. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. It is also true that, though the shipment at its destination be unsold and still retain its character of interstate shipment, it may nevertheless be subject to certain state action; for example, taxation in connection with taxation of general

property throughout the state. Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. Also to inspection. But this must not be of such a character as to unduly burden interstate commerce. Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Patapsco Co. v. Brd. of Agric., 171 U. S. 345, 356, 18 Sup. Ct. 862, 43 L. Ed. 191.

But state action is not permissible in certain other directions; for example, prohibition of the sale of the goods, except by express authority through congressional enactment. Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Bowman v. Railway, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150. Even in the matter of taxation, state action is not allowable which places taxation upon "the occupation of doing a business" interstate in character. Leloup v. Port of Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1383, 32 L. Ed. 311; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368. The distinction between permissible and nonpermissible state action lies in "the nature and operation of the particular exertion of state authority." Am. Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. In the case of the State Freight Tax, 15 Wall. 232, 21 L. Ed. 146, the rule was announced in the following language:

"Whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature."

In the case of South Covington Ry. Co. v. Covington, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792, the court, in passing upon a municipal ordinance governing and regulating street cars running between that city and Cincinnati, Ohio, and with reference to one of the sections making it unlawful for the company to permit to ride in its cars more than one-third of the number of passengers over and above the number for which seats were provided therein, stated as follows:

"If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. De Cuir, 95 U. S. 485, 489 [24 L. Ed. 597], 'commerce cannot flourish in the midst of such embarrassments.' We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

As to the character of the business of transportation of natural gas, the Circuit Court of Appeals of this circuit has spoken as follows in the case of Haskell v. Cowham, 187 Fed. 403, 408, 109 C. C. A. 235, 240:

"Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of Congress

relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or its officers which prohibits it, or substantially restrains its freedom, is violative of the Constitution and void. Welton v. State of Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Walling v. Michigan, 116 U. S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; Case of the State Freight Tax, 15 Wall. 232, 21 L. Ed. 146."

This case was cited with approval in West v. Kansas Natural Gas Company, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

If anything further than the foregoing statement as to the character of the business actually carried on, and the application thereto of above cited authorities, were necessary, in order to establish that the business carried on by the receiver is interstate in its character, and of such a nature as not to be properly susceptible of or subject to local state regulations such as the 28-cent rate order, we have the statement of the Public Utilities Commission itself in its opinion of July, 1915, which opinion concluded with the following language:

"It developed upon the hearing that more than half the natural gas supplied and marketed by complainants is sold in the state of Missouri. It is conveyed by means of pipe lines passing through Kansas City, St. Joseph, and other cities in our sister state. It would be manifestly unfair to permit complainants to advance the price of gas to their Kansas patrons, unless a corresponding increase were made to consumers in Missouri. It is conceded that an advance in Kansas, without a similar one in Missouri, would be unavailing for the purposes contemplated by complainants, and they do not desire any advance in Kansas, except as it may be simultaneous with a corresponding one in Missouri. This Commission, therefore, awaits the pleasure and action of the rate-regulating body or bodies of Missouri having jurisdiction of the subject-matter; and if in that state proper and necessary orders be issued establishing a schedule of rates as herein outlined, an order, effective, if possible, simultaneously, will be issued by this Commission, in accordance with the views herein expressed."

The same conclusion was apparently reached by the Supreme Court of the state of Kansas, in State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22, when in its opinion the court said:

"The last question for our consideration concerns the legality of the rates, both those that are in existence at the present time and those named in the opinion of the Commission. The Commission finds that, where the net price of gas to consumers is now 25 cents per thousand cubic feet, the rate should be increased to 28 cents. This, in effect, is a finding that the rates now in existence are not compensatory. It then became the duty of the Commission to fix compensatory rates, taking into consideration the gas sold in Missouri, assuming that compensatory rates will be fixed in Missouri. However, we may say that obedience to law in making rates in Kansas cannot legally be made dependent on obedience to the same law in Missouri."

The state of Kansas itself has thus realized that the business carried on by the receiver is of such character that the fixing of rates thereon is not a merely local matter. Furthermore, control over the supply of gas is not within the power of the Commission. The supply is an important element, however, in the fixing of rates. This state of affairs militates strongly against a conclusion that the business is of such character as to be properly subject to state control in the matter of rates.

The case of Manufacturers' Heat & Light Company v. Ott (D. C.) 215 Fed. 940, relied upon by the defendant Commission, must be disregarded, if it conflicts with the decisions above cited, for these decisions are binding upon this court. It may, however, in my opinion, be distinguished by the fact that the great bulk of the business transactions considered in that case were concededly intrastate, and the portion claimed to be interstate of very minor importance; whereas, in the instant case exactly the reverse of those facts is true. It is true that about 6 per cent. of the gas delivered by the receiver in Kansas is produced in Kansas, but this cannot alter the general situation. Where a substantial part of a business is interstate commerce, the imposition of burdens and regulations thereon by state action cannot be justified by the fact that a portion of the business thus sought to be controlled and regulated is intrastate. See Leloup v. Port of Mobile, 127 U. S. 640, 647, 8 Sup. Ct. 1383, 32 L. Ed. 311; Norfolk Ry. v. Pennsylvania, 136 U. S. 114–119, 10 Sup. Ct. 958, 34 L. Ed. 394; Crutcher v. Kentucky, 141 U. S. 47, 59, 11 Sup. Ct. 851, 35 L. Ed. 649; Galveston Ry. v. Texas, 210 U. S. 217, 228, 28 Sup. Ct. 638, 52 L. Ed. 1031; W. U. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Williams v. Talladega, 226 U. S. 404, 419, 33 Sup. Ct. 116, 57 L. Ed. 275.

It is claimed by the defendant Commission that the inaction of Congress, in view of the character of the business, is an indication that it was intended that state action, such as is involved in the instant case, might properly be exercised. Here again it is not always easy to draw a hard and fast line between cases in which, in the absence of congressional action, the state may properly act, and those in which it may not act. In the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, the court in reference to this subject used the following language:

"The principle which determines this classification underlies the doctrine that the state cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national Legislature constitutionally ordains."

Even in the absence of congressional action, the exercise of state authority over interstate commerce does not extend to the fixing of rates for the transportation of goods in such commerce. This doctrine was announced before the establishment of the Interstate Commerce Commission, and applies not merely to cases where that Commission has jurisdiction in reference to rates, but also in the absence of such jurisdiction. Wabash Ry. Co. v. Ill., 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; L. N. R. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416; Ohio Ry. Com. v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. In the case of Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004, the following language is used:

"It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States, nor

to do more than reaffirm the equally well-settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void."

The conclusion reached, therefore is that the interstate commerce in which the receiver is engaged is not of a local nature, and is not, even in the absence of action by Congress, subject to burdens or regulations imposed by state action, which are substantial rather than incidental in their nature.

(C) Is the fixing of the 28-cent rate by the Public Utilities Commission in the present controversy a burden or a regulation upon interstate commerce such as the state is not authorized to impose? It is not necessary to review the many cases deciding what constitutes a burden upon or a regulation of interstate commerce. Reference may simply be made to the following amongst a great number: State Freight Tax Cases, 15 Wall. 232, 21 L. Ed. 146; Western U. Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Bucks Stove Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189; Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193.

It appears from the evidence in the case that gas transported by the receiver from Oklahoma costs at the initial point 5 to 7 cents per 1,000 cubic feet. The difference between this cost price and the selling price to the consumer is largely, if not wholly, made up of the cost of transportation. It would seem to require no argument to establish that any statute or order fixing the price at which gas may be sold to the ultimate consumer is, under the circumstances disclosed by the present record, in fact a fixing of rates for the transportation of the gas. If this be the case, then, under the authorities heretofore cited, state action fixing such rates is not authorized; it being a direct burden upon and a direct attempt to regulate interstate commerce. It is true the cases cited, involved rates by common carriers; but, as already noted, interstate commerce is equally protected, whether engaged in by a common carrier or by individuals.

That the 28-cent rate is in reality a transportation rate, and so intended by the Commission, is also shown by the method adopted by the Commission in fixing the rate, viz.: First, dividing the property used by the receiver in his business into two parts, that used in production, and that used in transportation, and then using the valuation of the latter only as a basis for fixing the rate. In its opinion upon the preliminary injunction the enlarged court used the following language:

"That the enforcement by a state through its officers of any legislative act preventing interstate commerce in this article of interstate commerce, either by a direct prohibition of such commerce in this article by state law, or by an inhibition of a sale of the article in the state at any rate price whatever, or at any price above a price so low that the laws of trade make it impossible to purchase or procure it in another state and to sell and deliver it in the prohibiting state at that price with profit, substantially burdens and unduly inter-

feres with interstate commerce, in violation of the commerce clause of the Constitution of the United States."

To the foregoing statement may be added, perhaps as a corollary, that whenever a state, acting under the guise of fixing prices at which an article of interstate commerce brought into the state may be sold by the introducer upon its arrival at destination, in reality thereby necessarily fixes or regulates the rate of transportation of such article from its initial point to the point of destination, such action by the state in fixing the sale price is an attempt to directly burden and regulate interstate commerce, and is, therefore, unauthorized. When tested by either or both of the last-stated principles, the 28-cent rate order of the Public Utilities Commission of Kansas, dated December 10, 1915, made under an assumed authority from the state, is found to be an attempt to directly and unduly burden and regulate interstate commerce, and is therefore unauthorized. This does not necessarily mean that the receiver, or the company after the receivership, can fix rates at their discretion. There still remain remedies for unreasonable rates. See Covington Bridge Co. v. Kentucky, 154 U. S. 204, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962.

To sum up the foregoing, it is held:

First, that the rates in force on January 1, 1911, under Laws Kan. 1911, c. 238, § 30, for the sale and delivery of natural gas by the receiver of the Kansas Natural Gas Company to consumers in Kansas, either directly or through intermediaries, were on December 10, 1915, and still are, noncompensatory, unreasonably low, confiscatory, and violative of the Constitution of the United States.

Second, that the new rates fixed by the Public Utilities Commission of Kansas by its order of December 10, 1915, known as the 28-cent rate order, for the sale and delivery of natural gas by the receiver of the Kansas Natural Gas Company, to consumers in Kansas, either directly or through intermediaries, were on said date, and still are, noncompensatory, unreasonably low, confiscatory, and violative of the Constitution of the United States.

Third, that section 30, c. 238, Laws Kan. 1911, in so far as it attempted to fix rates for the sale and delivery of natural gas by the receiver of the Kansas Natural Gas Company to consumers in Kansas, either directly or through intermediaries, was an attempt directly and unduly to burden and regulate interstate commerce, and therefore unauthorized and void.

Fourth, that the so-called 28-cent rate order by the Public Utilities Commission of Kansas, dated December 10, 1915, made under an assumed authority from the state, is an attempt to directly and unduly burden and regulate interstate commerce, and is therefore unauthorized and void.

Plaintiff is entitled to have the preliminary injunction heretofore granted made permanent. The court expressly reserves jurisdiction over the parties to the suit and over the other issues involved therein until further order is made in reference thereto.

A decree may be prepared in accordance with the foregoing decision.

In re JOHN LIDDLE CUT STONE CO.

(District Court, S. D. New York. July 13, 1916.)

1. CHATTEL MORTGAGES ⟸124—PROPERTY COVERED—AFTER-ACQUIRED PROPERTY.
   A mortgage upon real estate upon which a stonecutting plant was located, and the buildings and improvements, together with the machinery and other personal property used in such business, did not embrace machinery installed after the mortgage was executed, except so far as such machinery had become part of the realty.
   [Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 208, 209.]

2. MORTGAGES ⟸133—PROPERTY COVERED—FIXTURES.
   That such mortgage by its terms embraced machinery "and other personal property" did not limit it as a mortgage of real estate to the land and buildings.
   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 260, 264, 265.]

3. FIXTURES ⟸18(5)—RIGHTS OF MORTGAGEES—MACHINERY.
   In a stonecutting plant there was installed a traveling crane of steel construction with concrete foundations, a circular saw weighing about 10 tons, and a planing machine weighing about 20 tons. The track of the crane was upon heavy steel girders resting on steel pillars, the bases of which were sunk in concrete and anchored therein by bolts. The saw consisted of two tracks set in a concrete foundation, two tables mounted on wheels on the tracks, an overhead track and carriage, and a motor attached to the carriage; the ends of the carriage being fastened to concrete pillars, and the anchor bolts buried in such pillars. The base of the planing machine was imbedded in concrete and secured by anchor bolts. To a large extent they could not be removed without injuring the buildings and could not be removed to any extent without disintegration of the plant as a complete whole. *Held* that, as between a mortgagor and mortgagee, they constituted a part of the realty.
   [Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 38–41.]

4. FIXTURES ⟸18(5)—RIGHTS OF MORTGAGEES—MACHINERY.
   Though cross-girders supporting the hoisting machinery and hoisting machinery which traveled along such cross-girders, the tables used in connection with the saw, and the belting of some of the planing machinery, were not physically annexed and could be removed, they were parts of an entire structure constituting one co-ordinated piece of machinery, and were parts of the machinery, and hence parts of the land itself.
   [Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 38–41.]

In Bankruptcy. In the matter of the John Liddle Cut Stone Company, alleged bankrupt. On application for leave to foreclose a mortgage and for leave to make the receiver in bankruptcy a party. Motion granted.

Everett, Clarke & Benedict, of New York City, for petitioners.
George H. Gilman, of New York City, for receiver.

AUGUSTUS N. HAND, District Judge. This is an application by certain trustees under a will for leave to foreclose a mortgage which they hold upon premises belonging to the alleged bankrupt known as Nos. 402–422 East 107th street, in the borough of Manhattan, New

York City, and for leave to make the receiver in bankruptcy a party. The mortgage was executed by the alleged bankrupt in 1909, was duly recorded pursuant to the laws of New York, and contained a clause mortgaging, not only these premises, but also specifically the buildings and improvements thereon, together with the machinery, implements, engines, boilers, saws, and other personal property used in the cut stone business of the John Liddle Cut Stone Company thereon. After the making of the mortgage, that company installed upon the premises the following machinery: (1) A traveling crane of steel construction with concrete foundations. The track was upon heavy steel girders resting on steel truss pillars, the bases of which were sunk in concrete and anchored in the concrete by bolts running down a distance of 2½ feet below the sunken base of the pillars. (2) A Fuller patent diamond circular saw weighing about 16 tons, consisting of two tracks set in a concrete foundation, two tables mounted on wheels on the tracks, and an overhead track and carriage for the saw and a motor attached to the overhead carriage. The foundation was 8 feet deep, and the concrete pillars in which the two ends of the overhead carriage are fastened ran a few feet deeper. The anchor bolts for the machine were buried in concrete pillars and were 5 feet long, terminating in anchor bolts. (3) A planing machine fastened in concrete foundations about 8 or 9 feet deep, the base of the machine being embedded in the concrete and further secured in the concrete by anchor bolts running down into the foundation. This machine weighed about 20 tons.

It is evident from the foregoing statement, as to which all parties agree, that the machinery is embedded in or annexed to the ground much more substantially than many buildings, and the photographs submitted show that the removal of the pillars and tracks of the traveling crane would materially injure several of the frame buildings on the mortgaged premises, since these structures have been built around the steel pillars of the crane and lie beneath the track supported by the pillars. It may be doubted, however, whether the injury to the buildings caused by a removal of the steel pillars and tracks would be alone sufficient to determine the character of this structure and constitute it a fixture.

It is unnecessary to discuss at length what would have been the situation if this machinery had been installed by a tenant, or if the mortgagor and mortgagees had agreed that it should remain and be considered personalty after it was affixed. In the first case, the liberal treatment of the courts toward tenants who seek to remove additions to real property which they have installed for the conduct of their business would probably permit removal during the term. In the second case, I should probably find no sufficient reason for not holding the mortgagees to their agreement, and, as a result, the mortgage would not in such case cover the machinery added to the premises after the execution of the instrument, and it would consequently be general assets of the bankrupt estate which the receiver would be entitled to hold free from any lien.

[1] Under existing circumstances, however, I see no reason to suppose that the clause in the mortgage specifying machinery used in the

business of the mortgagor covered future acquired machinery. It specifically covered then existing machinery only, and can embrace the machinery which has been installed since the mortgage was executed only so far as such machinery has become part of the realty.

A portion of the machinery in question was, I think, so permanently affixed to the realty that it is by the weight of authority part of the land and is covered by the mortgage for that reason. The remaining articles were adapted for a stonecutting plant, were intended to be permanently used as a part of that plant, and were so annexed to or appurtenant to the land as to become fixtures within the authorities. Triumph Electric Co. v. Patterson, 211 Fed. 244, 127 C. C. A. 612; McRea v. Central National Bank, 66 N. Y. 489; Watts Campbell v. Yuengling, 125 N. Y. 1, 25 N. E. 1060; In re Welch (D. C.) 108 Fed. 367; Insurance Co. v. Allison, 107 Fed. 179, 46 C. C. A. 229.

[2] The fact that the mortgage in its terms embraced machinery "and other personal property" does not limit it as a mortgage of real estate to the land and buildings. The mortgage in no way attempted to define what constituted fixtures. It covered chattels used in the stonecutting business and ex abundanti cautela mentioned machinery, engines, boilers, and saws, leaving it to the law to determine their status. In McRea v. Central National Bank of Troy, supra, even a bill of sale covering the fixtures was regarded as unimportant in determining whether they were real or personal property.

In the case of Insurance Co. v. Allison, supra, Judge Wallace stated the law of New York, which is the law to be applied here, as follows:

"The general rule derived from the decisions of the courts of New York is that, unless the annexation is one of a permanent character, so that the machine or other chattel cannot be removed without substantial injury to the freehold, or unless the annexation is of a machine or chattel especially adapted for use in the particular place where it has been put, the purpose of the annexation and the intention with which it has been made are the most important considerations, and are the determining criterion, whether it is a fixture or a chattel."

[3, 4] It is evident, I think, that the three pieces of machinery in question were in general designed by the mortgagor for use in a large stonecutting plant, were architecturally and mechanically necessary for such a plant, and, to a large extent at least, could not be removed without injuring the various buildings. They could not be removed to any extent without disintegration of the plant as a complete whole.

The principal question which presents difficulty relates to the cross-girders supporting the hoisting machinery which are mounted on wheels that travel along the top of the longitudinal girders and the hoisting machinery which travels laterally along the top of the two cross-girders. This structure, though manifestly of great weight, could be lifted off the tracks upon which it runs, and is therefore not in a literal sense physically annexed. The same thing is true of the tables running upon the tracks used in connection with the diamond saw, and these, moreover, do not appear to be of unusual weight. The belting of some of the planing machinery could likewise be removed.

A careful discussion of the general principles laid down by the New York courts, in determining between vendor and vendee and mortga-

gor and mortgagee what are to be regarded as fixtures, may be found in the case of McRea v. Central National Bank of Troy, 66 N. Y. 489. The court there said that:

To create a "fixture" there must be "the union of three requisites: First, actual annexation to the realty or something appurtenant thereto. Second, application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third, the intention of the party making the annexation to make a permanent annexation to the freehold."

And Judge Rapallo later in the same opinion said:

"The purpose of the annexation, and the intent with which it was made, is in such cases the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached, as upon the motive and intention of the party in attaching it."

Now, it seems to me that all the portions of the machinery to which I have referred are appurtenant to the land, are particularly applicable to the use of the premises as a stonecutting establishment, and were intended for a permanent accession to the freehold which was designed to be used for a stonecutting business. It may be said that they were not either sunk in the ground or affixed by rivets or bolts. But this kind of annexation cannot be regarded as a final test. The court said, in the case of Hart v. Sheldon, 34 Hun, 38, quoting from the case of Snedeker v. Warring, 12 N. Y. 170:

"A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection often exercises a controlling influence."

And Judge Parker said in the case of Snedeker v. Warring, 12 N. Y. 170, where a statue of Washington and a sun dial, neither of which was fastened to any foundation or sunk in the ground, were under consideration:

"I apprehend the question, whether the pyramids of Egypt or Cleopatra's Needle are real or personal property, does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence."

The Master of the Rolls employed the same argument in the case of D'Eyncourt v. Gregory, L. R. 3 Eq. 382, in adjudging certain carved figures and marble vases in the great hall of a country house part of the real estate. He said:

"I think it does not depend on whether any cement is used for fixing these articles or whether they rest by their own weight, but upon this, whether they are strictly and properly part of the architectural design for the hall and staircase itself, and put in there as such as distinguished from mere ornaments to be afterwards added."

The question, therefore, is whether the articles under consideration are parts of the machinery, which is in turn a part of the land itself. I think both the belting and the tables, as well as the traveling crane,

are, as counsel for the trustees have aptly put it, a portion of an entire structure constituting "one co-ordinated piece of machinery."

In the case of Sheffield, etc., Society v. Harrison, L. R. 15 Q. B. D. 358, Cotton, L. J., said in discussing whether belting used to turn machinery was a fixture:

"These belts are not merely pieces of leather, but they were essential parts of certain machines, and these machines were affixed to the freehold. These belts were fitted to the machine and were only fit to be used with it as part of it; and, if the machine was part of the land, these belts were parts of the land."

Brett, M. R., and Lindley, J., sitting in the divisional court of appeal, were of the same opinion.

The tables running upon tracks used in connection with the diamond saw in some ways resemble rolling stock of a railroad which is generally regarded as personal property, but the cars and engines in use upon our railroads are shifted from one part of the road and often from one part of the country to the other. These tables are necessary to move the stone in proper adjustment to the diamond saw and are a necessary part of the machine as a whole.

No subject is more dependent upon the circumstances of each particular case and abounds in more conflicting judicial decisions than that of fixtures. Because of the confusion of the subject, I have quoted at length from some of the decisions in order so far as possible to justify my conclusions by explicit judicial utterances.

To summarize: My opinion is that the mortgaged premises were designed for a stonecutting plant, the machinery in question was all part of this plant, and, so far as any of it is not physically annexed to the land, it is a portion of structures that are permanently annexed. All the articles in question are therefore fixtures within the principles I have referred to.

For the foregoing reasons, the motion for leave to make the receiver and his successor, the trustee, parties to a foreclosure suit, is granted.

In re LIBERTY DOLL CO., Inc.

(District Court, S. D. New York. May 7, 1917.)

1. DAMAGES ⟸79(1)—LIQUIDATED DAMAGES OR PENALTY.

By an agreement between claimant and the bankrupt, a corporation, claimant was to make advances for labor and material on orders received by the bankrupt acceptable to claimant, to whom the bankrupt was to assign all accounts receivable for merchandise covered by such orders, the merchandise itself, etc. Claimant agreed to supervise the collection of all accounts so assigned, to advise as to the credit and financial responsibility of the bankrupt's accounts, assist in the bankrupt's credit department, and perform all such other services usual in its business. At its option the advances might be applied directly in payment for labor or materials. The bankrupt was to pay interest on daily balances, and, in addition, though advances were to be made only on orders acceptable to claimant, and it was therefore not obligated to make any advances, it was to be paid a commission of $2,500 for its services until orders or accounts receiv-

able amounted to $100,000 a year, when it was to be paid a commission of 2½ per cent. It was also to be paid all actual disbursements and reasonable attorney's fees. *Held* that, while the contract was not usurious, because the bankrupt, being a corporation, could not plead usury under the state law, it was unconscionable, and the provision for the payment of $2,500 was in the nature of a penalty, as there would be no difficulty in ascertaining the value of the services actually rendered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 164.]

2. DAMAGES ⟸80(1)—LIQUIDATED DAMAGES OR "PENALTY."

Where the sum agreed upon as liquidated damages is so great as to be unconscionable, it will be regarded as a "penalty."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170–172.

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

3. DAMAGES ⟸80(1)—LIQUIDATED DAMAGES OR PENALTY.

Where the amount stipulated as liquidated damages is disproportionate to the presumable and possible damages, or to a readily ascertained loss, it will be treated as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170–172.]

4. CHATTEL MORTGAGES ⟸115—ATTORNEY'S FEES—RIGHT TO ATTORNEY'S FEES.

Under a chattel mortgage given as additional security for advances under a contract providing for the payment of all of the lender's disbursements or expenditures and all reasonable attorney's fees, where the lender was compelled to defend the validity of the mortgage in bankruptcy proceedings, it was entitled to a reasonable attorney's fee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 190, 191.]

5. BANKRUPTCY ⟸474—COSTS—REVIEW OF REFEREE'S ORDERS.

Where, on the trustee's motion for review of an order of the referee in favor of another litigant, neither party was wholly successful, the disbursements should be taxed equally against the trustee and such litigant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884.]

In Bankruptcy. In the matter of the Liberty Doll Company, Incorporated. On review of an order of the referee, directing the trustee in bankruptcy to pay to Levison & Co. $2,412.61, and $250 for the fees and disbursements of their attorney, aggregating in all $2,662.61. Order modified.

On February 14, 1916, Levison & Co., as party of the first part, entered into a written agreement with the bankrupt corporation, as party of the second part. For the convenience of those interested in the principal question involved, the essential features of the agreement are herewith quite fully set forth.

"First. The first party hereby agrees to advance unto the second party * * * such sums of money as may be required by the second party for the purpose of paying for labor and material on orders received by the second party in its business, provided such orders are acceptable to the first party as security, and in such event the first party agrees to advance to the second party an amount on each order not exceeding fifty (50%) per cent. of the selling price indicated therein. Upon delivery and acceptance of merchandise, and the assignment to first party of the account receivable created thereby and delivery of invoices therefor, first party will make a further advance of 25% of the amount of invoice; it being the intention that the total advance under any account receivable shall not exceed 75% of the net amount thereof.

"Second. The second party agrees to execute * * * and deliver unto the first party an assignment * * * of all the accounts receivable there-

after to be created by reason of the delivery and acceptance of the merchandise provided for in said orders, together with all moneys due and to grow due thereon.

"Third. And in order to carry out the intents and purposes of the agreement between the parties hereto, the second party has agreed to, and * * * does hereby, sell, assign, transfer, and set over unto the first party all such orders upon which the first party shall hereafter make advances, as hereinbefore provided, and of all the moneys due and to grow due thereon, * * * and does hereby sell, assign, transfer, and set over unto the first party each and every account receivable created by the delivery and acceptance of the merchandise covered in each such order, and of the moneys due and to grow due upon each such account receivable, and does hereby sell, assign, transfer, and set over unto the first party all and each and every article of merchandise used or to be used in the filling of any order upon which the first party shall have made advances and which shall have been assigned as hereinbefore provided for, including raw material and finished article, and such merchandise used in the orders above provided for shall at all times be and remain the property of the first party herein until actually delivered to and accepted by the customer giving such order, and, should such customer reject or return said completed merchandise, such rejected or returned merchandise shall at all times be and remain the property of the first party herein, wherever the same may be situated, and shall so remain the property of the first party until any and all advances made by the first party to the second party shall have been fully liquidated and discharged. Such returned merchandise may be reshipped or redelivered, and in such event the accounts receivable created thereby shall be immediately assigned to the first party as additional collateral, and the same are hereby so assigned.

"Fourth. The first party agrees to supervise the collection of all accounts assigned to them, and to use due diligence in the collection thereof, but they shall not be liable for any failure to collect provided the first party has used such diligence, to issue statements and draw drafts as and when necessary, to advise as to the credit and financial responsibility of the accounts of the second party and to assist in the credit department of the second party, to open and keep accurate and true books of account concerning the accounts transferred and assigned to it, and render unto the second party reports of collection and credits, and to perform all such other services usual in the business of the first party.

"Fifth. The advances to be made by the first party of fifty (50%) per cent. of the amount of any order, as above provided for, shall, at the option of the first party, be either turned over unto the second party, or be applied by the first party to the payment for materials to be used in the filling of such orders and the payment of labor to be employed therefor. Invoices for materials and merchandise purchased for the filling of such orders are to be submitted to the first party for payment and the weekly pay roll for labor for such purpose to be submitted on Saturday of each week, and the same to be paid by the first party.

"Sixth. All checks received by the second party in payment of any assigned orders, or accounts receivable, shall at all times be and remain the property of the first party, and upon receipt thereof by the second party the identical checks so received shall immediately be delivered to the first party, and the first party is hereby authorized and empowered by the second party to indorse such checks in the name of the second party, if need be, and to indorse or sign any receipts, warrants, notes, checks, or drafts, or any other negotiable instruments received in payment of such accounts receivable. And the second party does hereby constitute and appoint first party its attorney irrevocable, for it and in its name, place, and stead, or in the name of the first party, and at the cost and expense of the second party, to ask, demand, receive, collect, compromise, sue for, and institute and complete any actions or proceedings whatsoever for the collection of any moneys due upon orders or accounts receivable assigned as aforesaid.

"Seventh. The second party agrees to pay in full and liquidate each and

every advance, whether made upon orders or accounts receivable, within a period of ninety (90) days from the date of such advance.

"Eighth. All sums received from the collection of accounts assigned shall be applied by first party to the credit of second party's account, allowing interest thereon at the rate of six (6%) per cent. per annum, and second party agrees to pay interest at the rate of six (6%) per cent. per annum on all daily balances against it. The equity of 25% in each account receivable when paid shall be applied to the repayment of any advances then remaining unsecured except by assignment of orders; when such advances have been fully liquidated, then such equity shall be paid to second party upon demand.

"Ninth. The second party agrees to pay unto first party, for the services to be rendered by first party, a commission of twenty-five hundred ($2,500) dollars, same to be paid in advance, and such sum to be in full payment of all of the first party's services and commissions until the gross amount of orders or accounts receivable upon which the first party shall have made advances shall have amounted to one hundred thousand ($100,000) dollars in each year; said commissions to be paid in any event, regardless of the amount of gross orders or accounts receivable assigned upon all advances made in excess of the said sum of one hundred thousand ($100,000) dollars in any year. The second party agrees to pay unto the first party a sum equal to two and one-half (2½%) per cent. of the gross amount of orders or accounts receivable assigned to the first party. In addition thereto, the second party agrees to pay to and reimburse the first party for any actual disbursements or expenditures, such as postage, exchange on checks, all reasonable attorney's fees and disbursements incurred, if necessary, in the collection of any accounts receivable, or in any other matter made necessary by reason of any of the provisions of this contract.

"Tenth. The second party agrees to pay to the first party, upon demand, the invoice value of any returned merchandise or the amount of any assigned account past due for fifteen days, or the amount of any account, the debtor of which shall have become insolvent. Such accounts shall, however, continue to be held by the first party as additional security for any indebtedness then due from the second party.

"Eleventh. In the event of any default in the terms hereof, or of any misrepresentation concerning any assigned account, or any misrepresentation in regard to any matter pertaining to this agreement, or in the event that the second party becomes insolvent, or makes an assignment for the benefit of creditors, or if bankruptcy proceedings be instituted against it, or a petition be filed by it, or if any judgment be entered against the second party and remain unpaid for a period of thirty days, all indebtedness of the second party to the first party then outstanding shall immediately become due and payable to the first party upon demand.

"Twelfth. All collateral coming into the possession of the first party shall at all times be and remain as collateral for any liability then outstanding from the second party to the first party.

"Thirteenth. First party shall have the right to examine the books of the second party at all reasonable times for the purpose of verifying the validity of any assigned accounts, and shall have a lien upon all moneys, property, or collateral of the second party which is now, or may hereafter be, in the company's possession, or under its control, for any and all indebtedness which may accrue under this agreement or otherwise.

"Fourteenth. Second party represents and warrants that it is absolutely solvent, and makes this statement for the purpose of inducing the first party to make the advances herein provided for, knowing that the first party relies upon this representation in so doing.

"Fifteenth. It is agreed between the parties hereto that no waiver by the first party of any of the terms, provisions, or covenants hereof shall be deemed a waiver of such term, provision, or covenant thereafter. The first party shall be entitled thereafter to the strict performance of such term, provision, or covenant; and this covenant shall also apply to any other agreement or instrument between the parties hereto.

"Sixteenth. The second party, as security for the full and faithful performance of each and every of the covenants, terms, and conditions of this agreement, hereby sells, assigns, transfers, sets over, and conveys unto the first party the following described policies of insurance. * * *"

As further security, it was agreed between Levison & Co. and Kahnweiler, president of the bankrupt, that the bankrupt would execute and deliver a chattel mortgage for $8,000 on its machinery, fixtures, etc. Owing to the necessity of obtaining an assignment of an existing mortgage held by one Behrman, or having the Behrman mortgage satisfied and a new mortgage executed, a delay occurred, so that the bankrupt did not execute and deliver the chattel mortgage until February 19, 1916. This mortgage was promptly filed in the New York county register's office. The details of the execution and delivery of the chattel mortgage are fully and correctly dealt with by the referee and need not be here repeated. On April 17, 1916, the bankrupt made a general assignment for the benefit of creditors, which was followed the next day by the filing of a petition in involuntary bankruptcy.

The total amount of advances made by Levison & Co. up to the filing of the petition in bankruptcy, was $8,341.37. Against these advances, Levison & Co. had collected $8,749.45. After deducting interest and other charges, there still remains a small amount in the hands of Levison & Co. over and above their advances, so that they have received full payment, and this small balance is due from them to the trustee, unless the referee was right in holding that they were entitled to $2,500 under paragraph ninth of the agreement, and $250 attorney's fee under the same paragraph.

Benjamin B. Greller, of New York City, for the motion.
S. C. Sugarman, of New York City, opposed.

MAYER, District Judge (after stating the facts as above). Two questions are in controversy: (1) The validity of the chattel mortgage; and (2) the legal effect of paragraph ninth of the contract. I am satisfied that the mortgage was valid. The testimony of Sugarman, the attorney for Levison & Co., is clear and convincing in respect of the history and details of the mortgage transaction, and the report of the referee need not be added to in that regard.

[1] *Paragraph Ninth.* As the bankrupt is a corporation, the trustee, under the New York law, cannot plead usury. The provisions of the ninth paragraph are, however, different from those in such reported cases as have been called to my attention. Levison & Co. were not under any binding obligation to advance a dollar, because under paragraph first of the contract the advances were to be made only if the orders received by the bankrupt were "acceptable to" Levison & Co. "as security." This gave Levison & Co. uncontrolled discretion at any time to refuse to make further advances. Such a provision was, of course, not open to criticism, for, where the lender is financing a business on orders, he may, with propriety and wisdom, insist that he shall be the sole judge of the acceptability or character of the security upon which he is asked to make advances. But because this provision of paragraph first enabled Levison & Co. to decline at any time to make further advances, it was possible under paragraph ninth for Levison & Co. (quite irrespective of bankruptcy), to receive $2,500 and attorney's fees, even though they had advanced far less than the $100,000 contemplated.

I fully recognize that there are many persons in the same kind of business as Levison & Co., and that it is not the function of the courts to make contracts for grown-up persons. Doubtless there is an useful

field for lenders of this character, so long as their contracts are fair and commercially liveable; but, when these contracts are unconscionable on their face, the courts will scrutinize them closely, to determine, inter alia, whether a liability to pay is really in the nature of an agreement for liquidated damages or merely a penalty in an easily penetrated disguise.

The referee was impressed with the argument of counsel for Levison & Co. as to the "unusual character" of the agreement, for in his opinion he stated:

"In explanation of the apparently unconscionable terms of this agreement, by which, according to the trustee's theory, these petitioners took advantage of the bankrupt's necessity, the petitioners urge what they contend is the unusual character of the transaction. They point out that the advancements were made, not upon actual accounts receivable, but upon mere orders which had not been filled."

But a mere reading of the contract will show that the distinction suggested is of the most shadowy kind; that the lenders were fully protected, and the borrower bound hand and foot. In Matthews v. Coe, 49 N. Y. 57, and 70 N. Y. 239, 26 Am. Rep. 583, the action was for conversion, brought by the owner of the property, on the theory that the defendant had no right to hold it by virtue of a contract void for usury.

"The agreement between the parties" said Judge Allen, in 70 N. Y. at page 242 [26 Am. Rep. 583], "was in form the usual commercial contract by which a commission merchant contracts with a dealer in produce or other merchantable commodity for the loan or advance of his money at the legal rate of interest, to enable the dealer to purchase or carry his merchandise, and also for an agreed commission to undertake the care, management, and sale of the commodity. Such contracts, proper and usual in form, may be made covers for usury, and, when this fact is established by competent proof, they are within the condemnation of the laws against usury, and void. The question is upon contracts for the transaction of a commission business in connection with the use of money, whether a fair, reasonable, usual, and customary allowance for the trouble and inconvenience of transacting the business only has been secured, or whether, under the guise of a commission for services, trouble, and expenses, the lender has sought to and has reserved and secured to himself compensation for the use of his money in excess of the rate of interest allowed by law. The contracts are not necessarily usurious, and the onus is upon the party, seeking to impeach them for usury, to prove the guilty intent, and that the contract is a cover for usury, and for the loan of money upon usury."

The contract between the parties (see record on appeal) provided that the lender was to receive interest on his advances and 2½ per cent. on the advances by way of commission. In Spain v. Talcott, 165 App. Div. 815, 152 N. Y. Supp. 611, Talcott (in addition to interest), for his "services as factor, supervisor, and selling agent," was to receive 3½ per cent. commission on the sale of consigned goods up to $200,000 and 3 per cent. upon sales in excess of that amount. While Spain really conducted the business, nevertheless Talcott, if called upon, was obligated to act as factor and selling agent, and in fact collected the bills. See, also, Cockle v. Flack, 93 U. S. 344, 346, 33 L. Ed. 949. In Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780, the circumstances were peculiar, and the contract contemplated the actual services of Burden, a retired merchant and experi-

enced accountant, who wished to secure light employment and was willing to lend money if he could secure such employment. The contract will be found in the case reported under the title In re Canfield, 193 Fed. 934, 113 C. C. A. 562, and under paragraph VII thereof it was provided that Burden—

"shall be entitled to compensation for the labor and services to be performed, * * * which compensation is to be measured by computing 1 per cent. per month upon whatever part of the advance shall remain uncollected on the said accounts. * * *"

The contract in Re Mesibovsky, 200 Fed. 562, 119 C. C. A. 42, provided that the 2 per cent. commission was to be calculated on the amount due from the customer. In the case of In re Fishel, 198 Fed. 464, 117 C. C. A. 224, the commission was to be figured on "the gross amount of accounts of the customer assigned to the banker."

From the foregoing it will be seen (1) that all these contracts fixed the commissions or compensation upon the theory that such commission or compensation should be paid for services actually rendered by one obligated to render them if called upon, and (2) that the commission or compensation was to be calculated on some definite and reasonable basis. In none of the contracts considered in these cases can be found any provision such as the ninth paragraph, which obligates the borrower to pay a fixed amount, irrespective of services rendered.

It will be noted that the services agreed to be rendered under paragraph fourth are not the services of a factor. Where a factor sets aside a part of his warehouse, hires buyers or salesmen, or otherwise obligates himself to others genuinely (and not as a mere cover) to render real service to the borrower, it may be that the parties can contract that, in the event of a breach, a stated sum shall be the liquidated damage. In the case at bar, however, all that the lenders bound themselves to do was to collect the accounts, to advise as to credit, to keep books of account, and "to perform all such other services (ejusdem generis) usual in the business" of the borrower.

[2, 3] I find no evidence as to what they did in this regard, except that, when insolvency overtook the bankrupt, the lenders had collected more than enough to cover their advances. Undoubtedly, as between private individuals, the provision of the ninth paragraph would be void for usury, because the obligation to pay, irrespective of service rendered, clearly would make the $2,500 a bonus for a loan. As against this bankrupt corporation, the provision is certainly in the nature of a penalty. Two rules are well established: (1) That where the sum agreed upon is so great as to be unconscionable, it will be regarded as a penalty; (2) that where the stipulated amount is disproportionate to presumable and possible damages, or to a readily ascertainable loss, the courts will treat it as a penalty. Cotheal v. Talmage, 9 N. Y. 554, 61 Am. Dec. 716; Ward v. Hudson River Bridge Co., 125 N. Y. 230, 26 N. E. 256 (in which Judge Gray points out the distinction between a "penalty" and "liquidated damages"); Curtis v. Van Bergh, 161 N. Y. 47, 52, 55 N. E. 398 (an interesting review by Judge Vann); Cæsar v. Rubinson, 174 N. Y. 492, 67 N. E. 58; Hicks v. Monarch Cycle Mfg. Co., 176 N.

Y. 111, 68 N. E. 127 (opinion by Judge Werner analogously in point here); Dunn v. Morgenthau, 73 App. Div. 147, 76 N. Y. Supp. 827, affirmed 175 N. Y. 518, 67 N. E. 1081; Perley v. Shubert, 121 App. Div. 786, 106 N. Y. Supp. 593. See, also, Poppenberg v. R. M. Owen & Co., 84 Misc. Rep. 126, 146 N. Y. Supp. at page 486.

In the case at bar there should be no difficulty in ascertaining the value of the services (such as they were) actually rendered, and I cannot imagine any damages for the breach. The lenders have practically made their own rule of damages, for, in the event that the acceptable assigned orders or accounts reached over $100,000, Levison & Co. were to receive 2½ per cent. on the gross amount thus assigned. To save the expense of sending the matter back to the referee, I think on the evidence in this record that it can be found that Levison & Co. are entitled to 2½ per cent. on $9,475.58, the gross amount of the assigned accounts—a reasonable compensation for the service they bound themselves to render. If, however, Levison & Co. desire to offer proof of damages in excess of this amount, the claim will be remitted to the referee for that purpose only.

[4] I am of opinion that Levison & Co. are entitled to recover a reasonable attorney's fee, because they were compelled to defend the validity of the mortgage. While the services rendered to Levison & Co. in this connection by their attorney are not set forth in detail, the referee was undoubtedly sufficiently familiar with them to be able to fix the fee intelligently, and the sum of $250 seems to me to be reasonable.

[5] As neither litigant has been wholly successful, the disbursements will be taxed equally against the trustee and Levison & Co.

Submit order in accordance herewith on two days' notice.

TOWNE v. EISNER, Internal Revenue Collector.

(District Court, S. D. New York. June 15, 1917.)

1. INTERNAL REVENUE ⟸7—INCOME TAX—GAINS AND PROFITS OF BUSINESS.
Gains and profits from business can only be taxed under Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114, by virtue of ownership of the property from which they are derived.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

2. INTERNAL REVENUE ⟸2—CONSTITUTIONALITY OF REVENUE LAWS.
Under Const. Amend. 16, providing that Congress shall have power to lay and collect taxes on income from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, stock dividends cannot be reached by Income Tax Act Oct. 3, 1913, even though expressly declared taxable thereby, unless they are in fact income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2.]

3. CONSTITUTIONAL LAW ⟸14—STATUTES ⟸188—MEANING OF LANGUAGE—PRIOR CONSTRUCTION BY CONGRESS.
The word "income," as used in Const. Amend. 16, and in Income Tax Act Oct. 3, 1913, must be presumed to have been used in the sense in

which the Supreme Court had theretofore defined it, if judicial definition had been clearly given.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Statutes, Cent. Dig. §§ 266, 267, 276.]

4. INTERNAL REVENUE ⟸7—INCOME TAXES—STOCK DIVIDENDS.
That a stock dividend so lessened the market price of a stockholder's original stock as not to affect the market value of his aggregate holdings is not conclusive that it was not income taxable under Income Tax Act Oct. 3, 1913, § 2, par. B, providing that the net income of a taxable person shall include gains, profits, and income derived from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, as this would be true in case of any cash dividend, extraordinary, or even ordinary.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

5. INTERNAL REVENUE ⟸7—INCOME TAX—STOCK DIVIDEND—"GAINS, PROFITS, AND INCOME."
Stock dividends are taxable income, under Income Tax Act Oct. 3, 1913, § 2, par. B, since, even though not technically dividends, they represent "gains, profits, and income," within the meaning of the statute, and they are subject to the supertax under paragraph A, subd. 2, providing that for the supertax there shall be a return of total net income from all sources, corporate or otherwise.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

6. INTERNAL REVENUE ⟸7—INCOME TAXES—STOCK DIVIDENDS.
Stock dividends are taxable as income, under Income Tax Act Oct. 3, 1913, though paid out of a surplus accumulated and in the treasury of the corporation when the act went into effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

7. STATUTES ⟸225—CONSTRUCTION—SUBSEQUENT LEGISLATIVE CONSTRUCTION.
Income Tax Act Sept. 8, 1916, c. 463, § 2, 39 Stat. 757 (Comp. St. 1916, § 6336b), providing that a cash or stock dividend payable out of earnings since March 1, 1913, shall be considered income, cannot be held to define the income taxable under Income Tax Act Oct. 3, 1913.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298.]

8. INTERNAL REVENUE ⟸2—CONSTITUTIONALITY OF REVENUE LAWS.
Income Tax Act Oct. 3, 1913, construed as taxing stock dividends, is constitutional, for they possess the real essentials of income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2.]

At Law. Action by Henry R. Towne against Max Eisner, Collector of United States Internal Revenue for the Third District of the State of New York. On demurrer to the complaint. Demurrer sustained.

Louis H. Porter, of New York City, for plaintiff.

H. Snowden Marshall, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant.

Archibald R. Watson, Paul D. Cravath, George Welwood Murray, and Charles E. Hughes, all of New York City, amici curiæ.

AUGUSTUS N. HAND, District Judge. This is an action to recover income taxes paid upon stock dividends under protest. The directors and stockholders of the Yale & Towne Manufacturing Company, having a surplus, all of which was earned prior to January 1,

1913, voted on December 17, 1913, to transfer $1,500,000 thereof to its capital account and to apply the same to the payment of an issue of 15,000 shares of new stock, of the par value of $100 a share, and to distribute this stock pro rata among stockholders of record on December 26, 1913. The actual distribution was made January 2, 1914. The effect of this resolution was to increase the capital stock from $3,000,000 to $4,500,000, par. The resolution under which the stock dividend was declared also provided for scrip redeemable at par for fractional shares. The plaintiff was a holder of 8,349 shares of stock of the company, and upon distribution of the stock dividend received 4174½ more. A tax of $20,208.94 was assessed upon his stock dividend, which he paid under protest, and now sues to recover.

The act of October 3, 1913, provides (section B):

"* * * The net income of a taxable person shall include gains, profits, and income derived from * * * interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The ruling of the Treasury Department (Decision 2274, issued December 22, 1915) provides:

"Stock dividends paid from the net earnings or the established surplus or undivided profits of corporations * * * are held to be the equivalent of cash and to constitute taxable income under the same conditions as cash dividends."

[1] Gains and profits from business can only be taxed under the present Income Tax Act by virtue of ownership of the property from which they are derived. They are not, like excise taxes, based upon the earnings of a business, corporate or otherwise. They are direct taxes, under the decision of the Supreme Court in Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and would have to be apportioned, but for the recent enactment of the Sixteenth Amendment to the Constitution. This amendment provides that:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

[2, 3] Now, it is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income. It is likewise true that the word must be presumed to have been used in the constitutional amendment and in the act in the sense in which the Supreme Court had theretofore defined it, if a judicial definition had been clearly given. Kepner v. United States, 195 U. S. at page 124, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655; Latimer v. United States, 223 U. S. at page 504, 32 Sup. Ct. 242, 56 L. Ed. 526; United States v. Baruch, 223 U. S. 191, 32 Sup. Ct. 306, 56 L. Ed. 399.

I cannot, however, accede to the contention of the plaintiff that stock dividends had received such a clear definition in the case of Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525. That, like most, if not all, of the cases where the question has arisen, involved

the consideration whether stock dividends are principal or income in a litigation between a life tenant and remainderman. The stock dividend was there principally based upon a surplus earned prior to the creation of the trust which received it, and the question involved was not whether or not the dividend was income, but whether it belonged to life tenant or remainderman. The Massachusetts courts, with a numerically small following, have adopted the English rule, and held all stock dividends to belong to the corpus of the trust fund, as between life tenant and remainderman, while New York, New Jersey, New Hampshire, Pennsylvania, Maryland, Wisconsin, and other states of the Union have adopted rules of apportionment. In the Matter of Osborne, 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, the New York Court of Appeals held that extraordinary dividends, representing accumulated profits, whether distributable in cash or in the form of stock, are to be apportioned between the corpus of the trust and the income, in the proportion in which the surplus thus distributed has been earned before or after the creation of the trust fund.

These varying rules laid down for the guidance of trustees have been to a considerable extent rules of convenient administration. The English and Massachusetts law, which the Supreme Court adopted in Gibbons v. Mahon, supra, has the advantage of avoiding the difficulty and expense of investigating the facts upon which any apportionment must be based.

After the decision of Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796, it was thought by many New York trustees that extraordinary dividends, whether of cash or stock, if derived from an accumulation of corporate profits and thus appearing in the corporate resolutions, were distributable to the life tenant, irrespective of when they were earned. New York trustees began to rely upon this decision as laying down a definite, even if a rather unjust, rule, when a series of cases of which the Matter of Osborne, supra, was the culmination, practically, though not in terms, overruled Lowry v. Farmers' Loan & Trust Co., and established the method of apportionment I have mentioned.

The cases relating to distribution of extraordinary dividends by trustees are particularly designed to keep the corpus intact under all circumstances, and to furnish trustees with definite rules of conduct. A court may well hold that extraordinary dividends are always capital, because it thinks that so much trouble and expense is avoided that this consideration outweighs occasional injustice to the life tenant. The Supreme Court laid stress upon this consideration in Gibbons v. Mahon, supra, and Mr. Justice Gray remarked that the method of apportionment could not, "* * * without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts * * * and by a distinct and separate investigation * * * of the affairs and accounts of the corporation."

I confess that, if strict justice between life tenant and remainderman is to be attained, I can imagine no other method than that of apportionment possible. The criterion adopted in these cases between life

tenant and remainderman does not necessarily depend on whether the extraordinary dividend is in general income or not, but upon the person to whom it should belong in view of the date of the creation of the trust. For this reason I cannot regard the decision in Gibbons v. Mahon as determining the present issues, or the language of the court there as being at most anything more than a dictum in respect to the matters here involved.

[4] I can give little weight to the argument that the issue of the stock dividend did not affect the market value of the plaintiff's aggregate holdings, and that the distribution of 50 per cent. more stock to the stockholders lessened the market price of their original stock 33⅓ per cent. This would be true in case of any cash dividend, extraordinary, or even ordinary. The cash distributed, plus the market value of the stock after the dividend was paid, would ordinarily be equivalent in value to the stock before the dividend. But the objection seems impressive that the transaction in no wise affected what the stockholder already had, except to give him additional pieces of paper evidencing his ownership. He does, however, have something different before and after receiving the additional stock. What was before a mere chance that he might receive his share of the surplus in cash dividends and a vague right to secure them if the directors withheld them in a way and to an extent that indicated bad faith is now converted into a permanent interest in the capitalized surplus. He has lost the chance of cash dividends and gained an interest in the corporate enterprise that cannot be taken away. This interest is derived from earnings, and may be really of much greater advantage to the stockholder than the possibility or right which he has lost. It becomes capital of the corporation, but in his hands it is income, and in many respects resembles the common extraordinary cash dividend, accompanied by a right to subscribe for additional stock at par to an amount equivalent to the dividend in cash. To say that this distribution is not income, because he received no cash, and the intermediate step is not taken, is, to my mind, quite to disregard the real nature of the transaction. As Lord Eldon said in Paris v. Paris, 10 Vesey, Jr., 185, when discussing the converse of this case:

> "As to the distinction between stock and money that is too thin; and if the law is that this extraordinary profit if given in the shape of stock shall be considered capital it must be capital if given as money."

See Will of Pabst, 146 Wis. 330, 131 N. W. 739.

[5] The contention of plaintiff that corporate dividends are exempt, not only from the normal, but from the super tax, is answered by the requirement in paragraph A, subdivision 2, that for the supertax there shall be a return of "total net income from all sources, corporate or otherwise." While I think the stock dividend is a dividend, it is taxable, irrespective of whether it technically comes within the meaning of the word, because it represents "gains, profits, and income," and thus comes within the language of the Act. I can see no distinction in theory between the present case and that of Edwards v. Keith, 231 Fed. 111, 145 C. C. A. 298, where the Circuit Court of Appeals for this circuit held that commissions of an insurance broker, earned

before the Income Tax Act was passed, but received after, were subject to the Act, or the recent case of Southern Pacific Co. v. Lowe (D. C.) 238 Fed. 847.

It is not important whether in any given case the present stock dividend would belong to the life tenant or remainderman of a trust. In either event, within the meaning of the Income Tax Law, it must be regarded as income, whether it be added to the corpus of the trust or paid to the beneficiary. The Circuit Court of Appeals for the Eighth Circuit, in the cases of Lynch v. Turrish, 236 Fed. 653, 149 C. C. A. 649, and Lynch v. Hornby, 236 Fed. 661, 149 C. C. A. 657, use language inconsistent with the conclusion I have reached in discussing extraordinary cash dividends paid from moneys received by a corporation prior to the time the Income Tax Act went into effect. These dividends, however, were not derived from corporate earnings, but from appreciation of capital which had been converted into cash. They were, therefore, in no sense income, and were not subject to a tax, as the Supreme Court had already held in the case of Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, in construing the old Income Tax Act passed during the Civil War.

The recent case of Brushaber v. Union Pacific R. R., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, held, following Stockdale v. Insurance Cos., 20 Wall. 323, 22 L. Ed. 348, that the Income Tax Act under consideration could not be assailed because of its retroactive character, and that Congress could impose a tax upon income, even when received during a portion of the year prior to the passage of the act. The stock dividend in question, or an equivalent cash dividend, would not belong to the stockholder until declared by the board of directors, so that it was in no proper sense income of the stockholder until that time.

[6] If deferred payments for commissions, which were earned prior to the date of the act, but not payable until after it went into effect, were taxable as income when received, under the rule laid down in Edwards v. Keith, supra, a fortiori is a dividend taxable as income when received, even though paid out of a surplus accumulated prior to the passage of the act, since at no time is there any legal right to the dividend vested in the stockholder until it has actually been declared. Such was the interpretation passed upon the Wisconsin Income Tax Act by the Supreme Court of that state in the case of Van Dyke v. City of Milwaukee, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509. There a dividend paid after the act went into effect, out of surplus earned prior to that time, was held taxable.

The whole matter turns on the new rights which the stockholder gets by the declaration of the stock dividend. The market value of the totality of his holdings may for the time remain the same as before. But as the New York Court of Appeals, in the case of Williams v. Western Union, 93 N. Y. 162, said when speaking of the surplus of the Western Union before the declaration of a stock dividend:

"* * * It was not beyond the reach of the dividend-making power of the directors," but after the dividend was declared, "so far as the solvency and responsibility of a corporation is concerned, they are increased, * * * where it has a surplus of property to correspond to the amount of shares

issued. In such case the surplus property is secured and impounded for the benefit of the creditors of the corporation and for the public, so that thereafter it can never be legally divided, withdrawn, or dissipated in any way."

The new stock, purchased and paid for out of earnings which have been added permanently to capital, is as truly income of the stockholder as the cash from which it was derived was income of the corporation. This cash has by the action of the directors become capital of the corporation, but in its place the stockholder has received new shares, representing a permanent interest in the company, not subject to abatement by dividend distributions which have a value capable of realization in cash. His rights are different from those he had before the dividend was declared, and the shares of stock evidencing the new appropriation of the earnings and creating the new rights are income.

It may be said that in Edwards v. Keith, supra, moneys representing income had not yet come in, whereas in the case at bar they were in the hands of the corporation. Such a distinction, however, treats the stockholder as though he were entitled to a dividend if the money were in the treasury of the corporation. That such is not the correct rule is a principle permeating the whole law of corporations. To go counter to it here would be to require investigations in every case as to when the property out of which dividends are paid accrued to the corporation itself. Indeed, the very year the Income Tax Act was passed it probably was true that a good many of the corporations which were paying their regular dividends were not earning them, but were paying them out of past earnings. Can it be supposed for a moment that Congress intended to require no income tax of the citizen because the regular dividend he received would not have been received at all, if it had depended upon the earnings of the corporation during that year? The real stumbling block which affects every one, and I confess has affected me, is the taxation of very large accumulations of earnings distributed by corporations after the passage of the act. Certainly a mere matter of size can make no difference in determining whether the property taxed is income or not. The doubt I have felt in reaching my conclusion has not been due to the nature of stock dividends, but to the difficulty which Judge Sanborn found in Lynch v. Turrish, supra, in determining whether Congress intended to tax earnings at all which had accrued in the hands of the corporation prior to the passage of the act, but were distributed later. In other words, in determining whether practically to ignore the corporate form and treat earnings whenever distributed as though declared in law at the time they were earned.

[7] The federal Income Tax Act passed September 8, 1916 (Comp. St. 1916, § 6336b), providing that a cash or stock dividend payable out of earnings since March 1, 1913, shall be considered income, has no bearing upon this case. It may be argued that it was a limitation or an extension of the income taxable by the act under consideration, but in neither event can it be held to define the income which was theretofore taxable.

[8] I can have no doubt that the act of Congress taxing the dividends in question is constitutional, for they possess the real essentials

of income. The action of the officials in assessing and collecting the tax was authorized.

The plaintiff has established no claim to a repayment of it, and the demurrer to his complaint is sustained.

GULF OIL CORP. v. LEWELLYN, Internal Revenue Collector.

(District Court, W. D. Pennsylvania. May Term, 1916.)

No. 1592.

INTERNAL REVENUE ⟸9—INCOME TAX—STOCK DIVIDENDS—ACCUMULATED EARNINGS—"NET INCOME ARISING OR ACCRUING IN THE PRECEDING CALENDAR YEAR."

Plaintiff, as a holding corporation, owned all of the stock of subsidiary corporations, except sufficient to qualify their directors. Such subsidiaries were associated in a common enterprise, the earnings of which had been for a number of years prior to January 1, 1913, used in common by the several subsidiary companies in the acquisition of property and the carrying on of the business, with the result that there was indebtedness between them, as shown by their books. About March 1, 1913, such accumulated earnings were taken over by plaintiff in the form of dividends declared by the several subsidiaries, equal in amount to their respective interests therein. Each was charged on plaintiff's books with the amount of the dividends, and its indebtedness to the other subsidiaries, if any, became due to plaintiff. *Held*, that such dividends did not constitute "net income arising or accruing * * * in the preceding calendar year" to plaintiff, within the meaning of Income Tax Act Oct. 3, 1913, c. 16, § 2A (1), 38 Stat. 166, which became effective from March 1, 1913, and were not subject to tax thereunder, but were a distribution of accumulated earnings arising through a period of years, the equitable ownership of which was vested in plaintiff as owner of the stock prior to January 1, 1913.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

In Equity. Suit by the Gulf Oil Corporation against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgment for plaintiff.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for plaintiff.

E. Lowry Humes, U. S. Dist. Atty., and B. B. McGinnis, Asst. U. S. Dist. Atty., both of Pittsburgh, Pa., for defendant.

ORR, District Judge. The plaintiff has brought this suit to recover from the defendant the sum of $114,244.40, with interest from February 17, 1915, the payment of which was illegally exacted of the plaintiff by reason of a wrong construction of certain provisions of Act Cong. Oct. 3, 1913, c. 16, 38 Stat. 114–166, commonly called the "Income Tax Law of 1913." In pursuance of a stipulation in writing, the case has been tried by the court without a jury. From the evidence produced at the trial, the court has found the following facts:

First. The Gulf Oil Corporation is a corporation duly organized under the laws of the state of New Jersey. C. G. Lewellyn is the collector of internal revenue for the Twenty-Third district of Pennsylvania, be-

ing duly commissioned as such pursuant to the laws of the United States of America.

Second. The Gulf Oil Corporation, on the 14th day of February, 1914, in compliance with the provisions of the act of Congress of October 3, 1913, made a return of its annual net income for the 12 months ending December 31, 1913, as required by said act. In making said return the Gulf Oil Corporation certified that it had not included in the statement of gross income for the year 1913 certain dividends, amounting to $11,424,440, received by it from subsidiary companies out of earnings and surplus of said subsidiary companies accrued prior to January 1, 1913.

Third. In said return the Gulf Oil Corporation showed net income for the 12 months ending December 31, 1913, of $886,250.44, but under date of May 1, 1914, the said C. G. Lewellyn, collector, mailed to said corporation notice of an assessment of tax thereon amounting to $9,072.56. A claim for abatement of this overcharge, amounting to $210.06, was filed with the collector June 9, 1914, and on June 30, 1914, the Gulf Oil Corporation paid to the said C. G. Lewellyn, collector, the sum of $8,862.50, being the amount of said assessment, less the $210.06 for which abatement was claimed. Said claim for abatement having been disallowed, said Gulf Oil Corporation, on the 5th day of November, 1914, paid the said collector the additional sum of $210.06, with interest amounting to $6.30, making a total payment of $216.36.

Fourth. On the 30th day of December, 1914, the said C. G. Lewellyn, collector, acting under instructions from the Commissioner of Internal Revenue at Washington, D. C., mailed notice and demand for tax assessment against the Gulf Oil Corporation for the year ending December 31, 1913, amounting to $114,034.34. In fact, this additional assessment amounted to $114,244.40, being the 1 per cent. upon the entire amount of the dividends received by the Gulf Oil Corporation from subsidiary companies out of surplus accrued to such subsidiaries prior to January 1, 1913, and payable to the Gulf Oil Corporation prior to March 1, 1913, and said additional assessment was based solely on said dividends. In making the assessment, however, the Commissioner of Internal Revenue reconsidered and allowed the previous claim for abatement of $210.06, erroneously assessed against the corporation in the original assessment, and credited the same as having been paid upon the assessment of December 30, 1914, leaving the net balance of such assessment $114,034.34, as stated.

Fifth. The notice and demand of the said C. G. Lewellyn, collector, for the payment of this additional tax, recited that if the tax is not paid on or before January 8, 1915, it would be the duty of the collector to collect said tax, together with 5 per cent. additional and interest at the rate of 1 per cent. per month until paid.

Sixth. That subsequently the plaintiff filed with the defendant for presentation to the Commissioner of Internal Revenue a claim for the abatement of said income tax amounting to $114,034.34, a copy of which claim is attached to and made a part of plaintiff's statement as Exhibit A. That after an examination of said claim for abatement the Commissioner of Internal Revenue rejected the same.

Seventh. On February 17, 1915, the said Gulf Oil Corporation paid

to the said C. G. Lewellyn, collector, said additional income taxes assessed for the period ending December 31, 1913, in the sum of $114,-034.34, and at the same time filed with said C. G. Lewellyn a written protest, a copy of which protest is attached to and made a part of plaintiff's statement as Exhibit B.

Eighth. That subsequently the plaintiff filed with the said C. G. Lewellyn for presentation to the Commissioner of Internal Revenue a claim for the refund of the net amount of the assessment of said income tax, to wit, $114,034.34, and also the amount of the credit allowed thereon of $210.06, representing an overassessment against the corporation on the basis of its return as originally filed; the two amounts constituting the entire amount of the additional assessment in the sum of $114,244.40. A copy of the said claim for refund is attached to and made a part of plaintiff's statement as Exhibit C.

Ninth. That after consideration of said claim for refund, the Commissioner of Internal Revenue rejected the same, and the said C. G. Lewellyn was instructed to notify the Gulf Oil Corporation, and on or about April 13, 1915, did so notify said corporation, that said claim was rejected, a copy of which notice is attached to and made a part of plaintiff's statement as Exhibit D.

Tenth. The plaintiff is a holding company, and continuously since its organization in February, 1907, it has been the owner of all of the capital stock of the J. M. Guffey Petroleum Company, the Gulf Pipe Line Company, the Gulf Pipe Line Company of Oklahoma, and for many years has been the owner of all of the capital stock of the Indiana Oil & Gas Company and the Gulf Commissary Company, except, in the case of each company, of directors' qualifying shares, and was the owner of said shares during all of the period in which the earnings have accumulated out of which the dividends in question in this case were declared and paid. That with the exception of the Indiana Oil & Gas Company and the Gulf Commissary Company, and a dividend of the J. M. Guffey Petroleum Company hereafter referred to, no dividends were paid by any of the above-named subsidiary companies prior to December 31, 1912. All of the earnings of said companies prior to said date were either invested as earned in the extension and development of the properties and business of the companies mentioned, or allowed to accumulate in the treasuries of such companies, respectively and all of the said earnings were actually used and required in carrying on the business of the subsidiary companies. In January, 1913, the officers of the Gulf Oil Corporation, plaintiff, decided that the accumulated earnings and surpluses of these subsidiary companies should be taken over by the plaintiff company in the form of dividends, and accordingly—

Eleventh. On February 7, 1913, the J. M. Guffey Petroleum Company declared and authorized, out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf Oil Corporation received $3,749,750. Payment of said dividend was made April 11, 1913.

Twelfth. On February 7, 1913, the Gulf Pipe Line Company declared and authorized, out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf

Oil Corporation received $4,724,055. Payment of said dividend was made April 11, 1913.

Thirteenth. On February 7, 1913, the Gulf Pipe Line Company of Oklahoma declared and authorized, out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf Oil Corporation received $2,597,660. Payment of said dividend was made April 11, 1913.

Fourteenth. On January 8, 1913, the Indiana Oil & Gas Company declared and authorized, out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf Oil Corporation received $338,000, and on February 24, 1913, declared and authorized the immediate payment of a dividend, of which the Gulf Oil Corporation received $10,000. Payment of the dividend declared January 8, 1913, was made on that day, and payment of the dividend declared February 24, 1913, was made on February 25, 1913.

Fifteenth. On December 17, 1912, the Gulf Commissary Company declared and authorized, out of its accumulated surplus earned prior to December 17, 1912, the payment of a dividend, of which the Gulf Oil Corporation received $4,975. Payment of said dividend was not made until January 4, 1913.

Sixteenth. Payment of said dividends by the J. M. Guffey Petroleum Company, the Gulf Pipe Line Company, and the Gulf Pipe Line Company of Oklahoma was made as follows: The several companies mentioned, together with certain other companies, constituted a single enterprise carried on by the plaintiff, that enterprise consisting in a general way of the production and purchase of crude oil, the transportation of oil, and the refining and marketing thereof. During the period in question the business of producing and purchasing oil was carried on principally in the state of Oklahoma, where also the oil was gathered and stored, the transportation of oil by pipe lines from points in the state of Oklahoma and in Texas to the Gulf of Mexico, where the company owned refineries in which the refined products were manufactured. The marketing of these products was carried on over a large part of the United States and in foreign countries, and for the purpose of shipping such refined products the company owned and operated its own fleet of carrying vessels. At the time of the declaration of the dividends before referred to all of the earnings of the subsidiary companies had been retained in those companies, treating the subsidiary companies collectively, although for the purposes of the enterprise as a whole it was necessary that the funds or credit of one subsidiary be loaned to and used by another. As a result of this, at the time of the declaration of said dividends, there existed among the subsidiary companies considerable indebtedness, evidenced by book accounts; such indebtedness arising almost entirely through transactions between such companies in the purchase and sale of oil or property. All of these funds were either invested in properties or actually required in the carrying on of the business of the subsidiary companies, so that the subsidiary companies were without moneys with which to make payment of this intercompany indebtedness. For the purpose of clearing the transaction the matter was consummated on

the same day, to wit, April 11, 1913, and in this way: The Gulf Oil Corporation took over upon its books the amount of the dividends before mentioned (other than the Indiana Oil & Gas Company and the Gulf Commissary Company, which it had already received), and at the same time set up upon its books accounts receivable owing to it by various subsidiaries aggregating the amount of the dividends so received. Upon the books of the subsidiary companies entries showing the same facts were made, and all of these entries were made upon vouchers passed between the parties to the transactions. As a result, the subsidiary companies collectively, after the payment of this dividend, owed substantially the same amount as prior thereto had been owing to some of the subsidiaries by other subsidiaries, but such indebtedness was shifted so that it was owing entirely to the Gulf Oil Corporation, and the Gulf Oil Corporation, after the payment of the dividends, had no property or assets which prior thereto was not represented in the shares of stock of the subsidiary companies owned by it, but it had upon its books accounts receivable of subsidiary companies which, together with the shares of stock of the various subsidiary companies owned by it, represented the same property and assets as was represented by the shares of stock alone prior to the declaration and payment of said dividends.

Seventeenth. The only dividend declared by the J. M. Guffey Petroleum Company prior to January 1, 1913, was a dividend of $2,024,865 declared and paid in the year 1912; but the moneys out of which that dividend was paid arose out of the sale by the J. M. Guffey Petroleum Company to the Gulf Refining Company (another subsidiary of the plaintiff company) of certain ships owned by it, and was merely the carrying out of a change of ownership of the property from one subsidiary to another.

Eighteenth. That the said J. M. Guffey Petroleum Company, Gulf Pipe Line Company, Gulf Pipe Line Company of Oklahoma, Indiana Oil & Gas Company, and Gulf Commissary Company were all corporations subject to the payment of the excise tax imposed by the act of Congress of August 5, 1909 (36 Stat. 11–112), and that all of said companies had in fact paid all of the taxes imposed upon them under the provisions of the said act, including such taxes on the earnings from which said dividends were declared.

Discussion.

The payment of all taxes thitherto required of the several subsidiaries by acts of Congress, and the full disclosure by the plaintiff in its return for 1913 of the dividends from its subsidiaries, negative any suggestion that the conduct of the plaintiff has been in any way evasive or otherwise improper. The plaintiff has merely asserted its legal rights. Its right to bring this action is clear, because it has performed all the conditions precedent to suit which the law requires. The chief matter in controversy between the parties is whether the dividends declared by the subsidiaries are within the provisions of the Income Tax Law (Act Oct. 5, 1913, 38 Stat. 114–172, § 2G). Referring to said law (Id. p. 166, § 2A), we find in subdivision 1 a provision for a tax of 1 per centum "upon the entire net income arising or accruing from

all sources in the preceding calendar year to every citizen of the United States," and in subdivision 2, a provision for a tax in addition to the foregoing, which is called the "normal income tax," upon the net income of every individual when the same shall exceed the amounts therein specified.

Turning to section 2G of the act (Id. p. 172), we find the following language:

"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," etc.,

—with certain exclusions not necessary to be considered in the present case, because the plaintiff is not within the exclusions or exceptions mentioned. The question therefore is: Are the dividends, which are the subject of the assessment in controversy in this case, being, as it appears, but distributions of accumulations of profits extending over a long period of years, income within the meaning of the said Income Tax Law? The defendant contends that, so far as the plaintiff corporation is concerned, the distribution of such profits and earnings must be considered as part of the net income arising or accruing to it during the year 1913. He urges that the plaintiff corporation had no interest in or title to any of the earnings of the subsidiaries until after such dividends were declared by them, and has cited many authorities holding that shareholders in a corporation do not have any enforceable title to profits of corporations until dividends are actually declared by the directors of such corporations. It is unnecessary to consider these cases in detail, because they do not control the question now before the court. It is preferable to adopt the language of Mr. Justice Clifford in Collector v. Hubbard, 79 U. S. 1–18, 20 L. Ed. 272, a case not otherwise helpful:

"Decided cases are referred to, in which it is held that a stockholder has no title for certain purposes to the earnings, net or otherwise, of a railroad prior to the dividend being declared, and it cannot be doubted that those decisions are correct as applied to the respective subject-matters involved in the controversies. Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends; that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled, provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares, whether held by the original subscribers or by assignees."

While decisions bearing upon the right to stock dividends declared by corporations in distribution of accumulated earnings may not be specially helpful, we find very careful consideration of such questions in Gibbons v. Mahon, 136 U. S. 549, on page 558, 10 Sup. Ct. 1057, on page 1058, 34 L. Ed. 525, where the following language by Mr. Justice Gray is found:

"Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof."

The case of Bailey v. Railroad Co., 106 U. S. 109, 1 Sup. Ct. 62, 27 L. Ed. 81, is of value in the consideration of the question now before the court. That case, in the lower court, was a proceeding by the railroad company to recover from Bailey, a collector of internal revenue, moneys claimed by the railroad company to be illegally exacted as income tax within the meaning of section 122 of an act of Congress passed June 30, 1864 (13 Stat. 223–284, c. 173). The act provided that certain corporations should be subject to and pay a tax on the amount of interest, etc., and upon "any dividend in scrip, or money due or payable to its stockholders as part of the earnings, profits, income, or gain of such company, and all profits of such company carried to the account of any fund, or used for construction." The government had undertaken to assess an income tax under that act of 1864 upon a scrip dividend made in 1868, distributing earnings which had accrued through the period from 1853 to 1868. The court held that there was no authority for the imposition of the tax upon so much of the earnings as accrued prior to 1862, the date from which the tax took effect. It was argued on behalf of the plaintiff in error, representing the government, that by the express terms of the act, inasmuch as the certificates issued to the stockholders evidencing their proportions in the scrip dividend, "being a declaration of a dividend as part of the earnings, profits, income, or gains of the company, are taxable upon the amount thereof without deduction, that the policy as well as the language of the act fixes the charge upon the declaration itself when made effectual as between the company and its stockholders, and, for the purposes of taxation, concludes both as to the amount subject to the tax, and that the rule is reasonable as furnishing an obvious standard and the only safe criterion for the assessment of the tax to prevent fraudulent evasions, and consequently that when such a dividend has once been declared, and ascertained to come within the description of the law as a subject of taxation, all the rest follows, and the amount declared is necessarily established as the amount to be taxed." The foregoing quotation is the statement of the contention on the part of the government as it appears in the opinion of Mr. Justice Matthews (106 U. S. 114, 1 Sup. Ct. 67, 27 L. Ed. 81). The learned justice proceeds as follows:

"The soundness of this mode of interpretation, and its application to ordinary cases, may well be admitted; but it cannot be applied to every case without a careful regard to its necessary limitations. It should be borne in mind, in the first place, that the tax provided for in this section is an annual income tax, and its subject is the interest paid and profits earned by the company for each year, and year by year, and that both by the express letter of the law, and its necessary implications, the tax is not laid on any of these funds which came into being before the time prescribed in the act. And in the ordinary execution of the law, it was contemplated that the funds to be taxed, and the tax imposed upon them, would be concurrent, as to each fiscal year, the scheme of the statute being to levy the tax upon the income for the year ending on the 31st of December next preceding the assessment, and while it

would be altogether admissible to go back, for the purpose of assessing a tax upon a proper fund which had accrued during a previous year and escaped taxation, nevertheless the tax imposed would be for the omitted year. But no tax, in contemplation of the law, accrues upon the fund, except for the year in which the fund itself accrued."

The foregoing seems to be a direct authority in support of the contention of the plaintiff in the present case, for the language of the act of 1913 is no clearer in showing an intent of the lawmakers to tax earnings accrued prior to the time they were subjected to the operation of the act than was the language of the act of 1864. The argument that there should be a different construction of the act of 1913 from that given to the act of 1864 is weakened by the fact that, at the time the earnings in the present case accrued, the authority given to Congress by the Sixteenth Amendment was wanting. It seems to be perfectly clear that the advances in the value of property during a series of years can in no proper sense be considered gains, profits, or income of any one particular year of the series, although the entire amount of the advance may be at one time turned into money by the sale of the property. See Gray v. Darlington, 82 U. S. 63, 21 L. Ed. 45, and Gauley Mountain Coal Co. v. Hays, 230 Fed. 110, 144 C. C. A. 408.

The Income Tax Law of 1913 has already received the consideration of the federal courts. Indeed, the very contention of the plaintiff in this case has been supported in the decisions by the Circuit Court of Appeals of the Eighth Circuit in Lynch v. Turrish, 236 Fed. 653, 149 C. C. A. 649, and Lynch v. Hornby, 236 Fed. 661, 149 C. C. A. 657. Nothing could add to the reasoning or strengthen the conclusions reached by that court. A mere statement from the syllabus of the first case is sufficient for present purposes:

"The enhanced value of property of a corporation which accrues from the gradual increase in its value during a series of years prior to the effective date of an income tax law, although divided or distributed by dividends or otherwise, subsequent to that date, does not become 'income, gains, or profits' taxable under such an act, but is rather an 'increase of capital assets.'"

The specific facts in each of those cases are not specially material. The complaints of the plaintiffs therein were generally the same as the complaint of the plaintiff in the present case. Each had been assessed and compelled to pay a tax levied upon a distribution of assets, because of the mistaken view of the collector of internal revenue that such distribution of assets was "income, gains, or profits within the meaning of the Income Tax Law." The difference between the plaintiffs in those cases and the plaintiff in the present case is that they are individuals, while the plaintiff in the case at bar is a corporation. Such difference, however, is not material, because, as has been seen, under the law the income to be taxed is the same in the case of corporations as in the case of individuals. Moreover, section 2, par. G, subd. (b), provides for the ascertainment of the net income of a corporation by making deductions, not from its gross receipts, but from its "gross income."

It is perhaps worthy of observation that Congress, being without authority to levy an income tax until February 25, 1913, when the

Sixteenth Amendment was adopted, provided in Act 1913, par. G, (c), that the tax for that year should be upon the entire net income accrued within that portion of said year from March 1st to December 31st, both dates inclusive, to be ascertained by taking five-sixths of the entire net income for said calendar year. In paragraph S of section 4, which repeals the Excise Tax Act of 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 11), save with respect to pending cases, there is a provision that, for the special excise tax covering the first two months of 1913, it should be computed upon one-sixth of the entire net income of the corporation for said year, which said income, however, was to be ascertained in accordance with subdivision G of section 2 of the act of 1913. There is a further provision in the act of 1913 that the act of 1909 should remain in force for the collection of the excise tax in the latter act, but provided that for the year 1913 it should not be necessary to make more than one return and assessment for all the taxes imposed.

Without further referring to other provisions in the repealing portion of the act of 1913, it seems clear that the excise tax for January and February was intended to be computed upon "one-sixth of the entire net income" for the year 1913, and that said net income was to be ascertained in accordance with the provisions of subdivision G, section 2, of that act. The provisions in the repealing part of the act of 1913 do not change or add to the subject of taxation. That subject of taxation was to be net income accruing to the corporation. Unless the dividends in question are taxable as income under the prior provisions of the act, which related to corporations, then clearly such dividends are not taxable under the proviso.

Because of the view this court has taken of the rights of the plaintiff in this case, it is not deemed necessary, or perhaps even profitable, to consider other questions that have been raised. It seems to be clear that the Gulf Oil Corporation, being a holding company and owning all the shares, except such as were necessary to qualify the directors (one share for each), in reality received nothing in pursuance of the declaration of dividends by the subsidiaries which it has not owned before.

Under all the facts, and in consideration of the law applicable thereto, this court has reached the following conclusions:

1. The dividends in question in this suit were not subject to the tax imposed, because they were a distribution of surplus earnings arising through a period of years, and which had accrued to, and the equitable ownership thereof was vested in, the plaintiff prior to January 1, 1913, and such earnings were not intended by Congress to be subject to taxation.

2. That judgment should be entered in favor of the plaintiff and against the defendant for the amount claimed, to wit, $114,244:40, with interest. to be added from February 17, 1915, and that an order for judgment, with a correct calculation of the debt and interest, may be submitted.

UNITED STATES v. BROOKSHIRE OIL CO. et al. (three cases).

(District Court, S. D. California. June 8, 1917.)

Nos. A-34—A-36.

1. MINES AND MINERALS ⟸38(21)—LOCATIONS IN GOOD FAITH.
In a suit involving mineral lands, evidence *held* to show that the principal defendant, who made the locations under the placer mining laws, did not act in good faith for the benefit of the alleged locators, but merely used their names with the intent to secure for himself an area of mineral land in excess of that allowed by law.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 107.]

2. MINES AND MINERALS ⟸14(2)—LOCATIONS—RIGHTS OF HOLDER.
One in possession under defendant, who made locations under placer mining laws, using the names of the locators merely as a subterfuge to obtain more land than he was entitled to, has no greater rights than defendant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20.]

3. MINES AND MINERALS ⟸14(2)—PLACER MINES—LOCATIONS.
Under Rev. St. §§ 2330, 2331 (Comp. St. 1916, §§ 4629, 4630), limiting mining claims for associations to 160 acres and for individuals to 20 acres, a location by an individual in the name of others, by which means it was sought to evade the limitations, is void, and furnishes no basis for title.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20.]

4. MINES AND MINERALS ⟸14(2)—PLACER MINES—LOCATIONS—VALIDITY.
Prior to withdrawal by presidential order, defendant, under the laws relating to placer mines, located a claim in the names of third persons, intending in that manner to evade the limitations of the statutes. The claim was supposed to contain oil, and defendant entered into a contract with an oil company for the development of such claim; the contract being in part for defendant's benefit. *Held* that, after withdrawal, the oil company, as it had become defendant's representative, could not assert any rights under Pickett Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1916, §§ 4523–4525), which undertakes to protect occupants or claimants of oil and gas bearing lands, who were prosecuting work in good faith at the date of the withdrawal order.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20.]

5. MINES AND MINERALS ⟸38(4)—SUIT TO ENJOIN TRESPASS AND WASTE—EQUITY—JURISDICTION.
Locations on mineral lands being void, the United States sued to enjoin and restrain defendants from continuing to trespass upon the land from which they were extracting oil. Defendants, the operators of the wells, disposed of the product to marketing companies, which removed the oil from the premises through their own pipe lines. *Held*, that as such marketing companies asserted no title to the property, and as the basis for a court of equity's jurisdiction was to prevent waste, such marketing companies were not proper parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 88.]

6. INJUNCTION ⟸189—JURISDICTION—QUIETING TITLE.
A suit to enjoin and restrain a continuation of a trespass, and to prevent waste, begun by the true owner, who was out of possession, cannot be treated and made to serve the purpose of one to remove a cloud from title.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409.]

In Equity. Suits by the United States against the Brookshire Oil Company, E. D. Burge, and others, and against the Brookshire Oil Company, the Standard Oil Company, and others, and against the Brookshire Oil Company, the Midway Pacific Oil Company, and others. Decree for plaintiff against the principal defendants, and bills against the marketing companies, the Standard Oil Company and others dismissed.

Frank Hall and A. E. Campbell, Sp. Asst. Attys. Gen., both of San Francisco, Cal., for the United States.

C. P. Kaetzel, of San Luis Obispo, Cal., A. L. Weil, of San Francisco, Cal., Theodore Martin, of Los Angeles, Cal., W. B. Beaizley, of Bakersfield, Cal., Willis I. Morrison and Willoughby Rodman, both of Los Angeles, Cal., and Pillsbury, Madison, & Sutro, of San Francisco, Cal., for defendants.

BEAN, District Judge (sitting by special assignment). These three suits involve the northeast, northwest, and southeast quarters of section 24, township 31 south, range 22 east, M. D. M., in the state of California. The land in question is oil-bearing, and is included within the area described in presidential withdrawal order of September 27, 1909.

On November 15, 1908, Mr. E. D. Burge posted on each quarter section a notice prepared by himself, purporting to be on behalf of eight named locaters, evidencing an intention to claim the same under the placer mining laws, and caused such notices to be recorded. The alleged locators were principally relatives of Burge and nonresidents of the state. Burge had no previous authority from them to make such locations, and they did not know of the posting of the notices until after he had contracted for the disposition of the locations. On December 23, 1908, Burge, without consulting the alleged locators or obtaining authority from them, and without their knowledge, entered into a contract in his own name (which recites that he was the owner of the property described and was desirous of having it developed and proved to contain petroleum) with the defendant Brookshire Company for the development of the three quarters in question and also the southwest quarter of the same section. By this contract the Brookshire Company agreed to enter into possession of the entire section on or before January 3, 1909, and to erect with reasonable diligence on each of three quarters thereof, at places to be selected by it, derricks, and upon the fourth quarter a complete standard drilling rig, and thereupon to commence the actual work of drilling and to prosecute same with all reasonable diligence to a depth of 2,000 feet, unless oil in paying quantities was discovered at a less depth: Provided, however, that if the conditions of drilling at the first location were not favorable, the company should have the right to change the location of the well before it was drilled to the depth specified. As soon as practicable after the discovery of oil in paying quantities and the completion of the first well, the company was to commence drilling operations on at least one of the three remaining quarters and continue such operations with all reasonable diligence until oil was produced there-

on in paying quantities, and that as soon as the work was completed on any quarter the development should be prosecuted upon the remaining quarters until all were tested. As soon as oil in paying quantities was discovered on a quarter section, the company was immediately to take all necessary steps at its own expense to obtain a patent from the United States, and upon issuance thereof to convey to Burge and one Johnson designated portions of the patented land.

The Brookshire Company entered into possession under the contract and did some work on each of the locations, and was drilling on the southwest quarter at date of the withdrawal. The other defendants claim portions of the land in controversy under alleged rights acquired subsequent to the withdrawal, through Burge and Johnson, being the portions to accrue to them under their agreement with the Brookshire Company. It is claimed by the government that the alleged locations were not made in good faith for the use and benefit of the locators, but were an attempt by Burge to obtain title to more mining ground than the law permitted one person to locate in one claim, and were therefore fraudulent and void, and as the Brookshire Company was in possession under him at the date of withdrawal, it was in effect occupying as his agent, and therefore had no rights to the property superior to his; and, second, that it was not in diligent prosecution of work leading to discovery on either of the claims now in controversy at the date of the withdrawal order, within the meaning of the Pickett Act.

[1] From a careful examination of the testimony, I am forced to the conclusion that the paper locations were not made in good faith for the use and benefit of the alleged locators, but that Burge used their names in an attempt to secure for himself an area of mineral land in excess of that allowed by law. The notices and all matters in connection with the location were prepared, initiated, and attended to by Burge without previous authority from the so-called locators. Immediately after posting the notices Burge began dealing with the property as his own, without the knowledge of the named locators, and without obtaining authority from them, and without advising them of his intention or purpose. It was not until after he had made the contract with the Brookshire Company that any effort was made to obtain authority to act for the locators, and then only because he was advised that it was necessary to clear the apparent title. He thereupon wrote the alleged locators, inclosing powers of attorney to be executed by them, and which were excuted without question, and without their making any inquiry, or being advised as to what disposition Burge intended to make or had made of the property, or what contracts he proposed to enter into, or what he intended to do with the proceeds. Thereafter, and at the request of Burge, they executed deeds to him for a nominal consideration; the amount thereof being suggested and fixed by him, and in effect a mere gratuity on his part. The testimony shows that the alleged locators understood their names were being used by Burge for his own advantage and profit.

It is unnecessary to refer to the evidence in detail. The entire transaction is well put by the witness Nyc, whose name was used in the attempted location of the northwest quarter, and with whom Burge

seems to have had the principal dealings regarding that property. Nyc says that he first learned that his name had been used as a locator in a letter from Burge in January, 1909, requesting the execution of a power of attorney; that he (witness) did not understand that he was locating for himself, but that Burge was getting some oil land, out of which, later, all would get some profit; that Burge told him the location would be a valuable thing for him and some day pay him well, but did not make any direct statement as to the probable amount of the profit; that he (witness) knew nothing about the contract or options entered into by Burge, and made no inquiry in reference thereto, and never requested any statement or accounting from Burge, but "I took Burge to be a promotor who had been able to locate certain oil fields in which oil could be found." The transactions between Burge and the so-called locators were carried on principally by correspondence. One letter of July 18, 1910, from Burge to Nyc has been produced. In this letter Burge says:

"I am inclosing a quitclaim deed, which I am going to ask you to kindly execute for me, and also get the Kisers to properly sign. I am inclosing $50 apiece for yourself and Maud, and also the same for Nellie and her husband, which I will leave for you to give them. You undoubtedly have seen by the papers that thousands of acres of land in California have been withdrawn. Well, all my located land comes under that act and is affected by it, so we have quite a fight on our hands, and the oil people in this district, and in fact all the fields in this state, have representatives in Washington, trying to protect us. I have been advised by my attorneys to get these quitclaims from all those whose names are used in my locations as it may help me some in my fight for the land. I am into it and intend to stay until I know, one way or the other."

By this letter, Mr. Burge himself characterizes the transaction. He refers to the property as "my located land," and the names used in "my locations" and this characterization is borne out and supported by the testimony of practically all of the alleged locators.

[2, 3] It is manifest that Burge could acquire no right in mineral lands as against the government by such subterfuge, and since the Brookshire Company was in possession and claiming under him, and as his representative or agent, it necessarily follows that its interest was no greater than his. It is true there is no limitation as to the number of mining claims an individual or association of individuals may locate, but it is provided that no claim shall exceed 20 acres for each individual (section 2331, R. S. [Comp. St. 1916, § 4630]) or 160 acres for any association. Section 2330, R. S. (Comp. St. 1916, § 4629). This is a direct and positive limitation of the amount of mining ground any one claimant may appropriate individually or as a member of an association in any one claim, and he cannot evade the law by the use of the names of his friends, relatives, or employés. Any device whereby one person is to acquire more than 20, or an association more than 160, acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void. Cook v. Klonos, 164 Fed. 529, 90 C. C. A. 403; Nome & Sinook v. Snyder, 187 Fed. 385, 109 C. C. A. 217; Gird v. Cal. Oil Co. (C. C.) 60 Fed. 531; Hall v. McKinnon, 193 Fed. 572, 113 C. C. A. 440; Duffield v. S. F. Chemical Co., 205 Fed. 480, 123 C. C. A. 548.

[4] It is argued that, since there is no law requiring or authorizing the posting and recording of a notice of location of mining claims prior to discovery, and since the Pickett Act undertakes to protect a certain class of occupants or claimants of oil or gas bearing lands at the date of withdrawal order, the good faith of the occupant or claimant, and not that of the locators, is the material question involved in these suits; but the Brookshire Company's occupation or claim to the property was under a development contract with Burge as his representative and in part for his benefit, and unless he had or could acquire a lawful right to the property it necessarily follows that the contention is without merit.

I am not concerned at this time with the status or interest, if any, of an occupant or claimant at the date of withdrawal, who had, in good faith and without knowledge of the fraudulent character of the paper locations, purchased or acquired the alleged interests of the locators, and was occupying or claiming the property in his own right, and not for or as the representative of another. That question is not presented by this record, and I refrain from indicating any opinion thereon. It is enough that here the defendants are claiming and were in possession under the so-called locators, and if such locations were fraudulent their rights must fail.

This view renders it unnecessary to consider the question of whether the Brookshire Company was in diligent prosecution of work leading to discovery on the claims in question, within the meaning of the Pickett Act, at the date of the withdrawal order. Whatever may be the construction or the scope and effect of the act, it is manifest that it was intended and designed for the benefit of those who were intending at the date of the withdrawal order to acquire title or the right to possession of mining ground by complying in good faith with the mining laws of the United States, and not one seeking to evade such laws or obtain title in violation thereof.

[5, 6] The plaintiff is therefore entitled to a decree as prayed for, except that the suits should be dismissed as to the marketing companies. There is nothing in these cases to distinguish them from U. S. v. Midway Northern (D. C.) 232 Fed. 619. The fact that the purchasers of the oil removed it from the premises through their own pipe lines after its delivery to them by the operating companies does not affect the question, nor make them proper parties to suits in equity brought against the operating companies to enjoin and restrain a continuation of the trespass.

Inasmuch as it appears from the bills that the plaintiff was not, and the defendants were, in the adverse possession of the disputed property at the commencement of the suits, it follows that, if a court of equity has jurisdiction at all, it is for the purpose of preventing waste, and the only proper parties to such a suit are those who are committing or threatening to commit the waste complained of, or causing or permitting it to be done. Such a suit cannot be treated or made to serve the purpose of one to remove a cloud from the title, since the plaintiff is admittedly out of possession. Whitney v. Hay, 181 U. S. 86, 21 Sup. Ct. 537, 45 L. Ed. 758; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010.

Plaintiff is therefore entitled to a decree as prayed for.

UNITED STATES v. NORTH AMERICAN OIL CONSOLIDATED et al.

(District Court, S. D. California. June 8, 1917.)

No. A–48.

1. MINES AND MINERALS ⟸2—PUBLIC LANDS—WITHDRAWAL—RIGHTS OF OCCUPANTS.

To bring an occupant or claimant of oil or gas lands within Pickett Act June 25, 1910, c. 421, § 2, 36 Stat. 847 (Comp. St. 1916, § 4524), providing that the rights of any person who at the date of any withdrawal order is a bona fide occupant or claimant of oil or gas lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected by such order, it is not necessary that such occupant be engaged in actual drilling for oil or gas on a particular tract at the date of withdrawal, or necessarily that work is then being performed upon the identical claim upon which discovery must ultimately be made in order to make location, and it is enough if reasonable effort is being made at that time, indicating a bona fide intention to complete the work of discovery on the particular claim with all practical expedition; such intention being manifested by the doing of physical acts having a direct tendency to facilitate the exploration for and discovery of oil or gas.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

2. MINES AND MINERALS ⟸2—PUBLIC LANDS—WITHDRAWAL—RIGHTS OF OCCUPANTS.

A company which for months before the date of a presidential order withdrawing oil and gas lands from entry, and at the date thereof was engaged in work necessary and proper in order to effect a discovery of oil, with the then present bona fide purpose of completing such work with all reasonable expedition, was diligently prosecuting the work, so as to be within the protection of the Pickett Act, though it was delaying the installation of its machinery and the commencement of drilling until it could be assured of a supply of water necessary for the prosecution of the drilling; the land being in a semiarid region.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

3. MINES AND MINERALS ⟸2—PUBLIC LANDS—WITHDRAWAL—RIGHTS OF OCCUPANTS.

Such company was not required to make any unusual or extraordinary effort to obtain water, but only such as was reasonable under the circumstances confronting it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

4. MINES AND MINERALS ⟸2—PUBLIC LANDS—WITHDRAWAL—RIGHTS OF OCCUPANTS.

Under the Pickett Act, where an oil company was in diligent prosecution of work leading to discovery of oil at the date the land was withdrawn from entry, and never abandoned or intended to abandon the property, but remained in possession, proceeding with the work of development in good faith, with more or less diligence, until the actual discovery of oil, it was too late for the government, after discoveries had been made at a large expense, to question its rights on the ground that at some time during the progress of the work, subsequent to the withdrawal and prior to discovery, it was not as diligent as it could have been.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

5. MINES AND MINERALS ⟸2—PUBLIC LANDS—WITHDRAWAL—RIGHTS OF OCCUPANTS.

The Pickett Act, providing that the rights of a bona fide occupant of oil or gas lands, who at the date of any withdrawal order is in diligent

prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of such work, does not mean that the occupant's rights shall no longer continue after a discovery is made and the work leading to discovery ceases, but means that the occupant shall have a right to continue his work to a discovery, and the benefits of the discovery as if the land had not been withdrawn.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

6. STATUTES ⟨⟩183—CONSTRUCTION—SPIRIT OR LETTER OF LAW.

It is the duty of the court to search out the true meaning of a law, and to permit the spirit and reason to prevail over the letter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261.]

In Equity. Suit by the United States against the North American Oil Consolidated and others. Bill dismissed.

Frank Hall, Sp. Asst. Atty. Gen., of San Francisco, Cal., for the United States.

Chas. S. Wheeler and A. L. Weil, both of San Francisco, Cal., for defendants North American Oil Consolidated and others.

D. S. Ewing, of Fresno, Cal., for defendant Frick.

Andrews, Toland & Andrews, of Los Angeles, Cal., for defendant Union Oil Co. of California and Producers' Transp. Co.

J. Delmore Lederman, of San Francisco, Cal., for defendant Pioneer Midway Oil Co.

BEAN, District Judge (sitting by special assignment). This is a suit by the government to oust the defendants from the possession of section 2, township 32 south, range 23 east, M. D. M., oil-bearing lands in the state of California, and require them to account for and pay over to it the value of oil taken therefrom. The legal title to the land is in the United States. It is included within the area described in the presidential withdrawal order of September 27, 1909. No discovery of oil had been made on any part of the premises at the date of such order. The Pioneer Midway Oil Company was in possession thereof at the time, and it is claimed was in diligent prosecution of work leading to discovery of oil; hence it is said that the land was, by the terms of the order, excluded therefrom because it was "a location or claim existing and valid" at its date; but, if this is not so, the oil company and its successors in interest have a right to retain possession and extract the oil under the proviso of the act of Congress of June, 1910, commonly known as the Pickett Act, which reads:

"That the rights of any person who, at the date of any withdrawal order heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and, who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work." 36 Stat. 847.

In view of the conclusions I have reached on the second question, it is not necessary to consider the first. That the Pioneer Midway Oil Company was an actual bona fide occupant and claimant of the property at the date of the withdrawal order, for the purpose of acquiring

title under the mining laws, is clear; but the position of the government is that it was not then in diligent prosecution of work leading to discovery, within the meaning of the Pickett Act.

There is but little if any dispute about the material facts. In January, 1907, while the land in controversy was public land of the United States, subject to entry under the mining laws, Mr. Strasberger and his associates, all of whom were qualified entrymen, acting in good faith, posted notices on each quarter section thereof and had such notices recorded in the proper county, claiming the same under the placer mining laws. In August of that year they conveyed or transferred their interests to the Pioneer Midway Oil Company, and late in 1908 or early in 1909 the oil company, intending to explore the property for the discovery of oil as soon as practicable, went into possession of the four claims. It thereupon purchased the necessary material and caused to be constructed on each claim a derrick and a building or buildings for the housing and accommodation of its employés. The buildings so erected were designed and intended for use in the development and operation of the entire section, and were such as were common in the oil fields, and necessary and proper for that purpose. The derricks were substantial structures, designed and subsequently actually used for drilling.

By the end of June, 1909, these improvements were practically completed, except the hanging of the tools and setting the boilers. Two boilers (all that were available in the community) had been purchased and transported to the property, but not set up. Thereafter up to and at the time of the withdrawal order employés of the oil company were on each quarter section as keepers digging cellars, clearing up sage brush, and doing other preparatory work. Tools had not been hung in the derricks or the boilers set up because the oil company had been unable to obtain assurance of an adequate supply of water for boiler and drilling purposes. The land in controversy is in a semiarid section of the country and at the time of the withdrawal order water was secured with great difficulty. Large quantities of water are required to drill an oil well and a dependable supply is necessary not only for use in the boilers, but in the well itself for drilling, and to prevent the walls from caving and the casing freezing. It costs from $25,000 to $50,000 on an average to sink a well in the territory in question, and it would be imprudent to begin drilling without an adequate supply of water to enable the work to proceed continuously; otherwise the well would probably be lost and the expenditures be for naught.

Attempts had been made without success to develop water on the land in question, and it had to be brought from a distance. The only available sources were the Stratton Water Company, and a plant belonging to the Santa Fé, semipublic service concerns, and transportation by rail from Bakersfield, a distance of 50 or 60 miles. None of these sources was dependable, and none had any surplus to sell, or would guarantee any definite supply of water to its customers. Neither the Stratton Water Company nor the Santa Fé had piped water to a point nearer than several miles to the land in question. The Stratton Company had more customers connected with its plant than it could sup-

ply, the Santa Fé Company was not then selling water for drilling purposes, and transportation by rail from Bakersfield was irregular, uncertain, and inadequate. The Stratton Water Company and the Santa Fé people, however, were engaged in enlarging their plants by sinking new wells, laying additional mains, and installing new machinery, and held out the reasonable hope and promise that they would soon be able to furnish an adequate supply of water. For these reasons, the oil company did not commence drilling, although intending to do so as soon as water could be secured, but remained in possession of each quarter section with keepers or watchmen in charge, and employés doing more or less work, until March, 1910, when it disposed of its interests to Laymance and his associates, referred to as "No. 2 Syndicate."

About this time, the Stratton Water Company had enlarged its plant and increased its facilities by installing additional machinery and bringing in another well, and soon after the purchase by No. 2 Syndicate a water line was laid from its plant to the property, the derricks previously built by the oil company rigged up, and drilling actually begun on the southeast quarter on May 4, 1910, the southwest quarter June 20, 1910, the northwest quarter July 25, 1910, and the northeast quarter September 5, 1910, since which time and prior to the commencement of this suit numerous wells have been drilled and oil in commercial quantities discovered on each quarter section.

The Pioneer Midway Oil Company expended while in the possession of the property, in the erection of buildings, derricks, and the like, about $10,000, and there has been expended by its successors in interest, in sinking wells and developing the property, more than half a million dollars. The question for decision is whether these facts show the oil company to have been in diligent prosecution of work leading to discovery on the several claims at the date of the withdrawal order, within the meaning of the Pickett Act.

A statement in general terms of the conditions applicable to all cases arising under this act, and which should govern in determining whether the requisite diligence existed, is difficult, if not impossible. What constitutes diligent prosecution of work does not lend itself to exact definition. Diligence is a relative term, and what is due diligence in a given case must be determined by the circumstances. Chief Justice Lewis, in Mining Co. v. Carpenter, 4 Nev. 546, 97 Am. Dec. 550, says:

> That it "is that constancy or steadiness of purpose which is usual with men engaged in like enterprises; * * * such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practicable expedition, with no delay, except such as may be incident to the work itself," and that "the law does not require any unusual or extraordinary effort but only that which is usual, ordinary, and reasonable."

And the Supreme Court of California, in McLemore v. Express Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147, says that diligent prosecution of the work of discovery on an oil mining claim—

> "does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding by

cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view."

[1] To bring an occupant or claimant of oil or gas bearing lands within the provisions of the Pickett Act, it is not necessary that he was engaged in actual drilling for oil or gas on a particular tract at the date of withdrawal (U. S. v. Grass Creek O. & G. Co., 236 Fed. 481, 149 C. C. A. 533), or necessarily that work was then being performed upon the identical claim upon which discovery must ultimately be made in order to make location. It is enough if reasonable effort was being made at that time, indicating a bona fide intention to complete the work of discovery on the particular claim with all practical expedition; such intention being manifested by the doing of physical act or acts which had a direct tendency to facilitate the exploration for and discovery of oil or gas thereon, although drilling had not commenced and the work may not have been on such claim. Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; U. S. v. Thirty-Two Oil Co. (D. C.) 242 Fed. 730, just decided; U. S. v. Ohio Oil Co. (D. C.) 240 Fed. 996.

[2, 3] Diligent prosecution of work leading to discovery upon a mining claim depends so largely upon the physical conditions of the locality, the nature and situation of the region, its accessibility, the magnitude of the work, the difficulty of securing material and supplies, and the like, that each case must rest largely on its own facts and circumstances, and a decision in one is of but little assistance in another. Since, however, the law does not require any unusual or extraordinary effort, but only that which is usual, ordinary, and reasonable under the circumstances, I am of the opinion that the oil company was in diligent prosecution of work leading to discovery at the date of the withdrawal, within the meaning of the Pickett Act. It was when overtaken by the withdrawal, and for months before had been, in occupation of each claim, engaged in work necessary and proper in order to effect a discovery thereon, with the then present bona fide purpose of completing such work with all reasonable expedition, and was at the date of the withdrawal doing all that could reasonably and justly be expected of it under the circumstances. The law does not require a vain or useless thing to be done, and therefore the oil company was not required by the law of diligence to have installed all its machinery or commenced drilling before its supply of water was such that it could reasonably hope to successfully continue the work. Nor was it required to make any unusual or extraordinary effort to obtain water, but only such as was reasonable under the circumstances confronting it. Its possession, the work which it had done and was then doing, were such that it would have been protected by the courts from intrusion by private parties if the order had not been made. Cosmos v. Eagle Hill, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; McLemore v. Express, 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770; Borgwardt v. McKittrick Oil,

164 Cal. 650, 130 Pac. 417; Rooney v. Barnette, 200 Fed. 700, 119 C. C. A. 116. And that, I take it, is the true test in cases of this character.

[4-6] It is contended, however, on behalf of the government, that even if the oil company was in diligent prosecution of work leading to discovery at the date of the withdrawal, such diligence was not continuous thereafter. I do not think it necessary to carefully weigh the testimony on that point. The evidence shows that the Oil Company and its successors in interest never abandoned, nor intended to abandon, the property, but remained in possession, proceeding with the work of development in good faith, with more or less diligence, until the actual discovery of oil. Discoveries had been made and oil developed on each claim prior to the commencement of these suits, at an aggregate expense of more than half a million dollars, and it is now too late, in my opinion, for the government to question the defendants' right to the possession and to the oil contents because it may be that at some time during the progress of their work, since the withdrawal and prior to discovery, they were not as diligent as they could have been. It is true the Pickett Act provides that the right of a bona fide occupant or claimant at the date of a withdrawal order, and who was at such time in diligent prosecution of "work leading to discovery," shall not be impaired or affected so long as such occupant or claimant shall continue in diligent prosecution of "said work" referring logically to work leading to discovery, thus implying that when discovery is made his right shall no longer continue. It cannot be supposed, however, that Congress intended any such result. The duty therefore devolves upon the court to search out the true meaning of the law, and to permit the spirit and reason to prevail over the letter. U. S. v. Mulvey, 232 Fed. 513, 146 C. C. A. 471; Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. And, so construed, it conferred upon an occupant or claimant of withdrawn land, who is within its provisions, the right to continue his work to a discovery, and the benefit thereof, as if the land had not been withdrawn, with the same right in the government to re-enter, if the diligence was not continuous, as a private citizen would have had if the land had not been withdrawn.

The history of this and subsequent legislation, it seems to me, confirms this view. See Act March 2, 1911, c. 201, 36 Stat. 1015 (Comp. St. 1916, § 4637). Anomalous as it may seem, public land containing petroleum or other mineral oil and chiefly valuable therefor could, at date of withdrawal order, have been entered and patent obtained only under the placer mining law. Act Feb. 13, 1897, c. 221, 29 Stat. 526 (Comp. St. 1916, § 2497). No location of a placer claim, valid against the government, could have been made until the discovery of mineral within the limits of the claim. R. S. §§ 2320–2329 (Comp. St. 1916, §§ 4615–4628). Hence there could have been no such location of an oil claim until the discovery of oil. The oil measures in the district in question, however, lie far below the surface, often 3,000 or 4,000 feet, and can be reached only by great labor and expense. The installation of elaborate and expensive machinery, months of time, and

the outlay of many thousands of dollars were therefore required before a valid location could be made. There was no law, state or national, at the time of the withdrawal, authorizing or requiring the marking of boundaries of mining locations, or the posting and recording notice of an intention to locate a mining claim prior to discovery, or declaring the effect of such notice or the failure to give it. In view of the conditions, however, and the necessities of the case, a practice had grown up to mark the boundaries and post on the land and record in a public office a so-called notice of location, which operated by common consent as a manifestation of a purpose on the part of the parties named therein to claim the land within the prescribed boundaries, and gave to them or their assignees a preference right to the possession. This right had been recognized by the local courts as transferable, and the possession of a bona fide occupant or claimant holding under such location was protected against all forms of forcible or clandestine entry or intrusion by third parties, while he was in good faith diligently engaged in work leading to discovery, in order that he might make discovery, which, when made, would relate back to date of notice. McLemore v. Express, supra; Miller v. Chrisman, supra; Borgwardt v. McKittrick, supra; Rooney v. Barnette, supra.

This situation was called to the attention of Congress, and it was represented to it that at the time of the withdrawal of September, 1909, which came without notice and without giving interested parties an opportunity to be heard, land within the withdrawn area in California was thus occupied by persons and corporations who were in good faith engaged in the actual work of exploration, with the bona fide intention of complying with the mining laws, but had not yet discovered oil. There was no statutory law protecting such an explorer against the government, or giving him any vested right against it, even that of occupation, although he was in possession by its invitation and under its promise, implied, if not expressed, to permit him to retain possession and acquire the benefits of a discovery, if it should be subsequently made. R. S. 2319–2325 (Comp. St. 1916, §§ 4614–4622). For the government, under these circumstances, to have summarily dispossessed and ousted such occupants or claimants, confiscating the results of their labor and improvements, would have been a great hardship, if not a positive wrong. It was recognized that if the withdrawal order was valid (a question then undetermined) the interests of such parties were probably destroyed and their expenditures lost, unless relief was afforded; and hence Congress, in recognition and confirmation of their rights, as recognized by the local laws, and the moral obligation of the government, inserted the proviso in the act of June, 1910, for their benefit, and in view of the existing conditions made known to it at the time.

It is remedial legislation, and should be construed to carry out the intention of Congress. Whether it was intended to reward an occupant or claimant engaged in the work of discovery at the date of a previous withdrawal, and who continued therein in defiance thereof, and penalize one so engaged, but who stopped his work out of regard for the order until he could lawfully proceed, or whether it was in-

tended to require continuous diligence after the passage of the Pickett Act, is not clear; but the question is not material, I take it, where the required diligence existed at the date of withdrawal, and there has been no subsequent abandonment of the claim, but possession retained and actual discovery made prior to re-entry by the government or the commencement of a ouster suit.

Bill will therefore be dismissed.

UNITED STATES v. THIRTY-TWO OIL CO. et al.

(District Court, S. D. California. June 8, 1917.)

No. A-38.

1. MINES AND MINERALS ⟸36—PLACER MINES—WITHDRAWAL ORDERS.

In 1909, when oil lands were withdrawn by presidential order, there was no law for the entry and patenting of public lands containing mineral oils, except the provisions relating to placer mines, and under Rev. St. §§ 2329, 2330 (Comp. St. 1916, §§ 4628, 4629), no location of placer claims, valid against the government, could be made until the discovery of mineral. Pickett Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1916, §§ 4523-4525), enacted after the withdrawal, declares that the rights of any person who at the date of any withdrawal order is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery, shall not be affected or impaired by withdrawal orders, so long as such occupant or claimant shall continue in diligent prosecution of such work. *Held* that, if the occupant or claimant was in diligent prosecution of the work at the date of the withdrawal order, and continued until discovery, his rights would not be affected or impaired by the withdrawal, and he would be entitled to the same rights in the land under the mining laws as if it had never been withdrawn.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

2. MINES AND MINERALS ⟸36—PLACER MINES—WITHDRAWAL ORDERS.

Whether an occupant or claimant of oil or gas bearing land was, at the date it was withdrawn by presidential order, engaged in diligent prosecution of work leading to discovery, within the Pickett Act, is a question of fact, dependent upon the circumstances of each particular case.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

3. MINES AND MINERALS ⟸36—CLAIMS—OPERATION OF CLAIMS.

Under the Pickett Act, protecting the rights of an occupant or claimant under a location on oil-bearing lands, engaged in diligent prosecution of work leading to the discovery at the date of withdrawal by presidential order, it is not necessary that the work being performed at the time of the withdrawal was on the particular claim in question; but, before it can be deemed work leading to discovery thereon, it must have been such as would reasonably tend to that end, and hence the mere drilling of a well on an adjacent claim is not sufficient, for, while it might disclose the probability of the presence of oil, it in no way would amount to discovery.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

4. MINES AND MINERALS ⟸36—OIL AND GAS CLAIMS—LOCATIONS.

While in 1909, when oil-bearing public lands were withdrawn by presidential order, there was no law, state or national, which authorized or required the marking of boundaries of locations, yet the practice of

marking had grown up in oil districts, and gave the locators a preference right to possession as against all persons except the United States, which the Pickett Act was designed to protect.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

5. MINES AND MINERALS ⟸36—MINING CLAIMS—DISCOVERY.

Group development or assessment work, authorized by Rev. St. §§ 2324, 2325 (Comp. St. 1916, §§ 4620, 4622), in the case of mining claims, is permissible only after discovery; and discovery work, the diligent prosecution of which was necessary to protect the rights of a claimant or occupant of oil or gas locations under the Pickett Act after withdrawal, cannot be by group.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

6. MINES AND MINERALS ⟸36—MINING CLAIMS—DISCOVERY.

Under the Pickett Act, extraterritorial work, such as the building of roads, etc., for the benefit of an oil or gas location, or several locations, may constitute the prosecution of work of discovery necessary to protect the rights of claimants and locators after withdrawal of the land by the President, where such work tended to facilitate discovery.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87.]

7. MINES AND MINERALS ⟸38(4)—MINING OIL AND GAS CLAIMS—INJUNCTION.

In a suit to enjoin occupants and claimants under an oil and gas claim, who had no title, from continuing to trespass and to extract oil, marketing companies, to whom the products were sold, are not proper parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 88.]

In Equity. Bill by the United States against the Thirty-Two Oil Company and others. Decree for plaintiff, except as to the Thirty-Two Oil Company, J. M. McLeod, and the marketing companies, and as to them dismissed.

Frank Hall and A. E. Campbell, both of San Francisco, Cal., Sp. Asst. Attys. Gen.

Hunsaker & Britt, W. E. Mitchell, and Oscar Lawler, all of Los Angeles, Cal., Geo. E. Whitaker, of Bakersfield, Cal., and Edmund Tauszky and Pillsbury, Madison & Sutro, all of San Francisco, Cal., for defendants.

BEAN, District Judge (sitting by special assignment). The land in controversy in this suit is the northeast quarter of section 32, township 31 south, range 25 east, Mt. Diablo meridian, in the state of California. It is oil-bearing, and is included within the presidential withdrawal order of September 27, 1909. Oil had not been discovered on the property at that time, but it was occupied or claimed by sundry of the defendants, who, it is alleged, were then in diligent prosecution of work leading to discovery, and who thereafter continued such work to a discovery, and their successors in interest now claim the right to retain the possession and extract the oil therefrom under the act of Congress of June, 1910, commonly known as the Pickett Act. 36 Stat. 847.

The facts are that in January, 1907, L. B. McMurty posted a notice in the names of certain parties residing in Chicago, from whom he held powers of attorney, on each quarter of the section claiming location thereof under the placer mining laws. In October, 1908, acting as at-

torney in fact for the alleged locators, McMurty entered into a contract with Mrs. McLeod, wife of defendant J. S. McLeod, by the terms of which she was to drill a well in the exact center of the section, and if oil was discovered the alleged locators were to apply to the government for a patent for each of the four claims, and upon receipt thereof to deed to Mrs. McLeod the north half of the south half and the south half of the north half of the section. Thereafter Mrs. McLeod transferred to Messrs. Wheat, Wilson, and Gordon a three-quarter interest in the contract referred to, and there was subsequently and during the year 1908 purchased and moved onto each claim material for a derrick.

About October 1, 1908, a controversy arose between those claiming under the McMurty locators and Haberkern, Wibel, and others, who were claiming the entire section under location notices posted by them in December, 1907, which controversy was settled on October 30, 1908, by the McMurty interests surrendering and relinquishing any right they might have to the south half of the section, and the Haberkern interests doing likewise as to the north half.

McLeod, Wheat, and associates thereupon entered into a contract with the Haberkern-Wibel people for the development of the south half of the section, by which they agreed to begin drilling on the southwest quarter within 40 days, and on the southeast quarter within 4 months, and if oil was discovered, and receiver's certificate for a patent issued, they were to receive half of each claim upon which discovery had been made. The contract between the McMurty interests and Mrs. McLeod and associates, so far as it affects the north half of the section, was modified, or a new contract entered into, by which it was agreed that the amount of land they were to receive for development in case discovery was effected was confined to the south 60 acres of each quarter, in place of one-half thereof, and they were to drill for oil on each claim.

On November 7, 1908, Mrs. McLeod and associates leased to Gillette and others the east 20 acres of the south 60 acres of the northeast quarter, with an option to purchase, and on November 26th they leased the remaining 40 acres thereof and the south 60 acres of the southwest quarter by separate instruments to the California Midway Oil Company, a corporation organized by them, by the terms of which the lessee was to erect derricks and commence drilling on the property described in each lease within 60 days from November 4, 1908, and to complete at least one well thereon within one year from such date. On November 11, 1908, McLeod and associates transferred to Price and W. R. and R. H. Lacey certain alleged interests in the contracts and leases covering the south 120 acres of the north half of the section, and on December 28, 1908, the several parties, except Gillette, transferred their respective interests to the defendant Thirty-Two Oil Company, a holding corporation organized by them and in which they held the stock.

In November or December, 1908, McLeod, Wheat, and associates laid a water line from the Stratton Water Company into the section and a short distance north of the south line thereof, from which point a lateral was laid to the northwest corner of the southwest quarter, and from there to the southwest corner of the northwest quarter. Some

time in the latter part of 1908 a derrick was erected in the southwest corner of the northwest quarter by the California Midway Oil Company, and drilling commenced thereon by it in January, 1909, and continued with water through the line referred to until the well was brought in about a year later. A derrick was also erected by the same company at or near the southwest corner of the northeast quarter, which derrick was twice moved, and finally located in the northeast quarter, the property now in controversy, in February or March of 1909, but no further or other work was done on that quarter until the spring of 1910, when the derrick was rigged up and drilling commenced.

On January 1, 1909, some question having arisen as to the validity of the locations made by McMurty, in 1907, as attorney in fact for the Chicago people, McMurty attempted to relocate the north half of the section in the names of certain New York people, from whom he had powers of attorney, by posting thereon notice and recording the same. On May 17, 1909, acting as attorney in fact for the New York people, McMurty conveyed or attempted to convey the entire north half of the section to defendant McLeod in trust for the several claimants thereof, according to their respective interests, and took from him a contract which, after reciting such conveyance, and that he (McLeod) had theretofore erected derricks suitable for drilling wells on the northwest quarter and northeast quarter, and had actually commenced drilling on the northwest quarter, contained a stipulation on his part to continue drilling at the point where same was then being done until he had reached a depth of 2,500 feet or discovered oil, and within 30 days after the discovery of oil in paying quantities at such well to begin drilling on the northeast quarter at the point where the derrick was then erected, and upon discovery of oil upon either quarter to apply for patent therefor, and upon receipt of receiver's certificate to convey to the New York locators the north 100 acres thereof.

Such was the status of the property and the claims of the respective parties at the date of the withdrawal order. The defendant Buick Company and Associated Oil Company were occupying parts of the property at the time this suit was commenced, by purchase or lease from one or more of the parties subsequent to the withdrawal. The defendants Thirty-Two Oil Company and J. M. McLeod had parted with their interest in the property long prior to the commencement of the suit, and neither of them was in possession, or committing or authorizing the commission of waste, at that time. The defendant Standard Oil Company has a pipe line across the premises, and at one time purchased the oil produced from the property; but it had ceased such purchases several months prior to the commencement of the suit.

It is claimed by the government that the paper locations by McMurty in 1907 and 1909 were not made by him for the benefit of the alleged locators, but for himself and others, and were therefore a fraud on the mining law and void. I am disposed to believe there is merit in this contention. Indeed, there can be no question from the evidence but what the alleged locations made in 1909 were not for the use and benefit of the named locators, but to enable McMurty to consummate and carry out the previous contract made by him with McLeod

and others for the disposition of the property as heretofore stated. But I do not deem it necessary to put the case on that ground. If the defendants have any right to the property as against the plaintiff, it is conferred by the Pickett Act, and the facts do not bring them within the remedial provisions of that law.

[1] In considering this and similar cases, it is important to bear in mind that at the time of the withdrawal order of September, 1909, there was no law for the entry and patenting of public lands containing petroleum or mineral oil, except the provisions of the law relating to placer mines (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [Comp. St. 1916, § 4635]), and that no location of a placer mining claim, valid against the government, could be made until the discovery of mineral within the limits of the claim (sections 2329, 2330, R. S. [Comp. St. 1916, §§ 4628, 4629]). Therefore an occupant or claimant of public land included within the withdrawal order, upon which no discovery had been made at the date of such order, had no legal right as against the government, prior to the Pickett Act, to continue such possession and exploration, although he was holding or claiming in good faith under paper locations and was actually engaged in the work of discovery.

No discovery had been made on the premises in controversy at the date of the withdrawal, and so we must look to the Pickett Act to determine what rights, if any, the defendants now have. The general purpose of this act was to authorize the withdrawal of public lands by the President for certain specified purposes. Large areas had, however, been previously withdrawn, particularly by the order of September 27, 1909, in the oil-bearing districts of California. It was claimed and represented to Congress that many persons and corporations were bona fide occupants or claimants of land within such withdrawn area, under paper locations, and when overtaken by the withdrawal were engaged in the work of discovery, and as a result of the withdrawal, if valid, the benefit of such work and development which fell short of discovery would be entirely lost. To save the rights and interests of such claimants or occupants against the operation of a withdrawal, Congress provided in the Pickett Act that:

"The rights of any person who at the date of any withdrawal order heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

The rights therein conferred or confirmed are manifestly confined to bona fide occupants or claimants of public land and who were in diligent prosecution of work leading to discovery when overtaken by a withdrawal. In other words, if a bona fide operator, who had made or was holding under a location in other respects legal, except as to discovery, and on the date of withdrawal was engaged in work leading to discovery of oil or gas thereon, and he continued such work to discovery, his rights would not be affected or impaired by the withdrawal, and he would be entitled to the same rights under the mining laws as if the land had never been withdrawn. The question, then, for decision is whether the California Midway Oil Company was, on

September 27, 1909, in diligent prosecution of work leading to discovery of oil or gas on the land in controversy, within the meaning of this law.

[2, 3] Now it is clear from the testimony and in fact undisputed that there was no work in progress or immediately contemplated at the date of the withdrawal looking to discovery, or intended for the discovery, of oil thereon, and had not been for some months prior thereto, if at any time, unless the drilling of a well by the oil company on another location, half a mile distant, with the intention on its part, if oil was discovered thereon, to thereafter proceed with the development of the location in question, is held to be such work. Whether an occupant or claimant of oil or gas bearing land at the date of a withdrawal order was at that time engaged in diligent prosecution of work leading to discovery is a question of fact. No hard or fast rule applicable to all cases has or can be laid down by which it can be determined. Each case must depend to a large extent upon its own facts and circumstances. General principles only can be stated. It is not necessary that the work being performed at the time of the withdrawal was on the particular tract in question, but before it can be deemed work leading to discovery thereon it must have been such as would reasonably tend to that end, and been presently and purposely designed for that purpose. Now, the drilling of an oil well on one location would not, however long continued, lead to discovery of oil on another. It might afford evidence of the probable existence of oil on the other, and justify the expenditure of money in exploring it. Indeed, it might, by disclosing the formation, materially aid in subsequent drilling and lessen the expense. This result, however, would follow, whether the well was drilled by the occupant or claimant of the land in controversy or by a neighbor, and hence I do not think that such work on one location can be held to be work leading to discovery on another. The proviso in the Pickett Act is somewhat indefinite and uncertain, but when interpreted in the light of the known conditions and the purpose of Congress, it was intended, I take it, to confer upon those occupying or claiming in good faith at the time of withdrawal public land within a withdrawn area, with the bona fide intention of complying with the mining laws, and who were at such time in diligent prosecution of work leading to discovery thereon, the right to continue such work if discovery was subsequently made, and the right to retain possession and extract the oil, or take title by patent, the same as if the land had not been withdrawn.

[4] There was no law, state or national, at the date of the withdrawal, authorizing or requiring the marking of boundaries of a mining location or the posting or recording of notice of location prior to discovery; but a practice had grown up in the oil districts to do so, which operated by common consent as an aid in tracing the boundaries of the claim, and as constructive occupation or possession of the described area, and gave the locators or their assignees a preference right to the possession as against all persons, except the United States, while in diligent prosecution of work leading to discovery, in order that they might make discovery and a valid location. U. S. v. North American Oil Co. (D. C.) 242 Fed. 723, just decided. It was this right, existing

at time of withdrawal, Congress had in mind and intended to make valid as against the government by the provisos of the Pickett Act, within the limitations, if any, therein contained, and which it declared should not "be affected or impaired" by a presidential withdrawal. When, therefore, the occupation or claim was under such a location, the area or extent thereof should, for the purposes of the rights conferred, be determined thereby. Each location, which could not exceed 160 acres, so marked on the ground and described in the notice, should be considered as a separate unit, regardless of the number of such locations, contiguous or otherwise, occupied or claimed at the date of the withdrawal by any one person or corporation, and the work contemplated in the act is work leading to discovery on the particular location.

[5] Group improvement or development, "assessment work," or work necessary to support an application for patent, as authorized and required by Act Feb. 12, 1903, c. 548, 32 Stat. 825 (Comp. St. 1916, § 4636), and sections 2324, 2325, R. S. (Comp. St. 1916, §§ 4620, 4622), have, in my judgment, no application as such to cases of this character. They are statutory privileges accorded to and obligations imposed upon the claimants of mining land under the general mining laws after location, which must follow discovery, and have no reference to prior work. Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966; opinion of Judge Bledsoe in U. S. v. Stockton Midway Oil Co. (D. C.) 240 Fed. 1006. Decisions construing such statutes, and especially sections 2324, 2325, are no doubt helpful on determining what will be considered work on a mining claim; but we are here dealing with the rights as defined and conferred by the Pickett Act, which was designed for relief of bona fide occupants or claimants at the date of the withdrawal, who had not but were then intending in good faith to make a discovery, and who were manifesting such intention by the diligent prosecution of work tending thereto, and not for one holding under paper locations, or locations made for the purpose of enabling one person to acquire a larger area of mineral land by one discovery than the law permitted him to take, or one who by means of skeleton derricks, cabins, so-called assessment work, or the like, was endeavoring to hold land temporarily for speculation, or until exploratory work on adjoining property owned or occupied by him, or in the vicinity, had indicated the oil or nonoil bearing quality.

[6] I have no doubt that work could have been in progress at the date of withdrawal on one of a group of locations, or even extraterritorially to any of them, which could properly be held to be work leading to discovery on all, such as the building of roads, laying of water lines, establishing camps, assembling material and equipment, and the like, if such work directly tended to and was purposely designed for the development of each location with all practical expedition. Anvil Hy. & Dr. Co. v. Code, 182 Fed. 205, 105 C. C. A. 45; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; U. S. v. Ohio Oil Co. (D. C.) 240 Fed. 996. But such is not the case in hand. Here the preliminary work had been done almost a year before the withdrawal, and was necessary and proper for the development of the

northwest quarter, and had been and was being so used. All the work being done at the time of the withdrawal or immediately contemplated was on that quarter. The work on the remaining parts of the section was suspended to await results. If it was the original purpose to develop the several locations as a unit, it was not carried out, nor was the failure to proceed with the work of discovery on the property now in controversy due to the lack of water, but to the avowed policy of the claimant, as disclosed by the testimony and by the agreement entered into, not to do so unless the result of the work on the northwest quarter proved the oil-bearing quality of the district. Mr. Kinzie, the superintendent of the properties, testified that he had no instructions to begin drilling on the northeast quarter until the fall of 1909, and that it was not the policy of his company to do so until the other well was brought in, and this purpose is evidenced by the written contract with McLeod, made in May, 1909.

[7] It follows that the government is entitled to a decree as prayed for in the bill, except as to the Thirty-Two Oil Company, McLeod, and the marketing companies. As to them, the suits should be dismissed, for the reasons given in U. S. v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, and U. S. v. Brookshire Co. (D. C.) 242 Fed. 718, just decided.

In re NANNANGA.

(District Court, S. D. Georgia, E. D. July 5, 1917.)

1. ALIENS ⇐61—RIGHT TO NATURALIZATION—ALIEN ENEMIES.
Within Rev. St. § 2171 (Comp. St. 1916, § 4362), providing that no alien, who is a native citizen or subject or denizen of any country with which the United States are at war at the time of his application, shall be then admitted to become a citizen, the United States was not at war with Germany until Congress declared war, notwithstanding the aggressions of the German government against the United States.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.]

2. ALIENS ⇐61—RIGHT TO NATURALIZATION—ALIEN ENEMIES.
A German subject, whose petition for naturalization was filed in February, before the declaration of war against Germany, and who is not shown to have the slightest sympathy in antgonism with the purpose of this country in such war, is entitled to naturalization, notwithstanding Rev. St. § 2171.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.]

Petition by Henry Nannanga for naturalization. Petition granted.

William Garrard, of Savannah, Ga., for petitioner.

Erle M. Donalson, U. S. Atty., and Wallace Miller, Asst. U. S. Atty., both of Macon, Ga., for the United States.

SPEER, District Judge. There can be no doubt at all, in view of the evidence, that Mr. Nannanga would be a valuable American citizen. He has lived here from his youth. He reached here before he attained his majority. He testified that he had a hard struggle, but

has built up a highly prosperous shipping business in Savannah. Several of the foremost business men of Savannah speak in unqualified terms of approbation of his character. They are no less unqualified in the strong opinion that he would be a useful and valuable American citizen. Nor are his sympathies inimical to this country at this time. He so plainly testified. To the Liberty Bonds, regarded as vital to our safety, he subscribed $5,000. To the Red Cross fund, now in process of accumulation to relieve the agonies and horrors of war, he also made a considerable subscription. When one of his employés volunteered to enter the military service of the United States, although receiving no service from him, for a year Mr. Nannanga has continued his salary. There is no proof against him; no proof of the slightest sympathy in antagonism with the purpose of this country in the great struggle in which it is now engaged.

Now, then, it is said he should be refused naturalization as an American citizen, in view of a certain provision of a statute; that is, section 2171 of the Revised Statutes (Comp. St. 1916, § 4362). It provides that:

"No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States."

Now, his declaration was filed some two years ago. His application was filed in February. In April, the President of the United States in his wonderful message to Congress uses this language:

"With a profound sense of the solemn and even tragical character of the step I am taking, and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that the Congress declare the recent course of the Imperial German government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it, and that it take immediate steps, not only to put the country in a more thorough state of defense, but also to exert all its power and employ all its resources to bring the government of the German Empire to terms and end the war."

[1, 2] The President thus recognizes the power of Congress in that respect, and it is authorized by the organic law. The Constitution empowers Congress to declare war. The President advises Congress to declare war. But it is said that war existed between the United States and Germany at that time. Does not that contention, if maintainable, put the United States in an insincere position? The President says that Germany has thrust war upon us. But, if we had been at war with Germany three months before Congress acted, where would be the justice of that contention? The language of the statute, to bar the alien enemy, is that he must be a citizen or subject of a country with which the "United States are at war." How can it be said that the United States was at war with Germany? True, Germany had made many aggressions upon us. So had Mexico, quite as many, as exasperating, and probably quite as bloody. But can it be said that we were at war with Mexico? No. While, in a political sense, the resolution of Congress was in the highest sense justifiable, yet in a legal

sense, in that sense in which the rights of persons and rights of property are determined, there was no war in which the United States was engaged until the joint resolution of Congress was adopted. That being true, since the application of Mr. Nannanga was on file at the time war was declared, there is no reason why the court should refuse him his right to become an American citizen.

Order may be taken accordingly.

In re HAAS.

(District Court, N. D. Texas, Dallas Division. July 16, 1917.)

1. ALIENS ⟸61—RIGHT TO NATURALIZATION—ALIEN ENEMIES—"TIME OF HIS APPLICATION."

Under Rev. St. § 2171 (Comp. St. 1916, § 4362), providing that no alien, who is a native citizen or subject or denizen of any country with which the United States are at war at the time of his application, shall be then admitted to become a citizen, a German citizen, whose petition for naturalization was filed prior to the declaration of war by Congress, is not entitled to be naturalized during the continuance of the war, as "the time of his application" does not mean the date of the filing of the petition, but the whole intervening time from the filing of the petition until the petition is passed on, while "then" does not refer alone to the time of the application, but to the state of war existing at the time of the filing of the petition and the court's action thereon.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.]

2. ALIENS ⟸68—NATURALIZATION—RENOUNCING ALLEGIANCE TO FORMER GOVERNMENT.

An applicant for naturalization must without reservation absolutely and forever renounce allegiance to his former government, and no divided allegiance is tolerated by the law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145.]

3. ALIENS ⟸61—RIGHT TO NATURALIZATION—ALIEN ENEMIES.

In view of the recent German statute, authorizing German citizens to retain their citizenship when acquiring foreign citizenship, any doubt as to the right of German citizens to naturalization during the war should be construed against their admission.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.]

Application by Rudolph Haas for naturalization. Application denied without prejudice.

JACK, District Judge. [1] It is provided by section 2171 of the Revised Statutes (Comp. St. 1916, § 4362) that:

"No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States."

The petition of the applicant was filed prior to April 6, 1917, the date of the resolution of Congress declaring a state of war between the United States and Germany, of which latter country he is a citizen. He possesses the necessary qualifications, and his right to natural-

ization is brought into question only by the fact that the United States is now at war with the German Empire. If "the time of his application" be construed to mean the date that his petition was filed, then he would not fall within the prohibition of the statute. On the other hand, if by "the time of his application" is meant the time during which he is an applicant, that is to say, the intervening time from the date of the filing of his petition until the date the petition is passed on, then he would fall within the prohibition of the statute.

The court is of the opinion that "the time of his application" is the time during which his application is pending. He is an applicant for naturalization from the date of the filing of his petition until it is finally acted upon, and the time during which he is an applicant is "the time of his application." This provision was originally contained in the act of April 14, 1802 (2 Stat. 153, c. 28, § 1), and from that date until the passage of the act of June 29, 1906 (34 Stat. 596, c. 3592), the petition for naturalization was filed and acted upon the same day. By the act of 1906 it was provided that at least 90 days should elapse from the date of the filing of the petition until the hearing thereon. Thus, under the provisions of the original act of 1802, embodied in the present law, no alien whose country was at war with the United States at the time his application was acted upon by the court could be "then admitted to become a citizen of the United States." The word "then" does not refer alone to the time of his application, but refers likewise to the state of war existing at the time of the filing of the application, and the court's action thereon. Under the original act of 1802, it is clear that an alien could not be naturalized if his country at the time his application was passed upon was at war with the United States. The purpose of the act of 1906, changing the original law so as to require 90 days' delay before taking action on the petition, was evidently to provide greater safeguards against the naturalization of undesirable aliens, and it certainly could not have been intended by Congress to thereby change the law, so as to permit the naturalization of an alien whose country at the time of the hearing was at war with the United States. Such a construction would be contrary to the very purpose and spirit of the law.

[2] There is a recent statute in Germany, which went into effect January 1, 1914, some of the provisions of which are wholly contrary to, and at variance with, our ideas of the obligations of a naturalized citizen. No divided allegiance is tolerated by our law. The applicant must, without reservation, absolutely and forever renounce allegiance to his own government. One of the provisions of this German statute is as follows:

"Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home state to retain his citizenship. Before this consent is given the German consul is to be heard.

"The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country, may not be granted the consent provided for in paragraph 2."

In justice to the applicant in this instance, it should be said that the evidence does not show that he made such application to the au-

thorities of his own government, and that he is apparently, in every respect, in good faith.

[3] The existence of such a statute, however, shows the necessity of great care and caution in the naturalization of German citizens during the war. Any doubt as to the meaning of our law should be construed against their admission, particularly so as such construction does not finally deny, but only temporarily delays, their naturalization. I regret that I cannot, under my view of the law, conform to the opinion of the Circuit Court of Appeals, Second Circuit, in the case of the United States v. Meyer, 241 Fed. 305, rendered April 12, 1917, by a divided court. The Circuit Court of Appeals for this Circuit has not yet passed on the question.

It is ordered that the application of Rudolph Haas, for the present, be denied, and the case continued, without prejudice, pending the termination of the war with Germany.

In re DI GIOVINE.

(District Court, W. D. New York. May 7, 1917.)

1. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE.
   In a proceeding to cancel a certificate of citizenship, evidence *held* to show that the applicant had not resided in the United States continuously for five years preceding his application, but that he had during that time left the United States for a foreign country without intention to return.

2. ALIENS ⟸62—NATURALIZATION—CITIZENSHIP.
   The purpose of the law requiring aliens to reside within the United States for a period of five years preceding the filing of a petition for citizenship is to afford an opportunity for observing the conduct of the applicant for citizenship, and to enable him to familiarize himself with the local institutions and language; and in case of an applicant's failure to reside in the United States for the prescribed period, no certificate of citizenship can be granted.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125.]

In Equity. In the matter of the application for naturalization of Stanislao Di Giovine. On motion to set aside and cancel a certificate of citizenship. Certificate canceled.

W. M. Ragsdale, of Pittsburg, Pa., Chief Naturalization Examiner, for the United States.

Watts, Stockwell & Hunt, of Niagara Falls, N. Y., for respondent.

HAZEL, District Judge. Objection was at first made because the proceeding to cancel was not brought under section 15 of the naturalization law of June 29, 1906 (34 Stat. 601, c. 3592 [Comp. St. 1916, § 4374]), upon a petition and hearing; but, as this objection has not been insisted upon, I shall give consideration to the merits.

[1] It is contended by the government that, if respondent had not made false statements at the preliminary examination before the naturalization examiner, the fact that he had not resided in the United

States continuously for a period of 5 years would have been ascertained. It now appears that he was absent from this country for about 18 months immediately next preceding the filing of his petition for citizenship, and the question is presented whether it was his intention, upon leaving the United States, to remain temporarily or permanently in Italy. It is shown that he had declared his intention to become a citizen of the United States and had received his first papers some time between July, 1910, and May, 1914, when he and his wife returned to Italy, continuously residing there until October 26, 1915, when respondent left Italy, arriving in New York November 15th.

While in Italy respondent entered into partnership with his brother-in-law for the manufacture and repair of jewelry, but he asserts that his failure to return more promptly to the United States was owing to the European war, Italy refusing to issue passports to all persons of military age, and that he was therefore unable to obtain a passport, and was delayed in Italy until he left there clandestinely. Although the applicant first came to the United States in 1906, going back to Italy in 1908, and returning to the United States in 1910, I find nothing to satisfy me that he intended to return to the United States after his last visit here, and believe that his return was due to the war and the possibility of enforced military service in Italy. His untruthful replies to questions put to him by the naturalization examiner leave no doubt of this in my mind.

[2] In enacting the statute requiring aliens applying for citizenship to reside continuously in the United States for a period of 5 years, it was doubtless the intention of Congress to afford the government an opportunity to observe the conduct of applicants, and to give the applicants time in which to acquire the language and to familiarize themselves with our habits and institutions. As respondent has failed to comply with the statute, I hold that the certificate of naturalization issued to him must be canceled, but without prejudice to his right to file another application.

So ordered.

UNITED STATES v. UTAH LIGHT & RY. CO.

(District Court, D. Utah. June 29, 1914.)

No. 3186 (397).

1. WATERS AND WATER COURSES ⟸18—RIGHT OF WAY FOR DITCHES—TIME OF VESTING OF RIGHTS.

Under Rev. St. § 2339 (Comp. St. 1916, § 4647), providing that whenever, by priority of possession, rights to the use of water have vested and accrued, and are recognized and acknowledged by local customs, laws, and decisions, the possessors and owners of such rights shall be maintained and protected therein, and that the right of way for the construction of ditches and canals is acknowledged and confirmed, the right to an easement over public land for a ditch or canal only vests on completion of the work, and while, as between rival claimants, the title on completion relates back to the commencement of the work, or notice of appropriation, provided the work is prosecuted with due diligence, this rule does not

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

apply as against the United States, and as to it, prior to the final completion, the appropriator is acting under a revocable license, which may be withdrawn, even though he has expended a large sum of money in the expectation of finally obtaining title.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 10.]

2. WATERS AND WATER COURSES ⇐4—RIGHTS IN PUBLIC LANDS—RIGHTS OF WAY.

Rev. St. § 2339 (Comp. St. 1916, § 4647), giving a right of way over public land for ditches or canals to possessors of water rights, was superseded with respect to such right of way for electric power purposes by Act May 14, 1896, c. 179, 29 Stat. 120 (Comp. St. 1916, § 4944), authorizing the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way to the extent of 25 feet upon public lands by any citizen or association for the purposes of generating, manufacturing, or distributing electric power. *Held*, that one who had appropriated water prior to May 14, 1896, but did not complete its reservoir and canals until after that date, had no easement, as the act could be properly construed prospectively as providing in effect that no title to an easement should thereafter vest.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1.]

3. WATERS AND WATER COURSES ⇐4—RIGHTS IN PUBLIC LANDS—RIGHTS OF WAY.

That the Secretary of the Interior did not promulgate regulations under Act May 14, 1896, until the diversion of water was completed, did not entitle such party to an easement, as the subsequent acts of the Secretary of the Interior could cast no light on the intent of Congress in enacting the statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1.]

In Equity. Suit by the United States against the Utah Light & Railway Company. Decree for the United States.

See, also, 144 C. C. A. 485, 230 Fed. 343.

Wm. W. Ray, U. S. Atty., of Salt Lake City, Utah, and J. F. Lawson, of Ogden, Utah, for the United States.

P. L. Williams, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for defendant.

MARSHALL, District Judge. This is a companion case to U. S. v. Utah Power & Light Co., the decision of which by the Circuit Court of Appeals is reported in 209 Fed. 554, 126 C. C. A. 376. The defendant claims here, as was contended in that case, that its right to its reservoir and canals vested under section 2339 of the Revised Statutes of the United States (Comp. St. 1916, § 4647), and that subsequent legislation does not affect it.

[1] In the case cited it was determined that Act May 14, 1896 (29 Stat. 120, c. 179 [Comp. St. 1916, § 4944]), superseded section 2339 with respect to such rights over public lands for electric power purposes, the beneficial use to which the defendant devotes its water appropriation; that after the passage of that act no right of way could be obtained, except pursuant to a permit from the Secretary of the Interior. It is admitted that the defendant has not obtained such a permit; and

the question to be determined, therefore, is whether the defendant's right had vested prior to May 14, 1896. These rights were initiated by two notices of appropriation, the one on May 13, 1893, and the other on June 5, 1894; but the reservoir and canals were not completed and water was not in fact diverted until after May 14, 1896. There is a concurrence of authority that the right to an easement for a ditch or canal over the public land, claimed under section 2339, only vests on the completion of the work, but that, when so completed, as between rival claimants, the title will relate back to the commencement of the work, or notice of appropriation, provided that the work was prosecuted with due diligence. This rule of relation, however, has no application against the United States. As to it, prior to the final completion, the appropriator is acting under a revocable license, and cannot complain if the license be withdrawn, even if, as in the instant case, he has expended a large sum of money in expectation of finally obtaining title. U. S. v. Rickey Land & Cattle Co. (C. C.) 164 Fed. 496. It would seem that, when the decision of the Circuit Court of Appeals is applied to this case, a decree for the plaintiff must follow.

[2] It may, with force, be argued that a statute must be construed as intended to operate prospectively, and not retrospectively, if such construction does not clearly violate its language, and that the statute of May 14, 1896, should be held to apply only to future permits, and that those who have already commenced work pursuant to the implied license of section 2339 are unaffected by it. With some doubt I am unable to reach this conclusion. Assuming an intention to repeal section 2339, so far as appropriations of water for electric power purposes are concerned, there seems to be no injustice in substituting for an undefined implied license a defined express license, and the act can be properly construed prospectively as providing in effect that no title to an easement should thereafter vest. The object of the act, as determined by the Court of Appeals, was to substitute the permit system for the vested easement system. If an exception of inchoate rights had been intended, it would doubtless have been expressed.

[3] It is suggsted that as the Secretary of the Interior did not promulgate regulations under Act May 14, 1896, until after the diversion of the water was completed, that the defendant's rights are saved. I do not think so. The question is: What was the intent of Congress in enacting the statute of May 14, 1896? The subsequent acts of the Secretary of the Interior can cast no light on this intent. If the intent was to terminate the system of vested easements over the public lands for canals for power purposes, and to authorize the Secretary of the Interior to issue revocable permits thereafter, then no delay by the Secretary in issuing a permit can confer vested rights.

The injunction sought by the plaintiff will issue with respect to that part of the defendant's works which are situated on the lands of the United States.

CARNS et al. v. KEEFE BROS.

(District Court, D. Montana. May 5, 1917.)

No. 42.

COPYRIGHTS ⇐40—ABANDONMENT OF RIGHTS.

Where a structure to represent an elk was erected over a city street as the chief attraction at a celebration to which the public was invited, assuming that the structure was a statue within the copyright law, a copyright attempted to be secured thereon was invalid, since, where a production is intended for and bound to be given free and unrestricted public exhibition, and is so displayed, there is a publication of the thing and dedication to the public, defeating copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35.]

In Equity. Suit by E. B. Carns and others against Keefe Bros. Decree for defendants.

W. D. Kyle, of Butte, Mont., for plaintiffs. Wheeler & Grorud, of Butte, Mont., and Frank Woody, of Missoula, Mont., for defendants.

BOURQUIN, District Judge. Even as Hans Breitman, the Best People On Earth gave a party. All congenial souls and spirits were invited. For the success of such an enterprise, all recognize that guests must be amused and enthused. To that end the discreet business man donated more or less cheerfully, and many attractions were provided. The invitees, perhaps equally divided, were present. The celebration, to its full extent, was of endurance some several days. Competent judges estimate from 10,000 to 20,000 good fellows milled the streets for that period, enthusiastically separating themselves from surplus shekels, sans sandbagging, in solicitous endeavor to salt the tail of the elusive and illusive Bird of Pleasure, and that the underwriters made a profit.

The chief attraction was a monstrous elk (of the horned variety), which bestrode a street of Butte at a busy corner. Standing 60 feet in its hoofs, it was built of a wooden frame covered with what is described as "chicken" wire (whatever or why that may be), canvassed, plastered, and painted; and in conventional fashion it was all lit up all night, but with colored lights.

There is assurance that it resembled the real thing and was recognized by spectators of limited zoology. Local connoisseurs say that it was possibly neolithic in conception, perhaps slightly cubist in design, but positively nouveau in execution. At the hosts' expense, plaintiffs built it under cover and without police interference, reserving copyright. When unveiled, the structure bore plaintiffs' notice: "Copyrighted. Infringers beware." And the hilarious populace promptly shot this mighty elk with a thousand cameras.

Defendants bought and sold post card reproductions. Hence this suit for infringement; plaintiffs having registered copyright. If it be assumed that this creation was a "statue," within the law of copyright, the circumstances render the copyright invalid. Copyright, in analogy

to patents, is to reward originality and inventive genius, and to encourage it to put out its productions for public enjoyment and benefit, which otherwise the author proprietor might withhold, having right and power to do so, for his exclusive use and pleasure. If, however, the production is intended for or bound to be given free and unrestricted public exhibition—to attract the public to come and enjoy without price—and, if it is so displayed, there is publication of the thing and dedication to the public, again in analogy to patents, defeating copyright. For this display inevitably exposes the production to copy, and so is inconsistent with claim of copyright; and the latter cannot be preserved by any notice thereof hung upon the exhibit. This accords with the spirit of the law, and is suggested by Tobacco Co. v. Werckmeister, 207 U. S. 300, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

That is this case. Plaintiffs built the structure for public free exhibition, and were bound to yield it to such. They could not withhold it. This elk could no more be copyrighted than Liberty Enlightening the World, or the Dewey Arch, or the Washington Monument, and no one will seriously claim these latter could be.

See generally, Caliga v. Newspaper Co., 215 U. S. 186, 30 Sup. Ct. 38, 54 L. Ed. 150, and cases cited.

Decree for defendants.

UNITED STATES v. RECORD OIL CO. et al. SAME v. CONSOLIDATED MUTUAL OIL CO. et al. SAME v. CARIBOU OIL MINING CO. et al.

(District Court, S. D. California. June 8, 1917.)

Nos. A 41, 42, 43.

1. MINES AND MINERALS ⟸38(2)—SUITS TO ESTABLISH RIGHTS IN OIL LANDS.
Where a final certificate has been issued to a claimant of oil lands, and the matter is pending in the General Land Office on application for a patent, the final certificate and proceedings in the Land Office cannot be disregarded, and the same questions pending in such office litigated in a suit by the United States to enjoin the claimant from removing oil and to require an accounting for oil already taken.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½.]

2. MINES AND MINERALS ⟸39—FINAL CERTIFICATE—EFFECT.
While a final certificate issued to a claimant of oil lands is subject to cancellation by the land department, or to be set aside for fraud by the courts, until canceled, it vests the entryman with an equitable title to the land and the prima facie right to a patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 114.]

3. MINES AND MINERALS ⟸2—PUBLIC LANDS SUBJECT TO DISPOSITION.
The Pickett Act (Act June 25, 1910, c. 421, 36 Stat. 847 [Comp. St. 1916, §§ 4523–4525]), providing that the rights of any bona fide occupant or claimant of oil lands, who, at the date of a withdrawal of such lands from location, sale, or entry, is in the diligent prosecution of work, lead-

ing to the discovery of oil or gas, shall not be affected or impaired by such order so long as he shall continue in diligent prosecution of the work, relieves all land included within its provisions from the operation of the withdrawal order, and leaves it subject to the disposition of the Land Department.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2.]

Three suits by the United States against the Record Oil Company and others, against the Consolidated Mutual Oil Company and others, and against the Caribou Oil Mining Company and others. Suits dismissed.

Frank Hall, of San Francisco, Cal., for the United States.

Edmund Tauszky, of San Francisco, Cal., for defendant Associated Oil Co.

Oscar Lawler, of Los Angeles, Cal., for defendants McLeod and others.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant Standard Oil Co.

U. T. Clotfelter, of Los Angeles, Cal., and Charles S. Wheeler and A. L. Weil, both of San Francisco, Cal., for defendants Consolidated Mut. Oil Co. and others.

J. Delmore Lederman, of San Francisco, Cal., for defendants Mays Consol. Oil Co. and others.

Jordan & Brann, of San Francisco, Cal., for defendants Columbus Midway Oil Co. and others.

Geo. E. Whitaker, of Bakersfield, Cal., for defendant Wilkes Bros., Inc.

BEAN, District Judge (sitting by special assignment). These three suits were brought to enjoin the defendants from occupying or extracting and removing the oil from the northeast, northwest, and southeast quarters of section 28, township 31, range 23 east of Mt. Diablo meridian, in the state of California, and to require them to account to plaintiff for oil heretofore taken. The cases were tried and submitted together and will be so considered in this memorandum.

The land is chiefly valuable for its petroleum contents. It is within the area withdrawn from all forms of location, entry or disposal by presidential order of September 27, 1909. No discovery of oil had been made on any part of the property at the date of withdrawal, but defendants claim that they or their predecessors in interest were bona fide occupants or claimants thereof at the date of withdrawal, and were then in diligent prosecution of work leading to discovery, which was subsequently made, and are therefore entitled to the property by virtue of the provisions of the act of June, 1910, known as the Pickett Act (36 Stat. 847), and a final certificate issued by the Land Department on a patent application.

The facts, so far as material at this time, are that in June, 1909, H. C. Stratton, claiming as the successor in interest by assignment and transfer of paper locations made by sundry parties on each of the four quarters of section 28, conveyed his interest in the entire section

by quitclaim deed to J. M. McLeod. On June 25, 1909, McLeod leased a portion of each quarter for development purposes to J. M. Mays, acting for the Mays Oil Company, pursuant to the terms of which lease, and in compliance therewith, the Mays Oil Company went into possession of the leased property, and prior to the withdrawal had erected skeleton derricks on each of the three quarter sections involved in these suits, constructed a bunkhouse on the northwest quarter, a cookhouse and water tank on the northeast quarter, laid a water main from the Stratton Works to the tank on the northeast quarter, installed a complete standard drilling rig in the southwest quarter (property not included in this suit), and commenced drilling thereon about August 18, 1909, and continued such work with more or less interruption until the well was brought in. Oil in paying quantities was discovered by them on each quarter now in controversy. Thereafter, and on June 4, 1914, McLeod made application to the local land office for patent therefor, alleging:

"That on and for a long time prior to the 27th day of September, 1909, applicant and his predecessors in interest were, and ever since said date have been, bona fide claimants and occupants of said land, in the diligent prosecution of work leading to a discovery of oil or gas thereon; that the work above mentioned consisted of the drilling of wells upon said land, and upon each quarter section thereof, for the development and production of petroleum or gas therein and therefrom, which work applicant caused to be commenced long prior to September 27, 1909; and that said work consisted in the erection upon said land, and upon each quarter thereof, of a standard oil well drilling derrick, and thereafter actual drilling was begun upon the land herein described, and said work of drilling oil and gas wells upon the lands herein described has been diligently pursued and continued to discovery of oil or gas upon each quarter section of the land herein set forth and described."

Notice of such application was given, as required by law, and after the period of publication had expired, no adverse claim having in the meantime been filed, McLeod applied to purchase the land and paid to the local land office the purchase price, receiving from the register thereof a final certificate, stating that upon the presentation of the same to the Commissioner of the General Land Office, "together with a plat and field notes of survey of said claim and the proofs required by law, a patent shall issue thereon to the said J. M. McLeod, if all be found regular." The application and accompanying papers were immediately forwarded to the General Land Office by the register of the local land office, as required by the rules of the Department, where the matter is now pending.

[1, 2] Thereafter these suits were commenced. No reference is made in the bills to the final certificate, and no charge is contained therein that the same was obtained by fraud or misrepresentation. The suits seemingly proceed on the theory that the final certificate and proceedings in the Land Office can be disregarded, and the same questions now pending in that department be litigated in the courts. I am of the opinion that this cannot be done. The Land Department is charged by law with the sale and disposition of public lands. A final certificate issued by it on an application for a patent vests the entryman with an equitable title to the land and a prima facie right to a

patent. This title is, of course, subject to the jurisdiction of the Land Department, and for proper cause may be canceled by it. It may also be canceled and set aside for fraud by the courts, in a proper suit brought by the government for that purpose (U. S. v. Lost Hills [D. C.] 236 Fed. 973); but until the entry is lawfully canceled the entryman is in possession under an equitable title and to "be treated as though patent had been delivered" (Dahl v. Raunheim, 132 U. S. 262, 10 Sup. Ct. 74, 33 L. Ed. 324; El Paso Brick Co. v. McKnight, 233 U. S. 257, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113).

[3] It is urged, however, that the Land Department had no jurisdiction to receive or entertain an application for patent for land in controversy, or issue a final certificate, because such lands were withdrawn from all forms of entry, by presidential order of September 27, 1909. It is true the land was so withdrawn, but in my judgment the effect of the Pickett Act was a congressional modification of the withdrawal order, by relieving therefrom all land included therein occupied or claimed by bona fide occupants or claimants at the date of the order, who were then in diligent prosecution of work leading to discovery, as far as the rights of such occupants or claimants were concerned. As to them, the matter stood, therefore, as if the land had never been withdrawn, it remaining subject to the disposition of the Land Department.

It is claimed, also, that in any event the plaintiff is entitled to invoke the aid of a court of equity to protect the property from waste and destruction pending final disposition of the patent application by the Land Department. But the bills are not framed on that theory, and contain no allegations upon which such a decree could be based.

It follows, therefore, that the suits should be dismissed; and it is so ordered.

UNITED STATES v. O'HARA et al.

(District Court, D. Rhode Island. October 19, 1916.)

1. INDICTMENT AND INFORMATION ⊂⊃111(1)—NEGATIVING STATUTORY EXCEPTIONS.

Act Dec. 17, 1914, c. 1, § 1, 38 Stat. 785 (Comp. St. 1916, § 6287g), requires persons manufacturing or selling opium, etc., to register and pay a special tax. Section 8 (Comp. St. 1916, § 6287n) provides that it shall be unlawful for any person not registered, and who has not paid the special tax, to have in his possession or under his control any of such drugs, and that such possession or control shall be presumptive evidence of a violation of that section, and also of section 1, provided that this section shall not apply in certain cases, and provided, further, that it shall not be necessary to negative any of such exemptions in any indictment. *Held* that, where an indictment charged that defendants were persons required to register under section 1 and that they unlawfully had certain of the drugs in their possession and under their control, it was not necessary to negative an innocent possession by alleging that defendants' possession

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

was for purposes of sale, conceding that a dealer may have an innocent possession.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295.]

2. POISONS ⟸2—REGULATION—POSSESSION OF PROHIBITED DRUGS.

Act Dec. 17, 1914, c. 1, § 8, does not merely provide a presumption or rule of evidence to establish a violation of section 1, but itself makes the possession of drugs by certain persons, with some exceptions, unlawful.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1.]

Patrick J. O'Hara and another were indicted for offenses. On demurrers to the indictment. Demurrers overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Albert B. West, of Providence, R. I., for defendants.

BROWN, District Judge. This indictment is based upon Act Dec. 17, 1914, c. 1, 38 Stats. p. 785, known as the Harrison Act, which relates to opium, etc.

After the decision of the Supreme Court in United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, June 5, 1916, the second and fourth counts were nol. prossed. There remain for consideration the demurrers to the first and third counts.

By section 1 of the act certain persons are required to register with the collector of internal revenue and pay a special tax.

[1] The counts duly charge that the defendants are persons mentioned in section 1.

By section 8, as construed by the Supreme Court in United States v. Jin Fuey Moy, it is made unlawful for persons of the classes enumerated in section 1, who are not registered and have not paid the tax, to have in their possession or under their control any of the aforesaid drugs. The defendants are charged with unlawfully, willfully, knowingly, and feloniously having in their possession and under their control, certain of such drugs.

The defendants urge that the first and third counts are insufficient, in that they do not contain any allegations connecting the alleged possession with the requirement of registration. It is contended that the possession of a dealer which is made unlawful is possession for the purpose of dealing, and that the indictment must at least allege possession by a dealer for the purpose of dealing.

Conceding that a dealer may have an innocent possession of drugs, which is not connected with his dealing, for example, as medicine for his personal ailments, it does not follow that it is necessary, in framing an indictment on the statute, to charge that the possession of drugs was for the purpose of dealing, etc. The indictment charges unlawful possession. Section 8 makes possession of the drugs by a person who is required to register, and who has not complied with section 1, not only unlawful in itself, but presumptive evidence of a violation of section 1. It provides, however, certain exemptions, including the possession of drugs prescribed by a physician, and that it shall not be necessary to negative such exemptions in an indictment.

[2] While the act presents some difficulties of construction arising from the expression, "and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this act," this is to be read in connection with the provision that it shall not be necessary to negative in an indictment certain exemptions contained in section 8. Section 9 provides punishment for violation of or failure to comply with any of the requirements of the act. Section 8 makes unlawful the possession of drugs by certain persons, with some exemptions. Reference to section 1 is necessary to learn who must register; but section 8 defines what is unlawful, and section 9 (Comp. St. 1916, § 6287*o*) defines its punishment. Section 8, therefore, does not merely provide a presumption or a rule of evidence to establish a violation of section 1.

After due consideration of the very closely reasoned argument of the defendants, I am of the opinion that in effect it is that the indictment must negative the exemptions by defining the purpose of the possession. This seems to be inconsistent with the provision of section 8 that the exemptions need not be negatived.

Although section 8 must be limited to the persons enumerated in section 1, the possession of the drugs by such persons, not registered, and not having paid the special tax, is made unlawful, and, with certain exemptions which need not be negatived in the indictment, but may be set up in defense, is punishable as provided in section 9.

The demurrers are overruled.

ABBOTT BROS. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917.)

No. 2437.

1. INDICTMENT AND INFORMATION ⊂=52(2)—INFORMATION—SUFFICIENCY.
An information, bearing the signature of the district attorney and to which were attached four affidavits, sworn to before notaries public, is sufficient to support a judgment of conviction, though not verified by the district attorney; no warrant of arrest having been sought, and it being assumed that the district attorney, who signed in his official capacity, acted under his oath as a governmental official.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 165, 166.]

2. INDICTMENT AND INFORMATION ⊂=196(4)—WAIVER OF DEFECTS.
Defects in the acknowledgment of the information are waived, if not raised by suitable objection before trial, and cannot thereafter be raised.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 632.]

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

Abbott Bros. Company, a corporation, was convicted of violation of the Pure Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728), and it brings error. Affirmed.

Norman K. Anderson, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., for the United States.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. [1] The contention of the plaintiff in error that the information charging it with having violated the Pure Food and Drugs Act, bearing the signature of the district attorney for the Northern district of Illinois, and attached to which information and made a part of it were four affidavits sworn to before notaries public, is insufficient to support a judgment because of the insufficiency of the acknowledgement, must be rejected. Weeks v. United States, 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651; United States v. Adams Express Co. (D. C.) 230 Fed. 531.

No warrant for arrest having been sought, the information signed by the United States district attorney was sufficient, without any verification and without any supporting affidavits. It was unnecessary for the district attorney, who signed the information in his official character, to assert in the body of that document that he informed the court upon his oath as a government official of the facts therein set forth. It will be presumed he acted on his oath as an officer of the government.

[2] Nor do we think the plaintiff in error is in a position to raise this question for the first time in this court. Defects such as are here complained of are in any event waived, if not raised by suitable objection before trial. People v. Murphy, 56 Mich. 546, 23 N. W. 215; Bryan v. State, 41 Fla. 643, 26 South. 1022; State v. Osborn, 54 Kan. 473, 38 Pac. 572; State v. Brown, 181 Mo. 192, 79 S. W. 1111; Johnson v. State, 53 Neb. 103, 73 N. W. 463; State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; Hammond v. State, 3 Wash. 171, 28 Pac. 334. See, also, on waiver of informalities, Garland v. State of Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772.

Judgment is affirmed.

In re HOLLINGSWORTH & WHITNEY CO. HOLLINGSWORTH & WHITNEY CO. v. BOSTON et al. In re SCHMICK HANDLE & LUMBER CO.

(Circuit Court of Appeals, First Circuit. June 11, 1917.)

Nos. 1229, 1241.

1. BANKRUPTCY ⟸117(1)—AGREEMENTS WITH RECEIVERS—CONSTRUCTION.
Where a claimant of timber, also claimed by the receivers of a bankrupt, agreed to dispose of it and pay over the net proceeds to the receivers or their successors, to hold as officers of the bankruptcy court, the agreement must be treated as an agreement with the court; the receivers being officers thereof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 167.]

2. BANKRUPTCY ⟸288(1)—COURTS—JURISDICTION.
In such case, while the agreement remains in force, the bankruptcy court may order it complied with by either party thereto, without an independent suit brought for such purpose.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

3. BANKRUPTCY ⟸288(1)—COURTS—JURISDICTION.
In such case, the claimant, having made such agreement, could not contend that the court had no jurisdiction to require the payment to be made, or that it had no jurisdiction to require such payment by summary order.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

4. BANKRUPTCY ⟸117(1)—COURTS—JURISDICTION.
Where the receivers of a bankrupt and a claimant of property entered into an agreement for disposition by the claimant and delivery of the net proceeds to the receivers, neither party could abrogate the contract without the court's approval, and hence the receivers' failure to comply with a demand of the complainant concerning the contract could not release the claimant.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 167.]

5. BANKRUPTCY ⟸288(1)—COURTS—JURISDICTION.
Claimant and the receivers of a bankrupt corporation both claimed logs cut on the land of claimant, and for the protection of the property entered into an agreement that claimant should dispose of the logs and pay over the net proceeds to the receivers or their successors, to be held as officers of the bankruptcy court, subject to the final judgment of the court or courts having jurisdiction of the question of ownership, which was to be submitted as soon as possible. It was further agreed that nothing should prejudice any claim of ownership of either party, but that such claim should be determined by the court or courts having jurisdiction in all respects as if the agreement had never been made. *Held*, that the contract did not take the case out of the principle that possession lawfully obtained by officers of the bankruptcy court of property claimed by them draws to that court jurisdiction of all questions of title thereto or liens thereon, and hence the bankruptcy court could dispose of the question of ownership.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

6. BANKRUPTCY ⟸288(1)—COURTS—JURISDICTION—PROCEEDING—NATURE OF.
In such case, where the bankruptcy court merely directed the claimant to answer the trustees' petition, in which they set up their claim to the proceeds, and there was nothing which necessarily prevented the claimant from asking leave to present its claim by an independent suit, which was not done, the issues being referred to a special master, the proceed-

ing was in substance a plenary suit, and not a summary proceeding, which is heard by the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

7. BANKRUPTCY ⊂⊃288(1)—COURTS—JURISDICTION.

In such case, there was nothing in the agreement preventing the bankruptcy court from determining the questions at issue by summary proceedings, although the proceedings should be of such character as to secure to each party a full opportunity to present his case on the merits.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

8. BANKRUPTCY ⊂⊃288(1)—COURTS—PROCEEDINGS.

In such case, where claimant did not, by revisory petition at the time of submission of the case to the master, raise that question, claimant cannot, its substantial rights not appearing to have been violated, obtain a reversal because the methods of the plenary suit were not more strictly observed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

9. BANKRUPTCY ⊂⊃288(1)—COURTS—JURISDICTION—CONTROVERSY.

In such case, where full opportunity was afforded both parties for presenting their proofs, and the matter was disposed of on the merits, the fact that the trustees' petition must be deemed a general denial of the claimant's answer, in order for it to be said the issues were made by the petition and answer, will not necessitate a reversal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

10. PRINCIPAL AND AGENT ⊂⊃129—AGENT'S CONTRACTS—RIGHTS OF PRINCIPAL.

Where a bankrupt ratified contracts of its agent, who contracted in his own name, and the other party recognized the bankrupt as the real party in interest, the bankrupt, though not an ostensible party, was entitled to all the rights under the contract which the agent would have.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 451–457.]

Appeal from and Petition for Revision of Proceedings in the District Court of the United States for the District of Maine; Clarence Hale, Judge.

In the matter of the bankruptcy of the Schmick Handle & Lumber Company. The claim of the Hollingsworth & Whitney Company to a fund in possession of Frank E. Boston and others, trustees, was denied (233 Fed. 446), and the claimant appeals and petitions to revise. Petition to revise dismissed, and decree appealed from affirmed.

John E. Nelson, of Augusta, Me. (Andrews & Nelson, of Augusta, Me., and Butler & Butler, of Skowhegan, Me., on the brief), for petitioner and appellant.

William R. Pattangall, of Augusta, Me. (Thomas Leigh, of Augusta, Me., on the brief), for respondents and appellees.

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

DODGE, Circuit Judge. The three appellees are the trustees in bankruptcy of the Schmick Handle & Lumber Company, a Maine corporation adjudged bankrupt in the Maine District Court, February 6, 1914, upon an involuntary petition filed January 20, 1914. They were

appointed receivers of the bankrupt estate January 22, 1914, acted as such until after the adjudication, and were then duly chosen and qualified as trustees.

The appellant, Hollingsworth & Whitney Company, a Massachusetts corporation, was the owner of timber lands in Maine. On Bald Mountain township, belonging to it, there were lying in the woods, when the above bankruptcy petition was filed, certain hardwood logs which had been cut under a contract further considered below, dated November 15, 1912, between it and Wilson E. Schmick. These logs and the right to remove them were claimed by the receivers as belonging to the estate in their custody.

The questions here presented require us, in the first place, to determine the true meaning and effect of a written agreement under seal between said receivers and said company, dated February 12, 1914, which appears in full in the opinion of the District Court. 236 Fed. 446, 448. After reciting that "unless the logs are forthwith hauled from the woods and manufactured into lumber they will become a total loss," the parties mutually stipulated and agreed in substance as follows:

(1) That the company should advance the funds required to discharge labor liens on the logs, haul them off and load them on cars; and should thereafter sell them at the best obtainable prices.

(2) That the question of their ownership should be submitted as soon as possible, "for determination by the court or courts having jurisdiction thereof," and that the net proceeds of the sales of the logs as above when received by the company should be paid over by it "to said receivers or their successors in authority, and be held in their hands as officers of the bankruptcy court, subject to the final judgment of the court or courts having jurisdiction of the premises."

(3) That nothing in the agreement should "in any way prejudice any claim of ownership, right or title of either party * * * in or to said logs or the proceeds of the same * * * but said claim of ownership shall be determined by the court or courts having jurisdiction of the premises in all respects as if this agreement had never been made."

It is stipulated for the purposes of the present appeal that this agreement was approved by the District Court, and that the trustees in bankruptcy were duly substituted therein in the place of the receivers originally parties thereto.

The company had sold the logs and received the proceeds thereof as contemplated by the agreement, but had not paid said proceeds to the receivers or trustees; whereupon the trustees, by a petition in the bankruptcy case filed October 31, 1914, asked that the company show cause why it should not be ordered to make such payment to them, in accordance with the agreement, "as officers of the bankruptcy court, to hold subject to the final judgment of the court as to the ownership of said logs."

Notified to show cause as above, the company appeared specially on the day fixed for hearing said petition, and moved to dismiss it, on the alleged ground:

"That this court has no jurisdiction of said matter, and has no right or authority to make a summary order for the turning over of [said funds], nor has it any jurisdiction over the subject-matter mentioned in said petition and no jurisdiction summarily to grant the relief therein demanded, because it says that [said company] is now and always has been an adverse claimant of the subject-matter of the controversy, and that proceedings, if any, against it seeking the relief prayed for in the petition must be by plenary action and not by summary proceedings."

The company's motion to dismiss was denied on the same day (November 9, 1914), and on November 21, 1914, it answered the above petition (expressly reserving its objection that the court had no jurisdiction over it, or over the subject-matter of said petition). The material allegations in its answer were that the possession of and title to the logs and their proceeds were and had always been in the company, which asserted, as an adverse claimant, that the relief sought by the petition must be by plenary action, instead of summary proceedings. Further allegations in the company's answer were that it had, on April 2, 1914, notified the trustees of its readiness for a hearing according to the terms of the agreement of February 22, 1914, and asked them to join in a request to "the proper court" according to said terms, that the trustees had refused to do so, and had thereby broken said agreement, leaving it no longer bound to carry out its part thereof.

The District Court ordered, on December 5, 1914, that the company pay over the proceeds in question to the trustees forthwith, as officers of the bankruptcy court, and that the trustees hold the proceeds so paid over, as such officers, "subject, however, to final determination of all questions as to the legal ownership of the same, in accordance with (the agreement of February 12, 1914), which said agreement was duly approved by the court."

[1-3] The company contends that specific performance of said agreement could not be enforced by summary process in the bankruptcy court. But the agreement was unmistakably made with officers of that court appointed by it in a pending bankruptcy case, and it can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court wherein the case is pending. Walton v. Johnson, 15 Sim. 352; American, etc., Co. v. Baltimore, etc., Co., 124 Fed. 866, 877, 62 C. C. A. 397. And while it remained in force, the court with whom it was so made could order it complied with by either party thereto, without an independent suit brought upon it for that purpose. Walton v. Johnson, 15 Sim. 352. The principles applicable are those according to which it is held that a bankruptcy court may enforce by its order completion of a contract for sale of property belonging to the estate, made with its receiver. Mason v. Wolkowich, 150 Fed. 699, 701, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765; Re Jungman, 186 Fed. 302, 306, 108 C. C. A. 380. By contracting with the receivers, the company became a quasi party, instead of a stranger to the record, and subjected itself, for the purposes of the contract, to the orders of the court. After agreeing to pay over the proceeds to the court's officers, it could neither say that the court had no jurisdiction to require

such payment to be made as agreed, or that it had no jurisdiction to require such payment by summary order.

[4] Since neither party to such a contract could abrogate it or release itself or the other party therefrom without the court's approval, the objection set up by the company in its above answer that it had been released by the receivers' failure to comply with a demand addressed to them in a letter dated April 12, 1915, need not be further noticed.

We find no error in the order made December 5, 1914, nor in any of the proceedings prior thereto. No determination of the further question whether said proceeds belonged to the bankrupt estate or to the company was involved therein or prejudiced thereby. Nor had any particular method been up to that time prescribed for the determination of said question.

Coming next to the proceedings which followed said order, $16,128.86 was paid over to the trustees in compliance therewith on December 24, 1914, which sum they have since held in their official custody, and is apparently conceded to be the true amount of net proceeds realized from the above sales of the logs by the company. The next step was a petition by the trustees filed in the bankruptcy case May 12, 1915. In this they represented that they had requested the company to "present to this court" any claim to said fund which it had or claimed to have; but said request has not been complied with. They asked the court to order the company so to present any such claim, to fix the time within which it should be so presented, and in default of such presentation to order any and all claims by the company to said fund forever barred. The court set a date for hearing the petition and ordered notice to the company of such hearing.

May 28, 1915, the company, appearing under protest, moved to dismiss said petition, alleging that the court "had no jurisdiction of said matter" and had "no right or authority to make" a summary order such as the petition sought. It further alleged, as above, that it held the logs as adverse claimant and was still adverse claimant of their proceeds. It denied that the proceeds constituting the fund in the trustees' hands was subject to the court's jurisdiction as property of the bankrupt estate. It averred that it had not, by the agreement of February 22, 1914, consented to the court's jurisdiction in summary proceedings, but only to a plenary suit for the proper determination of the title to the fund; also that, in the absence of said agreement, there could have been no resort to summary proceedings for the purpose sought, and that the company was prejudiced by the trustees' resort to such proceeding contrary to the terms of said agreement. It submitted that the court could not let the trustees take the proceeds under said agreement and then permit further proceedings to be taken by them in violation of it.

This motion to dismiss was heard and denied by the court May 28, 1915, and on the same day the company was ordered to answer the petition. In its answer, filed accordingly July 5, 1915, it again asserted that the court "had no jurisdiction over it or over the subject-matter" of the petition. It repeated, under the heading "Answer in Lieu of Demurrer," the same objections in substance as had been made

in its motion to dismiss; and, under the heading "Answer," it alleged that it had requested the trustee to join it "in petitioning the proper court" to hear and determine the matters at issue according to the agreement, but the trustees had refused to do so in violation of said agreement. Then followed, under the heading "Further Defense and Claim of Ownership," allegations of the facts whereon the company based its claim that the logs were its property and not the bankrupt's when the bankruptcy proceedings were begun, with references to annexed documents relied on in support of said allegations.

With regard to the above orders of May 28, 1915, the first objection to be considered is the company's denial of jurisdiction in the court either over it or over the subject-matter of the trustee's petition then before it.

To the extent that said petition sought compliance by the company with the terms of the agreement it had made with officers of the court, for the purposes of the case wherein they had been appointed, it is clear from what has been said that no such denial of jurisdiction can be maintained. It was for the court to determine the proper construction of such an agreement, and to require performance by the company of any undertaking which it found the company to have thereby assumed. The only question here open to the company is as to the true meaning of the agreement which the trustees sought to enforce.

[5] The company contends that the court erred (1) in holding that the agreement required it to submit its claim to the proceeds for determination by the bankruptcy court; (2) even if such submission was required, in not holding that the agreement entitled it to have the merits of said claim determined in plenary instead of summary proceedings.

(1) The "questions" to which the agreement refers are questions of title to the property therein described, custody whereof was thereby expressly given to officers of the bankruptcy court, claiming said property as part of the estate in their charge. They were to keep it in their possession pending the determination of said questions, which by the express terms of the agreement were to be determined "as between said receivers or their successors and said * * * company, and any other party or parties." The principle that possession lawfully obtained, by officers of the bankruptcy court, of property claimed by them, draws to that court jurisdiction of all questions of title thereto or liens thereon, is so well established that we must regard it as recognized and assumed by the parties for the purposes of their agreement, unless clear indications of a contrary intent can be found in its terms. We find no such indications in the words "court or courts having jurisdiction," which occur three times in the agreement; these are adapted to provide for the case of an appeal by either party from an adverse determination. If the bankruptcy court was to have possession of the property, it thereby became so obviously the "court having jurisdiction" of the questions to be determined as to render the supposition unreasonable that determination by some other court was contemplated. We cannot suppose it intended by the agreement that the officers of

that court were to bring against the company, either a suit in a state court or a suit based on diverse citizenship in the District Court, to recover money already in their possession. And if it was intended that the company should be left free to bring any such suit against them, the period intervening between December 24th, when the money was paid over to them, and May 12th, when the trustees' petition was filed, would hardly have been allowed to pass without any steps taken in that direction. The provision in the concluding paragraph of the agreement, that the respective claims of ownership should be determined "in all respects as if this agreement had never been made," are relied on; but these words are part of provisions that neither party's claim of title or ownership should be in any way prejudiced by anything contained in the agreement, and we understand them as referring at most to the method of determination which the bankruptcy court was to follow, not as clear indications that determination by some other court was intended. We find no error in the order made on May 28, 1915, so far as it required presentation of the company's claim for determination by the bankruptcy court.

[6] (2) That order went no further than to direct the defendants to answer the trustees' petition of May 12th. It did not require them to present their claim in any particular manner, nor did it prescribe any particular method for the determination thereof. In the petition which it directed the company to answer, the trustees had done no more toward presenting their own claim than allege the fact that they claimed the logs and their proceeds, for the estate. This cannot be called a resort to summary process for determination of the title. It was not under the compulsion of any order of court that the company presented its claim as it did, by allegations in its answer. We find nothing in the court's order which would have prevented it from filing an independent petition in the bankruptcy case for repayment of the money to it, had it chosen so to present its allegations and claim. The allegations of such a petition would have called for an answer in due form by the trustees, and for determination of the issues raised by such pleadings, upon proofs to be heard either by the court or a special master, or by a jury upon request therefor approved by the court. If said issues were to be determined by the bankruptcy court, the company could not insist, and it has not insisted, that it was entitled to jury trial as of right. Nor did the court's order necessarily prevent it from asking leave, in the answer it was ordered to file, to present its claim by an independent suit against the trustees in the District Court for the determination of the questions raised in the bankruptcy proceedings. It complains, in its tenth assignment of errors, that the court erred in holding, after the filing of the answer wherein it presented its claim as above, and hearing thereon, that the court had jurisdiction to proceed to determine the title to said fund by summary proceedings on motion to show cause; but the record does not show that the court did in fact so hold at the time. The next step taken, according to the record, was an order by the court, October 16, 1915, that the issue made by the trustees' petition and the above answer thereto be referred to a special master to take testimony concerning the same and report

it to the court with findings of fact and conclusions of law thereon. The company thereupon proceeded to the hearing so directed, without then objecting that it was not according to the agreement, or raising any objection at all to the above order of reference made October 16, 1915. A hearing before a special master under such an order of reference, upon pleadings so raising the issues to be determined, was not in the strict sense a "summary proceeding on motion to show cause," such as is ordinarily heard by the referee before whom the case was pending, subject to review by the court. It was in substance a plenary suit, as In re McMahon, 147 Fed. 684, 77 C. C. A. 668, so far as the pleadings and proofs were concerned, and before the court, not before the referee.

[7] There being, as we hold, nothing in the agreement to prevent the bankruptcy court from determining the questions at issue, we agree with the opinion later expressed by the District Judge (June 16, 1916), that it might properly determine them by summary proceedings. It was necessary, however, that the proceedings should be such in character as secured to each party a full and fair opportunity to present his case on the merits.

[8] If the District Court was wrong in sending the case to a master as above, the company could have had the error corrected by a revisory petition at the time, and the expense and delay involved in the proceeding before the master and upon his report would thus have been avoided. Instead of taking such a course, and, so far as the record shows, without then suggesting any specific objection to the order of reference, the company submitted its proofs and arguments before the master, as did the trustees theirs, and was thereafter heard, as were the trustees, by the court on the question of confirming the master's report. Unless the method followed in determining the issues dealt with in said report appears to have deprived the company of some substantial right, we cannot consider ourselves obliged, under the circumstances, to reverse the result reached in order that said issues may be retried, merely because of the fact that the methods of a plenary suit were not more strictly observed. See Re Howard Laundry Co., 203 Fed. 445, 448, 121 C. C. A. 555; Salsburg v. Blackford, 204 Fed. 438, 122 C. C. A. 634. The further burden which such a course would impose upon the parties and the further delay in settling the estate would be very considerable, and without substantial benefit to any one.

[9] The record fails to show that full opportunity was denied the company, in any material respect, for presenting the merits of its case. It is true that only by regarding the trustees' petition of May 12, 1915, as having amounted to a general denial of the allegations made in that part of the company's answer whereon it based its claim of ownership, can it be said that issues regarding said claim had been made by said petition and answer. But this is an objection not taken by the company at the time, nor is it suggested, nor does it appear that either party, or the referee, or the court were ever at any loss to know what said issues were. Full opportunity was afforded both parties for presenting their proofs. The evidence heard by the master was volumi-

nous and it was reported in full to the court, with his findings and conclusions, in all respects as it would have been had the pleadings relating to the company's claim been more regular in form. We cannot doubt that the form in which the case is here presented brought it before the District Court and now brings it before us, upon the merits, as fully and completely in every substantial respect as it could have been brought by any other method. We hold, therefore, that the method pursued in determining the questions between the parties was in substantial compliance with their agreement, and involved no reversible error on the part of the court.

[10] Coming to the merits of said questions as now presented by the evidence as reported by the master, we find no reason for disagreeing with the results reached by him and adopted by the court. There was evidence sufficient to support his findings that Wilson E. Schmick was, throughout the transactions with the appellant company relating to said logs, the agent for the bankrupt, Schmick Handle & Lumber Company, which adopted and confirmed his acts therein; that said bankrupt, and not said Schmick individually, was the real principal with which the Hollingsworth & Whitney Company dealt, although under written agreements executed by him individually, said bankrupt having been recognized by it as such principal, long before the attempted transfer of the logs to it on January 16, 1914, which the trustees were seeking to avoid. The conclusion is therefore justified that the logs became the bankrupt's property as soon as they were cut; that said attempted transfer was the bankrupt's act, done within four months of its bankruptcy under circumstances rendering it a preference voidable by the trustees; and that the proceeds in their hands are part of the bankrupt estate. We find no error in any of the conclusions of law reported by the master, nor in any of his rulings upon evidence offered before him.

There are 81 assignments of error in all, and all are sufficiently disposed of by what has been said above, which also warrants the conclusion that the questions raised by such assignments may properly be determined upon the appeal, and not upon the petition to revise, also pending.

In No. 1229 the petition to revise the action of the District Court in the matter of law is dismissed, without costs.

In No. 1241 the decree of the District Court appealed from is affirmed, and the appellees recover their costs of appeal.

IOWA STATE TRAVELING MEN'S ASS'N v. RUGE.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1917. Rehearing Denied August 9, 1917.)

No. 4533.

1. INSURANCE ⊜16, 125(2)—FOREIGN INSURANCE COMPANIES—DOING BUSINESS—LAW GOVERNING CONTRACTS.

A mutual accident insurance company, incorporated and having its head office in Iowa, had members in other states, who paid their dues and assessments by mail upon notice sent them by mail. Its business was conducted with members in other states in precisely the same way as with its members in Iowa. Its members were authorized to solicit new members, and plaintiff's husband was so solicited by a member, and signed an application which was approved by such member and sent to the home office of the company in Iowa, where the insurance certificate was then signed and mailed to plaintiff's husband at his residence in Missouri. He paid all dues and assessments, until his death, by mail. *Held*, that the company was doing an insurance business in Missouri, and the certificate or policy was made in Missouri, and was governed by the laws of that state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 17, 174.]

2. INSURANCE ⊜465—RISKS AND CAUSES OF DEATH—SUICIDE.

Under the express provisions of Rev. St. Mo. 1909, § 6945, a provision in an accident insurance policy that the insurer should not be liable for injuries inflicted by insured upon himself while sane or insane, whether resulting fatally or otherwise, was no defense to a suit on the policy, where it was not shown that insured contemplated suicide at the time of making his application for insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1185.]

3. INSURANCE ⊜152(2)—CONSTRUCTION OF BY-LAWS AS PART OF CONTRACT—AMENDMENT.

A provision in an application for membership in a mutual accident insurance company, whereby the applicant agreed to amendments of the by-laws, permitted only an amendment germane to the original contract, and not an amendment impairing or disturbing vested contract rights.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 312.]

4. INSURANCE ⊜146(3)—CONSTRUCTION AGAINST INSURER—CONSTRUCTION OF BY-LAWS.

A provision of the by-laws of a mutual accident insurance company, as amended after the issuance of a policy, against liability for injury caused by the discharge of firearms when there was no eyewitness to the discharge except the member himself, was ambiguous, and should be construed most strongly against the company by whom it was incorporated into the by-laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

5. INSURANCE ⊜152(2)—CONSTRUCTION OF BY-LAWS AS PART OF CONTRACT—AMENDMENT.

Such provision, if intended as an exemption from liability for an injury resulting from accidental discharge of firearms by some unknown person when there was no eyewitness other than such person and the insured, was such a material and substantial impairment of a vested contract right as to be void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 312.]

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

Action by Alma M. Ruge against the Iowa State Traveling Men's Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert A. Holland, Jr., of St. Louis, Mo. (Sullivan & Sullivan, of Des Moines, Iowa, and Holland, Rutledge & Lashly, of St. Louis, Mo., on the brief), for plaintiff in error.

Charles Hutchinson, of Des Moines, Iowa, and Jesse H. Schaper, of Washington, Mo. (Hugo Muench, Lambert E. Walther, and Julius T. Muench, all of St. Louis, Mo., on the brief), for defendant in error.

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

REED, District Judge. This action was brought by the defendant in error, hereinafter called the plaintiff, in a state court of Missouri, against the Iowa State Traveling Men's Association, an Iowa corporation, the plaintiff in error, who will be called the defendant, to recover from said defendant upon a certificate or policy of accident insurance alleged by the plaintiff to have been issued by the defendant in the state of Missouri to Oscar A. Ruge, a citizen of that state, February 20, 1903, insuring him against injuries or death arising from external, violent, and accidental means. In case of the death of the insured by such means, it is alleged, the amount of insurance is by the terms of said policy made payable to his wife, Alma M. Ruge, the plaintiff in this action.

In due time the action was removed by the defendant to the court below upon the ground of the diverse citizenship of the parties. The defendant answered, admitting the issuance of the certificate or policy of insurance sued upon, the death of the insured, and that due proofs of his death were made to the defendant company; but denied that the policy was issued in the state of Missouri, and averred that it was issued in the state of Iowa, and was an Iowa contract, governed by the laws of that state, and was not a Missouri contract, governed by the laws of Missouri. The answer also averred that the policy does not cover death by suicide; that the insured died as the result of a wound resulting from the discharge of firearms by himself where there was no eyewitness to the discharge except himself. In other words, that he committed suicide. At the close of the evidence the defendant moved for a directed verdict in its favor upon the ground, among others, that the insured committed suicide by the discharge of a gun or pistol, thus causing his own death, when there was no witness to the discharge of the gun or pistol except himself, which motion was denied by the court. The cause was then submitted to the jury, which returned a verdict for the plaintiff for the full amount of the policy, $5,000, with interest, upon which judgment was duly entered for the plaintiff, and the defendant brings error.

1. Was the certificate or policy in suit issued in Missouri or in Iowa? This was the principal question upon the trial in the court below.

The defendant is an accident insurance company or association organized in Iowa about 1880, under section 1784 of the Iowa Code

(1897), with its principal office or place of business at Des Moines, in that state. That it is a mutual assessment association, and not a fraternal association organized solely for benevolent or charitable purposes, was held by the Iowa Supreme Court in Connell v. Iowa State Traveling Men's Ass'n, 139 Iowa, 444, 116 N. W. 820.

The method by which the insured Ruge became a member of this association is as follows: He was a citizen of Missouri, residing in the town or city of Washington, in that state, a traveling salesman for a St. Louis grocery house, and eligible to membership in said association. A Mr. Bleekman, also a resident of Washington, a traveling salesman and a member of the defendant association, solicited Mr. Ruge, as he (Bleekman) was authorized by the defendant to do, to become a member of the defendant association, and furnished Ruge with a membership blank of the company for that purpose, which he usually carried with him, or requested the company to send a blank to Mr. Ruge at Washington, to enable him to make application. Upon receipt of such blank it was either prepared by Mr. Bleekman or Mr. Ruge, signed by the latter, and approved by the former as a member of the association, which was essential to its acceptance by the association, and then sent by mail, postage prepaid, with the requisite fee, to the home office of defendant in Des Moines. The certificate was then signed by the proper officers of the defendant on February 20, 1903, and mailed to Mr. Ruge at his residence or post office address in Washington, where it was received by him and retained until his death in June, 1911. All annual dues and assessments upon the policy were paid by Ruge up to the time of his death upon notice of the amount thereof from the company, by a bank draft or postal money order, procured by him at Washington, and sent by mail from that place to the defendant at Des Moines, Iowa, either by him or his wife, and the proper receipts returned by the defendant to the insured therefor. This was the usual method or manner in which the defendant procured its membership in Iowa, Missouri, and other states, and to whom it issued and sent its beneficiary certificates or policies of insurance. After Ruge became a member of the association, the defendant sent to him at Washington, Mo., from its home office in Des Moines, quarterly notices of dues, together with a blank application for new members, and a printed circular or letter upon the letter head of the association, which, except the date, reads in this way:

"Des Moines, Iowa.

"To the Members: Notice of Assessment No. 87, $2.00, due August 1st, enclosed. Don't lay this aside and run the chance of becoming delinquent. Pay it now. Also you can prove your loyalty to our organization, your ability as a salesman, your sincerity as a booster, your energy as a worker, by bringing into our midst a new member. We need 'em. You can surely induce one of your traveling acquaintances to sign the enclosed application and come across with $2.00, which will pay his dues until November. Go to it and land him. Use your own methods, technic and tactics, but land him. Bring to bear all of your persuasive powers, your ingenuity and tact. Bombard him with arguments so convincing, inducements so alluring, that he will consider it a crime against society, his family and himself, if he fails to join us instanter. The pocketbook offer is still on. See slip enclosed for particulars. The new member brings you the premium. Go to it. Very truly. (Signed by the Secretary.)"

It was customary to send letters or circulars of this nature to all members of the association when informing them of their dues, and assessments when made.

At the time Ruge became a member of the association, in 1903, the association had a total membership of over 19,000, and in the year 1914 its membership had increased to more than 50,000 members residing throughout the United States and some in foreign countries, who had in the manner described become members, and to whom certificates and indemnity insurance had been issued. Of that number over 5,000 resided in the state of Missouri carrying a large amount of insurance in the defendant company. The defendant's method of doing business is more fully shown by the testimony of Frank D. Harsh, the head of its claim department, who, after stating that the defendant maintained a claim department consisting of examiners, investigators, and physicians, to examine and adjust claims made against it, who they send into Missouri and other states, where the claimant resides, testified as follows:

"Q. Mr. Harsh, I believe you stated that you had about 50,000 members in association at this time? A. It is my understanding. Q. And in how many different states and territories are you now doing business? A. We are doing business in the state of Iowa. Q. Anywhere else? A. No, sir. Q. You have members in other states? A. Yes; we have members in every state in the Union. Q. So you draw a distinction between doing business and having members in the states? In how many states and territories do you have members then? A. In every state and territory in the Union. Q. Getting down to this question of doing business; will you kindly explain here the different method in which you handle your business in Iowa to what you do in other states that you have members? A. There is no difference. Q. I think Mr. Hill (president of defendant) testified that you have no special license to do business in the state of Iowa? A. I don't think we have; except as we have under our incorporation. We were speaking with reference to a license from the Insurance Department. We have no such license in any state in which we have members; nor from any one else. Q. So that there is no difference in that respect in the way you carry on your business in Iowa or in any state? A. No. Q. Will you explain the difference, if there is any, in the way that you would handle an application for membership from some outside state or from Iowa? A. That is outside of my department. Q. You have a general knowledge? A. There is no difference. Q. If it is sent in by mail from Ottumwa, Iowa, the application would be treated in the same manner as if it came in by mail from Union, Missouri? A. Yes; or from Honkong, China. Q. And the manner of forwarding the certificate to the member and collecting the dues, etc., would be the same as if the member lived in Honkong or New York? A. It is my understanding; yes. Q. And the same would be true as to the methods employed in the adjustment of the claims? A. Yes. Q. You use the same methods and the same persons and so on in adjusting the claims—that is, the same character of persons—in adjusting the claims in Iowa that you would in Missouri or Illinois? A. Yes. Q. You use any of these service corporations in Iowa? A. Yes; I think we do. Q. I suppose probably or is it true that you would go out personally more in Iowa than any other state? A. It would depend on the location. Q. Do you have physicians in Iowa in various towns the same as you have testified to having them in Missouri? A. Yes. Q. So that the distinction you make of doing business in Iowa and not doing it in other states, as I understand you, is that you are incorporated under the laws of Iowa, and have your head office in the state of Iowa? A. That is my understanding; yes. Q. I assume if you have a lawsuit in Iowa or in Missouri it is handled in the same manner in both cases? A. Practically so. Q. Your counsel, Mr. Sullivan, either tries or assists in trying cases, both in Iowa and in other states? * * * A. Yes; he is the

general counsel. Q. The same way he does in Iowa, if you have a suit in Iowa? A. Yes. * * * Q. After checking up this claim register to which you have referred to Mr. Harsh, how many claims do you find that the association paid in the state of Missouri during the year 1913, assuming that you have made no errors in your calculations? A. The record shows that checks were sent to 314 men in Missouri. Q. In settlement of claims? A. I don't know whether that is their residence or not. Yes. * * * Q. Now do you know, or have you any means of ascertaining, how many claims sent to the association during that year from Missouri were rejected, if any? A. I would have to look through the office record for that. Q. There may have been some that came in from Missouri that were rejected besides these you settled? A. Yes; it is quite probable there were. Q. And I believe you stated that the total number of claims that were paid during the year 1913 was about 3,500? A. Yes; in round numbers."

[1] There is much other testimony of a similar character, wholly undisputed, and from it we are clearly of the opinion that the certificate or policy in suit was made to the insured in the state of Missouri, of which he was then a resident citizen; that the defendant was then doing an insurance business in that state, and also at the time this action was commenced. The policy, in the event of the death of the insured, is payable to the plaintiff in Missouri, and is governed by the laws of that state. Lumbermen's Insurance Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Mutual Life Insurance Co. v. Spratley, 172 U. S. 602, 614, 19 Sup. Ct. 308, 43 L. Ed. 569; Herndon-Carter Co. v. Norris & Co., 224 U. S. 496, 500, 32 Sup. Ct. 550, 56 L. Ed. 857; Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 255, 29 Sup. Ct. 445, 53 L. Ed. 782; Cravens v. New York Life Insurance Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628, affirmed 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Tomson v. Iowa State Traveling Men's Ass'n (Neb.) 129 N. W. 529. In Lumbermen's Insurance Co. v. Meyer, above, Mr. Justice Peckham said of the business of a fire insurance company, at page 415 of 197 U. S., at page 485 of 25 Sup. Ct. (49 L. Ed. 810):

"A fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. If not doing business in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract, and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the state of New York. Many contracts of the nature of the one in suit were entered into by the company covering property within the state. We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that state to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out."

What is so said would apply equally to a policy of life or indemnity insurance upon a person residing in a state or locality other than that in which the company is organized or incorporated as it does to a

policy upon real or personal property situated in a state other than that of the company issuing it.

[2] 2. Does the suicide clause of the policy defeat the recovery by plaintiff, admitting, without deciding, that the insured committed suicide, the contract being found to have been made in Missouri to a citizen of that state? That clause of the policy reads in this way:

"The association shall not be liable to any member or beneficiary for any indemnity or benefit for any injury to a member for * * * injuries inflicted by the insured upon himself while sane or insane, whether resulting fatally or otherwise."

Prior to the time this certificate or policy was made, a statute of Missouri, which is now section 6945, Rev. Stats. of Missouri 1909, was in force and reads in this way:

"Sec. 6945. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

This statute has been construed by the Supreme Court and the Appellate Courts of Missouri. In Logan v. Fidelity & Casualty Co., 146 Mo. 114–123, 47 S. W. 948, 950, which was a suit upon a policy of indemnity insurance which, according to the answer in the case, contained stipulations to the effect that, in the event of fatal injuries to the assured wantonly inflicted upon himself while insane, the company's liability under its policy should be a sum equal to the premiums paid, which should be in full liquidation of all claims under it. Under the statute above set out, the trial court instructed the jury to return a verdict for the full amount of the policy with interest. Upon appeal the Supreme Court said:

"The real object of the section as the clear * * * language express, is to affect all policies of insurance on life from whatever class, department, or line of insurance the policy may be issued, or by whatever name or designation the company may be known. * * * The section was enacted clearly to protect all policy holders of insurance on life against the defense that the insured committed suicide, all provisions in the policies to the contrary notwithstanding, unless, as provided in the section, it can be shown that the insured contemplated suicide at the time he made application for the policy. * * * No rule of construction, short of one applied for distortion and destruction, can relieve accident insurance companies, issuing policies of insurance on life in this state, from the operation and influences of section 5855, which in plain and unambiguous terms declares that, in all suits upon policies of insurance on life thereafter issued, it shall be no defense that the assured committed suicide, unless it shall have been shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time of making his application for the policies, all stipulations in the policy to the contrary being void."

It was also so held in Keller v. Travelers' Insurance Co., 58 Mo. App. 557, 560, and the rule so held in these cases and others was approved by the Supreme Court of the United States in the case of Whitfield v. Ætna Life Insurance Co., 205 U. S. 489, 498, 500, 27 Sup. Ct. 578, 51 L. Ed. 895.

It is unnecessary to consider the question further, for the suicide of the insured, admitting without deciding that he committed suicide, is not a defense to this action, as it is neither alleged nor is there any proof that he contemplated suicide at the time of making his application for membership and insurance in the defendant company.

[3] 3. One other contention in the defendant's brief is that as the insured died as a result of an injury (as claimed by the defendant) "caused by the discharge of firearms when there was no eyewitness to the discharge except the member himself," the defendant is not liable under an amendment to a by-law of the association which so provides. This contention is apparently urged only in the event that the contract is held to have been made in Iowa; but, as the contract is held to be a Missouri contract, it need not necessarily be considered. This clause, however, was not a part of the constitution of the association nor any of its by-laws when the certificate in question was issued, and appears only in an amendment to one of the company's by-laws made some time after the issuance of the certificate. Admitting that by his application for membership in the defendant company the insured agreed to such amendment of the by-laws, such an agreement at most would permit only an amendment germane to the original contract of the parties, and would not authorize an amendment that would impair or substantially disturb vested contract rights. Knight Templars', etc., Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, affirmed 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139; Mathews v. Modern Woodmen, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483; Supreme Lodge, etc., v. Light, 195 Fed. 903, 115 C. C. A. 591; Ayers v. Grand Lodge, etc., 188 N. Y. 280, 80 N. E. 1020, and cases cited in them.

[4, 5] This clause is ambiguous, and, under a familiar rule, should be construed most strongly against the defendant association by whom alone it was incorporated into one of its by-laws. The clause is either an enlargement of the suicide clause of the policy, and would fall with the suicide clause if the contract was made in Missouri to a citizen of that state (as we hold it was), or it is a further exemption of the association from liability for an injury resulting from the accidental discharge of firearms by some unknown person when there was no eyewitness to such injury other than such person and the insured, which would be a material and substantial impairment of a vested contract right and void; or by its terms it applies only to *injuries* so resulting and not to the *death* of the insured resulting from such cause. In either event, the clause is inapplicable to the present case and needs no further consideration.

Some other assignments of error based upon rulings on the admission or exclusion of evidence are urged in argument. We have examined them and find no substantial error in them. The judgment is therefore affirmed, with interest from the date of the judgment below.

Affirmed.

In re KINNANE CO.'S ESTATE.

In re FRED BUTTERFIELD & CO., Inc., et al.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

Nos. 2981, 2988.

1. BANKRUPTCY ⟸440—REVIEW—MODE OF REVIEW.
Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1916, § 9608), giving Circuit Courts of Appeals jurisdiction to superintend and revise in matters of law proceedings of the inferior courts of bankruptcy, provides the applicable method of review of orders affirming orders of the referee denying applications for allowances of counsel fees for services in connection with a proposed composition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

2. BANKRUPTCY ⟸444—PROCEEDINGS TO REVISE—TIME.
In the absence of a rule in the Sixth circuit governing the matter, proceedings to revise orders of the bankruptcy court, docketed four and six months after such orders were entered, will not be dismissed, especially where the original record was long, the finding of facts naturally took considerable time, and no appeal was thereby delayed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–927.]

3. BANKRUPTCY ⟸446—PROCEEDINGS TO REVISE—REVIEW.
On a petition to revise, the court cannot review the District Court's finding that a payment by the bankrupt to its counsel was ample remuneration for services of counsel in performing the duties imposed on the bankrupt, for which compensation is expressly authorized by section 64b(3) of the Bankruptcy Act (Comp. St. 1916, § 9648).
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929.]

4. BANKRUPTCY ⟸482(3)—COUNSEL FEES—BANKRUPT'S ATTORNEYS.
The services of a bankrupt corporation's counsel in presenting and urging the acceptance of offered compositions had no relation to the duties imposed on the bankrupt by Bankruptcy Act, § 7 (Comp. St. 1916, § 9591), and for which an allowance is authorized by section 64b(3) of the act (section 9648), and no allowance of fees therefor is authorized.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

5. BANKRUPTCY ⟸482(3)—COUNSEL FEES—BANKRUPT'S ATTORNEYS.
Where a composition was offered before an adjudication in bankruptcy, and the bankrupt resisted the appointment of a receiver and remained in control of its business, no allowance for the services of the bankrupt's counsel in advising the bankrupt regarding its business between the filing of the petition and the adjudication was authorized under section 64b(1) of the Bankruptcy Act (Comp. St. 1916, § 9648), specifying as one of the debts entitled to priority the actual and necessary cost of preserving the estate subsequent to filing the petition, especially as provision for such a case is made by section 12a, as amended by Act June 25, 1910, c. 412, § 5 (Comp. St. 1916, § 9596), providing that, in compositions before adjudication, the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, "and preservation and conduct of estates."
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

6. BANKRUPTCY ⟸482(3)—COUNSEL FEES—RIGHTS OF CREDITORS.
Where it was not clear that creditors would have received less if the second composition offer had been accepted, an allowance of counsel fees for opposing the composition was properly denied, and the fact that the second offer was the result of opposition to an earlier offer was not

ground for adopting the first offer as an inflexible basis of determining the ultimate benefit to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

7. BANKRUPTCY ⊜482(3)—COUNSEL FEES—RIGHTS OF CREDITORS—"ACTUAL AND NECESSARY COST OF PRESERVING THE ESTATE."

The expense of opposing an offer of composition before adjudication is not an "actual and necessary cost of preserving the estate," within Bankruptcy Act, § 64b(1), and no allowance of counsel fees for opposing it is authorized by that section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

8. BANKRUPTCY ⊜482(3)—COUNSEL FEES—RIGHTS OF CREDITORS.

The bankruptcy court cannot, under its general equity powers, make an allowance of counsel fees to creditors successfully opposing a composition offered before adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

9. BANKRUPTCY ⊜482(3)—COUNSEL FEES—RIGHTS OF CREDITORS.

That the petitioning creditors in an involuntary proceeding, in which a composition was offered before adjudication, favored the composition and did not press their petition for adjudication, and that creditors successfully opposing the composition, by so doing, contributed to bringing about the hearing on the original petition, did not make them petitioning creditors, so as to entitle them to an allowance of counsel fees under Bankruptcy Act, § 64b(3), authorizing the allowance of an attorney's fee to the petitioning creditors in involuntary cases.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

Petitions to Revise Orders of the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

In the matter of the estate of the Kinnane Company, bankrupt. On petition by the bankrupt to revise an order affirming an order of the referee denying an allowance of counsel fees, and on petition by Fred Butterfield & Co., Incorporated, and others, to revise an order affirming an order denying an allowance to it. Affirmed.

See, also, 217 Fed. 488; 221 Fed. 762.

In Case No. 2981:

Gilbert Bettman, of Cincinnati, Ohio, for petitioner.

F. A. Johnston and Keifer & Keifer, all of Springfield, Ohio, for respondents.

In Case No. 2988:

Sidney G. Stricker, of Cincinnati, Ohio, and Selden Bacon, of New York City, for petitioners.

Keifer & Keifer and F. A. Johnston, all of Springfield, Ohio, for respondent.

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

KNAPPEN, Circuit Judge. On June 17, 1914, involuntary proceedings in bankruptcy were begun against the Kinnane Company, a merchandising corporation at Springfield, Ohio, and on the same day a petition for the appointment of a receiver was filed. On or about July 6th following the alleged bankrupt made an offer of composition under section 12 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549 [Comp. St. 1916, § 9596]), which was referred to the referee for proceedings thereunder and report thereon. Pending this reference

a new offer of composition was made of 40 per cent. in cash, 5 per cent. in two equal payments at 30 and 60 days, plus a third mortgage on real estate of the corporation, giving privileges of redemption at $25,000 and $27,500, respectively, within certain periods stated. The first of the prior mortgages was for $65,000, plus some interest; the second being a proposed mortgage for $46,000 securing two Springfield banks, first, for the cash dividend payable to them, and, second, the cash required for paying other creditors. The banks also were to have other preferences in the way of pledge of the corporate stock and indorsements of two of the corporation's representatives. Certain creditors opposed the acceptance of the offer; a large majority, however, favored it, and the referee recommended its approval. The District Judge declined to confirm the composition, because of failure to give jurisdictional notice of the amended offer (217 Fed. 488), but permitted its resubmission. An appraisement of the debtor's property was had, under direction of the court. Further extended hearing was had before the referee; a large majority in number and amount of creditors voted in favor of accepting; the referee reported the facts; the District Court refused to confirm the composition as unjust, in not maintaining "the equality which the Bankruptcy Act contemplates" (221 Fed. 763); and on January 13, 1915, adjudicated the corporation a bankrupt.

The bankrupt then petitioned for the allowance of the claim of its counsel, amounting to several thousand dollars, for compensation and expenses in representing the bankrupt estate from the filing of the petition for adjudication until the adjudication was made. This application was denied by the referee, and the latter's order affirmed by the District Judge. The petition in No. 2981 is to revise that order.

One of the creditors opposing the confirmation presented a petition asking the allowance of several thousand dollars by way of compensation and expenses of counsel in resisting confirmation. This application likewise was denied by the referee, and his order affirmed by the District Judge. The proceeding in No. 2988 is to review that order.

[1, 2] 1. Section 24b of the Bankruptcy Act (Comp. St. 1916, § 9608) provides the applicable method of review.[1] The trustee moves to dismiss both petitions, as not taken within a reasonable time. The order of the District Court in No. 2981 was entered June 12, 1916; the proceeding was not docketed in this court until October 2, 1916, or nearly four months later. The order in No. 2988 was entered April 24, 1917; the notice of filing petition for review was given, and service accepted, on October 24, 1916, exactly six months after the order under review was made, and the next day after the finding of facts required by our rule 34(2) was signed, although the actual docketing occurred two days later. We treat the application as made within six months. The statute does not provide any limitation of time for bringing proceedings under section 24b. The question thus is: What is, under the circumstances, a reasonable time therefor? In some jurisdictions an

[1] Davidson v. Friedman (C. C. A. 6) 140 Fed. 853, 72 C. C. A. 553; Barnes v. Pampel (C. C. A. 6) 192 Fed. 525, 113 C. C. A. 81; Kinkead v. Bacon (C. C. A. 6) 230 Fed. 362, 364, 144 C. C. A. 504.

express limitation is provided by rule. This court has adopted no rule on the subject. The holdings of the different circuits as to what is or is not reasonable time are not harmonious; the periods recognized as reasonable ranging from ten days to six months. This question we have never definitely passed upon. The original record in No. 2988 was long, and the finding of facts in that case naturally took considerable time. The proceedings to revise have delayed no appeal. Under the circumstances we do not feel warranted in dismissing either proceeding.

2. The bankrupt employed counsel (a firm of attorneys) to represent it shortly before the proceedings in bankruptcy were begun; the petition for adjudication having been filed on failure of an attempt to obtain from creditors an extension of time. These counsel represented the bankrupt generally throughout the bankruptcy proceedings, including the preparation of the original and amended schedules and assistance in the other acts required of the bankrupt by law; services in the composition proceedings throughout, including the negotiation and preparation of offers, arranging for financing the same, and hearings before the referee and judge; advice to and conferences with the officers of the corporation respecting "the management of the business and keeping the company's trade alive during the unexpected opposition to the company's offer of composition," and defending the estate against an attachment suit and proceedings to enforce mechanics' and other liens on the property of the estate.

Counsel divide their services into three classes: (1) Those specifically required of the bankrupt (as under section 7 [Comp. St. 1916, § 9591]), for which compensation is specially provided by section 64b(3) Comp. St. 1916, § 9648; (2) services rendered the bankrupt in presenting and urging the acceptance of offered compositions; (3) the expense of preserving the estate under section 64b(1).

[3] As to the first class of items: Counsel had been paid by bankrupt itself $750 for services and $100 by way of expenses. The referee held the payment "ample for that portion of their services rendered in assisting the bankrupt in performing the duties imposed upon it by the act." The District Judge held that the sum paid was ample remuneration "for the services rendered, which were separate and apart from those performed in endeavoring to effect a composition from the bankrupt's creditors." There was evidence to sustain this finding, at least so far as respects the first class of services claimed for; and on this review we are bound by such determination.[2] It is clear that we cannot review the judgment of the District Court as to the first class of items.

[4] We think it also clear that the compensation claimed for services connected with the composition proceedings cannot be allowed. Services rendered in that respect have no relation to the duties of the bankrupt enumerated in section 7 and provided for by section 64b(3). Com-

[2] In re Stewart (C. C. A. 6) 179 Fed. 222, 228, 102 C. C. A. 348; Duryea Power Co. v. Sternbergh, 218 U. S. 299, 302, 31 Sup. Ct. 25, 54 L. Ed. 1047; In re Holden (C. C. A. 6) 203 Fed. 229, 233, 121 C. C. A. 435; Kinkead v. Bacon, supra, 230 Fed. at page 364, 144 C. C. A. 504.

position proceedings are no part of the administration of bankrupt estates; on the other hand, their object is to defeat the proposed adjudication by withdrawing the estate from the jurisdiction of the court. Upon confirmation the title to the estate revests in the bankrupt under section 70f of the act (Comp. St. 1916, § 9654). During their pendency the bankruptcy proceedings proper are in a sense suspended. In re Fogarty (C. C. A. 7) 187 Fed. 773, 109 C. C. A. 621. We are unable to distinguish this case from the Fogarty Case, in that the bankrupt there was a natural person, while here it is a corporation.

[5] The question remains whether the services of counsel in advising the bankrupt regarding its business during the period between the filing of the petition and the adjudication of bankruptcy, including legal services in opposing the attachment and lien proceedings, are within section 64b(1) of the act, as "the actual and necessary cost of preserving the estate subsequent to filing the petition." The debtor resisted the application for receiver, receivership was not ordered, and the alleged bankrupt remained in complete control of its business until the adjudication, except that shortly before that time a custodian was appointed to make purchases necessary to keep the merchandise stock in salable condition, to countersign checks for payments and make weekly reports of purchases and sales. The statement of the District Judge before quoted may perhaps be construed as holding that the payments made by the bankrupt were sufficient to cover the class of services here under consideration; but, as the bankrupt's counsel dispute that construction, we prefer not to rest our decision upon it.

In Randolph v. Scruggs, 190 U. S. 533, 539, 23 Sup. Ct. 710, 47 L. Ed. 1165, it was held that services rendered by counsel to a voluntary assignee under a state statute might be allowed in subsequent bankruptcy proceedings, so far as they benefited the estate, and that, inasmuch as the assignee would be allowed a lien on the property if he had paid the sum allowed, counsel might stand in his shoes and be preferred to that extent; and in Re Stewart, supra, we held that an assignee for the benefit of creditors who retained possession of property for some years after the filing of petition in bankruptcy against his assignor, and until final adjudication and the appointment of a trustee (no receiver having been appointed) might be treated in the settlement of his accounts as a quasi receiver, and allowed compensation for such services and disbursements as benefited the estate. Counsel seek to bring themselves within these decisions; but we think this contention carries the doctrine of those cases entirely too far. The bankrupt had not obtained possession and control of the estate through any trust or representative relation; it had personal ownership. True, it was charged with bankruptcy and insolvency, and, should the charge be sustained and the offer of composition be refused, this right of possession and management would be taken from it; and meanwhile the court had the power to take the estate into its own custody. But this it did not do, and presumably because of the pendency of composition proceedings. The claimants rendered the services we are now considering in the course of their general employment as the personal attorneys of the bankrupt. The service in question was incidental only

to their broad and general employment to protect the bankrupt in its retention and preservation of its estate, and such preservation directly worked personal benefit to the alleged bankrupt.

To permit in such case recovery from the bankrupt estate for services rendered directly to the bankrupt, and primarily for its interest and without the previous authorization of the court, from the mere fact that as the result of adjudication of bankruptcy the estate receives a benefit through its preservation, is, in our opinion, opposed to the policy of the act. Such permission would give opportunity for serious abuse in encouraging an alleged bankrupt and its counsel to undertake service in its or their discretion in the expectation (in case of adjudication) of obtaining from the estate a compensation which experience shows is apt to be more or less speculative in amount. The denial of such right need work no injustice. Where unusual efforts are required to preserve an estate pending bankruptcy proceedings, receivership is usually called for; but, even where full receivership is not demanded, a court of bankruptcy may and should exercise a quasi receivership, to the extent at least of making provision in advance for necessary services intended, in case of bankruptcy adjudication, to be made a charge against the estate. Indeed, section 12a of the Bankruptcy Act, as amended June 25, 1910 (36 Stat. 839), the applicable portion of which is cited in the margin,[3] provides a method whereby the expenses of preserving and conducting the business of an estate pending action on the composition may become part of the expenses of administration, in case composition is finally denied and adjudication made, and, impliedly at least, negatives the idea that such expenses may become part of the expenses of administering the estate where the defendant, without invoking the action of the court, in the prescribed manner, voluntarily and on its own sole motion continues the conduct of its business. In nothing we have said should we be understood as questioning the entire good faith of counsel. We think the order of the District Court denying compensation should be affirmed.

3. The principal ground on which the claim for compensation and expenses of counsel in opposing the confirmation is rested is that the rejection of the composition resulted in substantial benefit to the bankrupt estate, entitling those bringing about that result to reimbursement of expenses therein, as "the actual and necessary cost of preserving the estate" authorized by section 64b(1) of the Bankruptcy Act. Authority to so reimburse is also claimed to be found in the general equity powers of the court. The District Court found that the claim presented was exorbitant in amount, that a large part of the services and expenses charged for were wholly unnecessary, that it was at least doubtful whether the estate had been benefited by the defeating of the composition, and that no authority existed for making the reimbursement asked.

[3] "In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation and conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

[6, 7] The composition offer first reported was in reality a second offer, differing from the first only in that it included provision for the third mortgage mentioned. Creditors have already received dividends amounting to 45 per cent., which is exactly the amount of the first offer. After bankruptcy administration, there remains in the trustee's hands, above certain future disbursements, about $15,000, which, unless further reduced (as it does not appear it will be), would pay about 10 per cent. more to unsecured creditors. It is not clear, however, that creditors would have received less if the second composition offer (the only one reported on and considered by the District Judge) had been accepted. The fact that the second offer may have been the result of opposition to the first does not, we think, justify the adoption of the first offer as an inflexible basis of determining ultimate benefit to the estate, for petitioner and its associates equally opposed the second offer, and in fact the principal contest seems to have occurred after that offer. We think the District Court justified in denying the petition to reimburse on the ground that benefit to the estate from the rejection of the composition was not clear. But, however this may be, it seems plain that the expense of opposing the offer of composition is not an "actual and necessary cost of preserving the estate," within section 64b(1), and that to so hold would violate the purpose and spirit of the Bankruptcy Act, which carefully protects the estates of bankrupts against claims by creditors and counsel, except to the extent that specific provision is made therefor in the act. This purpose is manifest throughout.

It is only by a strained and artificial construction that a successful opposition to an offer of composition can be regarded as "preserving the estate." The bankrupt has an absolute right to make an offer. The question whether it shall be accepted is largely one of policy (perhaps partly of sentiment), as to which different creditors may well entertain different views, depending in part at least upon their relations to the alleged bankrupt and its business, past or prospective, as well as their individual and immediate needs. Necessarily, there is, in the usual case, more or less uncertainty as to the ultimate financial benefit connected with the acceptance or rejection of any composition offer. Primarily the statute is intended to give to a majority of creditors in number and amount power to decide whether the composition shall be accepted. The provision requiring approval by the court seems designed for the protection, first, of the dissenting minority as against the favoring majority, and, second, of the controlling majority as against an imposition leading to their approval; but essentially and ultimately the acceptance is, so far as concerns creditors, one of policy. To allow creditors to recover from the estate for expenses incurred in the adoption of one line of policy as against another would, we think, seriously contravene the purpose of the act, and open the door to unlimited and unseemly effort and expenditure at the cost of the estate. In the Fogarty Case, supra, Judge Baker, in discussing composition proceedings, well said:

"If a contest ensues, it is between the bankrupt (and his backers) on the one side and the dissenting creditors on the other, over the question whether the estate shall remain in court to be administered or go back to the bank-

rupt. In such a contest the dissenting creditors must bear their end in paying attorney's fees. Equitably, why should not the bankrupt and his backers pay theirs?"

While this language was obiter, because not involving reimbursement to those defeating a composition, we think it applicable to the instant case. In practice, if the situation is such as to justify contests of this nature, combinations between creditors can usually afford a measurable degree of protection.

[8] The nature of the objections made naturally justified the employment of counsel for their presentation, and it is true that in the absence of a trustee creditors alone could make the contest. But these facts do not alter the distinctive nature of the contest as one between two opposing factions of creditors, nor bring the case within the statute invoked. Nor does it materially alter the case that some of the objections made to the composition offer involved charges of misrepresentation and bad faith, or that they presented facts which, if established, would forbid discharge and thus defeat composition. The argument of analogy to opposition to a discharge is, we think, sufficiently answered by what is said on that subject in the Fogarty Case. Nor do we think the court can, under its general equity powers, grant the reimbursement asked. The authorities invoked by petitioner do not sustain its contention. For example, Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, holds, so far as material here, only that one generally interested with others in a common fund who in good faith maintains the necessary litigation to save it from waste, and secure its proper application, is entitled in equity to the reimbursement of his costs, as between solicitor and client, either out of the fund itself or by proportionate contributions from those who receive the benefit of the litigation. The holdings in Randolph v. Scruggs and In re Stewart have already been referred to in an earlier paragraph of this opinion. In the Roadarmour Case, 177 Fed. 379, 381, 100 C. C. A. 611, we disclaimed an intention to hold a lack of authority in the bankruptcy court, under its general equity powers, to allow compensation to attorneys employed by creditors, under proper safeguards, to defend against the allowance of claims where the trustee refuses to make the defense. None of these cases in our opinion sustains the right of creditors to recover from the estate the expenses of a successful opposition to an offer of composition.

[9] The suggestion that the claim for reimbursement is sustainable as an attorney's fee "to the petitioning creditors in involuntary cases" under section 64b(3) of the act is without merit. Petitioner and his associates were not actually petitioning creditors, either originally or by intervention; they did not become constructively such from the mere facts that during the pendency of the composition proceedings the petitioning creditors (who were with the majority favoring the composition) did not press their petition for adjudication, and that those opposing the composition urged that the case be brought to adjudication, and finally contributed to bringing about the hearing on the original petition. Creditors who opposed the composition naturally favored ad-

judication; those favoring composition quite as naturally opposed adjudication while composition proceedings were pending.

The respective orders under review in the two cases are affirmed, with costs.

DALTON v. HUMPHREYS et al.

In re ROBERT HARRIS & BRO.'S ESTATE.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1917.)

No. 1487.

1. BANKRUPTCY ⊂=440—REVIEW—APPEAL AS PROPER REMEDY.

A member of a firm, indebted to a bank in which the firm owned stock, died, and his son succeeded to his interest. The new firm became indebted to the bank, and later became bankrupt. The trustee filed a petition, stating his opinion that the rights of general creditors to the bank stock were subordinate to the bank's statutory lien, and recommending the court to so decree, and to direct a sale. Creditors of the old firm filed an answer, and the matter was sent to a special master. About that time, creditors of the old firm procured the appointment of a receiver for the old firm, who filed an answer and petition of intervention, claiming the stock as the property of the old firm, and this answer and petition were also referred to the special master. The master sustained the lien, and held that title to the stock was vested in the trustee, and his report was confirmed. *Held* that, while the issue arising upon the trustee's petition and the creditors' answer did not directly, if at all, involve the ownership of the stock, the issue raised by the answer and intervention of the receiver was a controversy arising in bankruptcy proceedings, and reviewable by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

2. BANKRUPTCY ⊂=440—APPEAL—SCOPE OF REVIEW.

While the issue as to the bank's lien, standing by itself, was a proceeding in bankruptcy, reviewable only by petition to revise, it was not separable from the issue as to ownership, and this issue carried with it and gave jurisdiction to review on appeal the subordinate question respecting the lien of the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

3. BANKS AND BANKING ⊂=42—LIEN ON STOCK—OWNERSHIP OF STOCK.

Where one member of a firm, indebted to a bank in which the firm owned stock, died, and his son succeeded to his interest, the bank was not entitled to a lien on the stock for the new firm's indebtedness to it, under a provision of its charter giving a lien on stock for debts due by stockholders, in the absence of any transfer of the ownership of the stock to the new firm, on the theory that in bankruptcy a partnership is a separate entity, continuing notwithstanding the death of one or more of its members, as a partnership is treated as an entity only for certain purposes, the most important of which is the distribution of assets.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 50, 56–60.]

4. PARTNERSHIP ⊂=245(3)—DEATH OF PARTNER—DISPOSITION OF ASSETS.

Upon the death of one member of a firm, title to its assets vests in the surviving partner, with the right, acting in good faith, to make any valid disposition thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 515.]

5. PARTNERSHIP ⟸245(1)—DEATH OF PARTNER—ADMITTING LEGATEE TO FIRM.
Where a partner bequeathed his interest in the firm to his son, the surviving partner could recognize the son's ownership of an undivided half of partnership property, and admit him to joint possession, without the aid of an administrator.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 514.]

6. PARTNERSHIP ⟸245(3)—DEATH OF PARTNER—DISPOSITION OF ASSETS.
In the absence of protest or adverse action by creditors of a firm dissolved by the death of one of its members, the surviving partner could exercise his right to dispose of its assets by transferring them in consideration of an agreement to pay its debts to a new firm, composed of himself and the deceased partner's legatee, who were already in possession of the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 515.]

7. BANKS AND BANKING ⟸42—LIEN ON STOCK—OWNERSHIP OF STOCK.
Where the surviving member of a partnership dissolved by the death of the other member acted with honest intent in transferring the firm assets to a new firm, composed of himself and the deceased partner's legatee, which assumed the debts of the old firm, and creditors assented to the continuance of the business by the new firm, the new firm became the owner of bank stock owned by the old firm, and its indebtedness to the bank was secured by the statutory lien of the bank on its stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 50, 56–60.]

8. PARTNERSHIP ⟸183(3)—APPLICATION OF ASSETS TO LIABILITIES—RIGHTS OF CREDITORS.
Where, in such case, the creditors of the old firm allowed the new firm to take up the business and carry it on for more than two years, and until bankruptcy, without protest or objection, their nonaction raised a strong presumption that the new firm took over the assets and assumed the liabilities of the old firm with the knowledge and consent of the old firm's creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 324–327, 348.]

9. PARTNERSHIP ⟸183(3)—APPLICATION OF ASSETS TO LIABILITIES—RIGHTS OF CREDITORS.
Creditors of the old firm, who by their nonaction assented to the new firm taking over the assets and assuming the liabilities of the old firm, could not upset the arrangement and require the application of the former property of the old firm to the payment of their debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 324–327, 348.]

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro, in Bankruptcy; James E. Boyd, Judge.

Petition by Ira R. Humphreys, trustee of the estate of Robert Harris & Bro., bankrupts, for the sale of certain stock claimed to be subject to a lien in favor of the Citizens' Bank of Reidsville, N. C. From a decree confirming the report of a special master, W. R. Dalton, receiver, appeals. Affirmed.

Thomas C. Hoyle and R. C. Strudwick, both of Greensboro, N. C. (J. T. Morehead and W. P. Bynum, both of Greensboro, N. C., on the brief), for appellant.

W. M. Hendren, of Winston-Salem, N. C., and Robert P. Levis, of New York City (H. R. Scott, of Reidsville, N. C., and Manly, Hendren & Womble, of Winston-Salem, N. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. For many years Robert Harris and his brother, H. C. Harris, were partners in the business of manufacturing tobacco at Reidsville, N. C., under the firm name of Robert Harris & Bro. As such partners they were the owners of 90 shares of the capital stock of the Citizens' Bank of Reidsville, of which 50 shares were acquired in June, 1885, and 40 shares in April, 1901. Prior to July, 1898, they became indebted to the Citizens' Bank in the sum of about $17,000, of which $11,000 was represented by their firm notes and $6,000 by notes signed jointly by them and another concern. The charter of the bank provides that it "shall have a lien on the stock for the debts due it by the stockholders, before and in preference to other creditors," and the loans in question were made upon the faith of this provision.

H. C. Harris died in April, 1911, leaving a will, drawn by himself, by which he gave his entire interest in the partnership, subject to a charge for his wife's support, to his son, W. C. Harris, who had for some time been connected with the business. The will was duly probated, but it named no executor, and no administrator with the will annexed was appointed. Without other legal proceedings of any sort, but acting on this testamentary bequest, and in evident accord with the desire of Robert Harris and the family of his deceased brother, the son at once assumed to take the place of his father as a member of the firm, and thereupon the business went on as before, under the same firm name, and apparently without any public announcement of the change of personnel, except by putting W. C. Harris, instead of H. C. Harris, on the letter heads of the company. For convenience the terms "old firm" and "new firm" will be used to designate the partnership before and after the change of membership.

The notes above mentioned were renewed at intervals of three or four months during the lifetime of H. C. Harris, and they continued to be renewed in the same manner after his death; the aggregate amount remaining at $17,000. The cashier of the bank testified, in September, 1913, that "up to three years ago," when a new note was taken, the old note was marked "Cancelled" or "Paid," but since that time the old notes had always been marked "Renewed." When W. C. Harris came into the firm, the bank was assured, both by him and by Robert Harris, that the business would continue the same as before, and that the bank would have its lien on the 90 shares of stock, which were worth more than its loan; and so the loan was extended by successive renewals of the notes. Thus matters went on for upwards of two years, during which time a large part of the indebtedness of the old firm to other creditors was paid off and fresh indebtedness incurred by the new firm. Then misfortune came, and in June, 1913, the new firm, together with Robert Harris and W. C. Harris as individuals, was forced into bankruptcy. In due course the bank made proof of its debt and

claimed a lien upon the stock in question by virtue of the above-quoted provision of its charter.

On August 1, 1913, the trustee filed a petition, reciting the indebtedness to the bank and the stock ownership of the bankrupts, stating his opinion that the rights of general creditors to this stock were subordinate to the statutory lien of the bank, and recommending the court to so decree, and to direct a sale of the stock accordingly. An answer to this petition was filed a little later by two creditors of the old firm, and thereupon the matter was sent to the referee in bankruptcy as special master. About this time certain creditors of the old firm took some action in a state court of North Carolina which resulted in the appointment by that court of a receiver of the partnership composed of Robert Harris and H. C. Harris, of which Robert Harris was the surviving partner. This receiver came into the bankruptcy proceeding in January, 1914, with an answer to the petition of the trustee, and in the following month with a petition of intervention, in which answer and petition he set up, among other things, that the old firm was dissolved by the death of H. C. Harris, that its affairs had not been wound up and settled, that its assets were insufficient to pay its creditors in full, that the trustee in bankruptcy had been put in possession of the property, including the manufacturing plant and the 90 shares of bank stock, that this property belonged to him as receiver of the dissolved partnership, and that it should not be used to pay the debts of the bankrupt firm of Robert Harris and W. C. Harris; and he prayed the court to so adjudge and to direct the trustee to turn the property over to him as such receiver.

So far as the record discloses the litigation under review is confined to the bank stock, and involves (1) the right of the bank to a lien thereon as security for its debt, and (2) the title to the stock as between the trustee and the receiver. The special master sustained the lien claimed by the bank, and also held that title to the stock was vested in the trustee, and his report was confirmed by the district court. The receiver appeals.

A motion is here made to dismiss the appeal, at least in part, on the ground that the decree below determines two separate and distinct questions, namely, the lien of the bank and the title to the stock; that the first of these questions, taking into account the way it was raised, is not a "controversy arising in bankruptcy proceedings," which can be reviewed by appeal, but rather and strictly a "proceeding in bankruptcy," which is reviewable only by petition to superintend and revise, to be filed within 10 days; and that consequently this court is without jurisdiction as to so much of the decree as adjudges the bank to have the lien it claims. And in this connection it is asserted that the question of title is of no consequence, if the lien be sustained, since the value of the stock is less than the bank's debt.

[1, 2] It appears to be the case, as the appellee says, that the issue first referred to the special master, arising upon the trustee's petition for leave to sell subject to the bank's lien, which he conceded, and the answer of certain creditors denying such lien, did not involve directly, if at all, the ownership of the stock. But that issue practically disap-

peared, or was merged in the larger issue raised by the answer and intervention of the receiver, which was also referred to the special master, as his report recites, and which thereupon became the real basis of the controversy. In the proceeding thus initiated the bank assumed the burden of establishing its lien, and in effect adopted the petition of the trustee as its answer to the intervention of the receiver. Thus was presented the broader question of the receiver's title and right to possession of property in the hands of the trustee, and we are of opinion that this was a "controversy arising in bankruptcy proceedings," and therefore reviewable by appeal. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Security Warehouse Co. v. Hand, 143 Fed. 32, 74 C. C. A. 186.

True, the decree below decides two questions, the disputed lien and the disputed title, and it might be conceded that the first of these, standing by itself, would be a "proceeding in bankruptcy," which could be reviewed only by petition to revise. But the two questions are not separable in the sense that they are independent and unrelated. On the contrary, they are so united that the determination of one virtually determines the other. If the receiver's contention be sustained, the bank has lost its lien, because in that case its debtor, the new firm, was not a stockholder; if the trustee's concession be sustained, the stock belonged to the new firm when bankruptcy occurred, and the lien of the bank attached by virtue of its charter provision. It thus appears, as we think, that the question of title is the dominant question, since it includes in effect or draws with it the question of lien. It would be an anomalous situation if this court should hold that the decree under review, so far as it relates to the lien, must stand as final, because not brought here by petition to revise, and at the same time hold, so far as it relates to the title, that it must be reversed, and the stock awarded to the receiver, when such reversal would necessarily operate to deprive the bank of its lien. Since the character of the proceeding must be determined "by the nature of the claim set up against the trustee in bankruptcy," as the Supreme Court said in Coder v. Arts, 213 U. S. 223, 236, 29 Sup. Ct. 436, 441 (53 L. Ed. 772, 16 Ann. Cas. 1008), it seems clear to us that the receiver's claim of title and right of possession must be regarded as the controlling issue, which carries with it, and gives jurisdiction to review, the subordinate question respecting the lien of the bank. The motion to dismiss is denied.

[3] On the merits the case is not without difficulty. Whilst the equities are strongly with the appellee, the decree in its favor cannot be upheld unless it finds support in approved and defensible rules of law. Despite the learned argument of counsel for the bank, we are unable to accept his contention that, "under the bankruptcy law, a partnership is an entity separate and distinct from the individuals composing it, and consequently must continue as the same entity, notwithstanding death among the individuals, very much like a corporation." The doctrine of a separate partnership entity has been declared more or less positively in a number of cases, though with a refinement of reasoning, as it seems to us, that the ordinary mind does not follow with

satisfaction. The Supreme Court, however, in Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, has pointed out the unsubstantial nature of this doctrine, and held, moreover, that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) establishes no principles at variance with the common-law rules respecting partnership relations. Referring to certain sections of the act, the opinion in that case says:

"No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate. * * * But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts."

These observations plainly refute the contention here considered. If, as Mr. Justice Holmes declares, the most important purpose for which we can recognize a partnership entity is limited to the distribution of assets, we may well conclude that its vitality does not survive the death of a member. It must, therefore, be held in this case that the old firm and new firm are not in law the same.

[4-7] But this ruling does not determine the title to the stock or the lien of the bank, and our views upon those questions remain to be stated. The situation is this: When H. C. Harris died, the old firm was dissolved, and the title to its assets vested in Robert Harris, the surviving partner, with the right, acting in good faith, to make any valid disposition of the same. Fitzpatrick v. Flannagan, 106 U. S. 648, 657, 1 Sup. Ct. 369, 27 L. Ed. 211. But W. C. Harris, as legatee of his father, owned an undivided half of the partnership property, and manifestly Robert Harris could recognize that ownership and admit his nephew to joint possession without the aid of an administrator. Nor does it seem to us doubtful, under the authority just cited, that the surviving partner of the old firm, in the absence of protest or adverse action by creditors, could exercise his right to dispose of its assets by transferring the same, for the consideration of agreeing to pay its debts, to a new firm composed of W. C. Harris and himself, who were already in possession of the property. Assuming that all parties acted with honest intent, as appears to be conceded, and that the creditors assented to a continuance of the business by the new firm, the evident effect of the arrangement was to make that firm the owner of the stock in question. It thereby became the actual stockholder, in place of the old firm, and its indebtedness to the bank was, therefore, secured by the lien imposed upon its stock by the terms of the bank's charter.

[8, 9] It goes without saying that creditors of the old firm, at the time of H. C. Harris' death, had full right to require the business to be wound up and the partnership property applied to the payment of their debts. But they took no steps to that end. Without protest or objection they allowed the new firm to take up the business and carry it on for more than two years; there was no dissent until after the bankruptcy. In the circumstances, this long acquiescence, manifested

at least by nonaction, raises a strong presumption that the new firm succeeded the old firm, taking over its assets and assuming its liabilities, with the knowledge and consent of the former's creditors. Indeed, it is quite significant that the receiver does not allege, either in answer to the trustee's petition or in his separate intervention, that any creditor of the old firm was unaware of the transfer or withheld his assent to what was done by the parties thereto. This being so, it appears plain to us that a few creditors of the old firm, whose debts remain unpaid, should not now be permitted to upset an arrangement to which they presumably consented and which at the time was undoubtedly deemed best for all concerned. Assuming the assent of creditors, as we are warranted in doing, the validity of the transaction, and its resulting transfer of title from the old firm to the new, are amply sustained by Fitzpatrick v. Flannagan, supra, and the earlier case of Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370, in which the rule of law is so clearly stated, and the principle upon which it rests so fully explained, as to leave no occasion for further comment.

It may be added, however, that the bankruptcy court had the disputed stock in custody and complete jurisdiction of all the interested parties. As a court of equity, in matters of this kind, it had the undoubted power to make such determination of the controversy as justice appeared to require. We are convinced that its decree is right, and should not be disturbed.

Affirmed.

JONES v. BLAIR et al.

In re BLAIR-FRAZIER CO.'S ESTATE.

(Circuit Court of Appeals, Fourth Circuit. June 1, 1917.)

No. 1516.

1. BANKRUPTCY ⊂⊃440—REVIEW—APPEAL.

A petition by a trustee in bankruptcy, alleging that the bankrupts and their agent had collusively, knowingly, and fraudulently concealed and withheld from the trustee certain of their assets, intending to hinder, delay, and defraud their creditors, and that the bankrupts failed and refused to turn over such assets when required to do so by referee, was dismissed. Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1916, § 9608), declares that the Supreme Court of the United States and the Circuit Court of Appeals shall have appellate jurisdiction of controversies arising in bankruptcy proceedings, while section 24b declares that the Circuit Courts of Appeals shall have jurisdiction in equity to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy. Section 25a (Comp. St. 1916, § 9609) declares that appeals as in equity cases may be taken in bankruptcy proceedings to the Circuit Courts of Appeals from a judgment adjudging or refusing to adjudge the defendant a bankrupt, from a judgment granting or denying a discharge, and from a judgment allowing or rejecting a debt or claim of $500 or over. *Held* that, while the denial of the petition did not fall within any of the classes enumerated in section 25a, nevertheless the denial of such petition must be deemed a controversy arising in bankruptcy proceedings, as distinguished from a proceeding in bankruptcy, and hence the denial could be reviewed by appeal, whether

the proceeding be considered summary or plenary; this being particularly true, in view of the wholly technical distinctions of the different proceedings for review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

2. BANKRUPTCY ⊂=136(2)—PROCEEDINGS—SUMMARY PROCEEDINGS.

As bankrupts are required by statute to embrace all of their assets in their schedules, the bankruptcy court, upon petition of any creditor, setting up a concealment of assets, must hear and determine the matters in a summary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

3. BANKRUPTCY ⊂=440—PROCEEDINGS—PLENARY SUIT.

Bankr. Act, § 23 (Comp. St. 1916, § 9607), declares that the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants, and that suits by a trustee shall only be brought in the courts where the bankrupt whose estate is being administered might have prosecuted them, had no proceedings in bankruptcy been instituted. A trustee in bankruptcy filed a petition, alleging that the bankrupts and their agents had collusively, knowingly, and fraudulently concealed and withheld assets, with the intention of hindering, delaying, and defrauding their creditors, and that the bankrupts had failed to produce such assets when ordered and required to do so by the referee. The bankrupts and their agents by joint answer set forth in detail all of their alleged defenses, making every issue of fact necessary for the full assertion of their rights, and offered evidence in support thereof. *Held*, that the proceeding, instead of being a summary one, was plenary in its character, involving a controversy in equity under the section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915.]

4. BANKRUPTCY ⊂=293(4)—PROCEEDINGS—JURISDICTION OF COURT.

In such case, though the bankruptcy court could not determine whether accounts due the bankrupts from their relatives had been fraudulently marked paid, so as to bind the relatives, who were not parties, yet as the agents of the bankrupts appeared, and without objection answered those allegations of the petition setting up that the bankrupts and their agents collusively concealed property, the bankruptcy court acquired jurisdiction to render judgment against the agents; such answer being a consent to the bankruptcy court's exercise of jurisdiction under Bankr. Act, § 23.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville, in Bankruptcy; Joseph T. Johnson, Judge.

Petition by Iredell Jones, Jr., trustee in bankruptcy of the estate of the Blair-Frazier Company, bankrupt, against Elizabeth M. Blair and others, bankrupts. From a decree for defendants, petitioner appeals. Reversed.

John D. Lee, of Columbia, S. C., and Arthur L. Gaston, of Chester, S. C., for appellant.

Glenn W. Ragsdale, James G. McCants, and Clarke W. McCants, all of Winnsboro, S. C., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The Blair-Frazier Company, a partnership composed of Mrs. Elizabeth M. Blair, Mrs. Lula E. Blair, and Mrs.

Marion M. Frazier, doing a mercantile business at Blair, S. C., was adjudicated bankrupt on the 7th day of April, 1915, and Iredell Jones, Jr., was appointed trustee of the estate. The business of the firm was conducted by L. M. Blair, the husband of Mrs. Elizabeth M. Blair, and J. B. Frazier, Sr., the husband of Mrs. Marion M. Frazier; the former exercising chief control. On March 9, 1916, a petition was filed in the bankruptcy court, alleging that the bankrupts and their agents, Blair and Frazier, had collusively, knowingly, and fraudulently concealed and withheld from the trustee certain assets of the bankrupt's estate—

"with the intention and purpose of defrauding the creditors of the said bankrupts, and of hindering, delaying, and defrauding their creditors, and have failed to produce the assets of the said bankrupts when ordered and required to do so by the said referee herein, and have failed and refused to turn over the said assets and property of the bankrupts, in the possession of the said bankrupts, or under the control of the said bankrupts and their agents, belonging to the creditors."

The relief asked was that the bankrupts and their agents be required to disclose and account for the personal assets of the bankrupt estate alleged to be concealed with the intent to hinder, delay, and defraud creditors and to produce and turn over such assets to the trustee.

The bankrupts and their agents filed a joint answer or return, denying the concealment and misappropriation, and alleging that all of the property of the bankrupts had been turned over to the trustee. Evidence was taken both before the referee and the court upon the issues made upon the petition and the returns. The District Court dismissed the petition, as to some of the charges, on the ground that the petition and return before the court constituted merely a summary proceeding, as distinguished from a plenary suit; that the questions involved could not be litigated in a summary proceeding, but required an independent suit against all the parties interested; and as to other charges on the ground that the allegations were not sustained by the proof. It will thus be seen that the District Court decided in its decree both questions of law and fact, not only between the trustee and the agents of the bankrupts, but between the trustee and the bankrupts themselves. From the decree an appeal was taken to this court, on the ground that the District Court was in error in its findings of fact and also in its conclusions of law.

[1] The first point made here is that the matter could not be brought to this court by appeal, but only by petition to superintend and revise, under section 24b of the Bankruptcy Act. It is true that it does not fall under any of the provisions of section 25a allowing an appeal. But we think it is clearly a "controversy arising in bankruptcy proceedings," as distinguished from a "proceeding in bankruptcy," and therefore is properly here by appeal under section 24a, rather than by petition to superintend and revise under section 24b. The issues made in the petition and return are (1) the title of the trustee to certain assets claimed by him to be in existence as part of the bankrupt estate, which the bankrupts claim should not have been embraced in their schedules, and which, they joined their agents in saying, were either not assets at all, or were assets belonging to their agents; and (2) an accounting by the bankrupts and their agents for the proceeds of cotton and other

property disposed of. The questions are not solely between the bankrupts or the trustee and their creditors, but between the trustee and the bankrupts, and also the bankrupts' agents. The case, therefore, falls distinctly under Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and Dalton v. Humphreys, 242 Fed. 777, — C. C. A. —, decided by this court May 1, 1917, holding that such a controversy may be brought here by appeal.

If there were any doubt upon this question of practice, it should be solved in favor of the appellants. The provisions of the bankruptcy statute providing for review by this court of questions which arise in the District Court in the administration of bankrupts' assets are so confusing that the most intelligent counsel are often puzzled and misled, and this court and doubtless other Courts of Appeals are often in a state of perplexity as to the proper proceeding. In this state of the law we think it our duty not to dismiss a proceeding looking to review of any proceeding in the District Court on the ground that the wrong method of seeking relief has been taken, unless it is so clear that the proceeding has been illegally brought that the court is required by the clear and imperative mandate of the statute to dismiss it. That there should be four distinct methods of bringing cases to this court, writs of error in law cases, appeals in equity cases, and petitions to superintend and revise and appeals in bankruptcy cases, is most unfortunate. The distinctions are purely artificial and technical; having no relation to substantial justice. These distinctions prescribed by statute require of the courts discussions concerning them which must seem to intelligent laymen more like sophistry than logic. Indeed, it is a reproach to the administration of justice that appellate courts should be required to dismiss causes brought up for review merely because counsel have made a mistake as to purely formal matters. Rule and regularity in such matters are of course essential, but due observance of rules could always be enforced by the infliction of costs on the offending party. The difficulty of the bar and the bench in distinguishing and applying these methods we venture to think could be entirely removed, so that the appellate courts could in every case decide the merits of the controversy, if a simple method of appeal applicable to all cases, legal and equitable, and all issues arising in bankruptcy, were provided by rule of court under authority of statute, with the discretion of the court to inflict the payment of costs for a material departure from the rule. Under the rigid and technical methods of review now prescribed by statute, Courts of Appeals cannot always escape dismissing causes without decision of the merits for failure to comply with the statutory method, however great the hardship may be to the parties seeking review of the action of the lower court.

[2] The District Court was in error in holding that the petitioners could not have their claim against the bankrupts for concealment of assets adjudicated under their petition without an independent proceeding, even if the proceeding had been summary. The bankrupts were required by the statute to embrace all of their assets in their schedules. Upon the allegation that they had failed to comply with the law in this respect, the District Judge was bound, upon the petition of any creditor

setting out concealment of assets, to hear and determine the matter under such petition in a summary proceeding. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

[3] Looking at the substance of the matter, however, this was not a summary, but a plenary and independent, proceeding in the bankruptcy court, involving a controversy in equity under section 23, as distinguished from proceedings in bankruptcy. The petition of the trustee set out in detail allegations of the concealment and conversion of certain assets by the bankrupts and their agents, acting in collusion with each other, the illegal and fraudulent cancellation of certain specified accounts due to the bankrupts, the illegal and fraudulent transfer of property for the purpose of hindering, delaying, and defeating creditors, and illegal preferences to alleged creditors. It cannot be doubted that all of these matters could be litigated under one bill in equity, and all proper relief granted. The bankrupts and their agents in their joint answer set forth in detail all of their alleged defenses, making every isssue of fact necessary for the full assertion of their rights. So far from questioning the power of the court to determine all of the questions under the petition, they asked that they be allowed to introduce testimony in verification of their defenses. All substantial features and requirements of a plenary action were present. The pleadings, therefore, presented fully a case of which the bankruptcy court had jurisdiction under section 23. It is said in Milner v. Meek, 95 U. S. 256, 24 L. Ed. 444:

"The pleading filed by the assignee was appropriate in form for a petition in the bankruptcy suit, but it was equally good in substance as a bill in equity. It contained a complete statement of a cause of action cognizable in equity and a sufficient prayer for relief. There was no formal prayer for a subpœna, but process was issued and served. All the parties interested appeared, and presented their respective claims by answers, or answers and cross-petitions with appropriate prayers for relief."

See Remington on Bankruptcy (2d Ed.) page 1727; In re McMahon, 147 Fed. 685, 77 C. C. A. 668; In re Steuer (D. C.) 104 Fed. 976; Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50.

[4] It is true that one of the allegations in the petition was that the bankrupts and their agents, without valuable consideration, fraudulently credited and marked paid on their books the accounts due the bankrupts by the agents individually and by their relatives. Of course, the court could not adjudge that these entries of payment were fraudulent, so as to bind the relatives, who were not parties to the petition. Nor, under section 23, would the bankruptcy court have jurisdiction to award a money judgment against the agents individually on the accounts against them set out in the petition, if it had not appeared that the agents, Blair and Frazier, had consented to the court taking jurisdiction of the controversy as to these accounts. But Blair and Frazier did give the consent required by section 23, when they answered the petition on this point without objection, and affirmatively asked to be allowed to offer proof that no fraud had been perpetrated by them in connection with the accounts. In re Connolly (D. C.) 100 Fed. 620; In re Emrich (D. C.) 101 Fed. 231; Remington on Bankruptcy (2d Ed.) § 1698.

The petition and the answer containing this request and consent to have the matter decided constituted a sufficient basis for the bankruptcy court to try the issue as to whether the accounts on the books of the bankrupts against the agents had been in fact paid, and to render judgment against the agents individually in case it should find they were not paid. Our conclusion is that, inasmuch as the petition and the return had all the elements of a bill in equity and answer thereto, all of the questions made therein between the trustee and the bankrupts and their agents should have been decided by the bankruptcy court and a decree entered accordingly. This follows inevitably when we look at the substance rather than the name by which the pleadings were called.

The decree of the District Court is reversed, and the cause remanded for a rehearing of all the issues made by the parties to the petition and return, on the evidence already taken and any other evidence that may be offered by the parties.

Reversed.

YOUNGE v. UNITED STATES.*

(Circuit Court of Appeals, Fourth Circuit. May 23, 1917.)

No. 1501.

1. CRIMINAL LAW ⟸564(5)—PROOF OF VENUE—SUFFICIENCY.
As the statute (Act Jan. 22, 1901, c. 105, 31 Stat. 736) establishing the Northern district of West Virginia provides for the holding of regular terms at Parkersburg, where it was shown, on a trial for transporting a woman from one state to another for an immoral purpose, that she was induced to go from Parkersburg to a point in Ohio, there was a sufficient showing that the offense was committed within the territorial limits of the court.

[Ed. Note:—For other cases, see Criminal Law, Cent. Dig. § 1281.]

2. CRIMINAL LAW ⟸1036(8)—REVIEW—OBJECTIONS—SUFFICIENCY OF EVIDENCE.
Where, in a criminal case, the court charged that if defendant induced, persuaded, or enticed the prosecuting witness to go from Parkersburg, in the state of West Virginia, to a point in Ohio, he was guilty, and defendant made no objection on the ground that there was no evidence that Parkersburg was in West Virginia, it was too late to raise this objection on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641.]

3. CRIMINAL LAW ⟸279—PLEA IN ABATEMENT—TIME FOR PLEADING.
Where defendant was indicted in October, 1913, pleaded not guilty, and was found guilty and appealed to the Circuit Court of Appeals, which reversed the judgment, a plea in abatement thereafter filed at the May term, 1916, at which time the offense would have been barred, if the plea had been sustained, was properly stricken, as filed too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 643, 644.]

4. GRAND JURY ⟸2½—CONSTITUTION OF JURY—PLEA IN ABATEMENT.
That there was no colored person of African descent on the grand jury which found an indictment was not ground for abatement, where it did not appear that colored jurors were excluded solely because of their race, or that the negro race was discriminated against.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 2.]

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

*Rehearing denied July 20, 1917.

5. CRIMINAL LAW ⟸121—CHANGE OF VENUE—DISCRETION OF COURT.
It was within the sound discretion of the trial court to determine an application for a change of venue.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241.]

6. JURY ⟸33(1)—CONSTITUTION OF JURY—COLORED PERSONS.
On the trial of a colored person, there was no error in refusing to require that at least one colored person be included in the jury, where there was no showing that colored jurors were excluded by the court, or those acting under it.
[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226, 227.]

7. PROSTITUTION ⟸3—INDICTMENT—VARIANCE—DATE OF OFFENSE.
On a trial for transporting a woman from one state to another, etc., for an immoral purpose, there was no fatal variance between an allegation that the offense was committed "on the ——— day of September, 1912," and proof that the transportation occurred in the latter part of August or the first part of September, and probably on the 4th or 5th of September.
[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3.]

8. CRIMINAL LAW ⟸1159(3)—REVIEW—QUESTIONS OF FACT.
Where, in a criminal case, the evidence was conflicting, the prosecuting witness testifying positively as to defendant's guilt, and defendant contradicting her testimony and offering evidence to establish an alibi, an appellate court would not interfere with the jury's determination.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Eugene L. Younge was convicted of an offense, and he brings error. Affirmed.

C. M. Hanna, of Parkersburg, W. Va., and John R. Clifford, of Martinsburg, W. Va. (Reese Blizzard, of Parkersburg, W. Va., on the brief), for plaintiff in error.

Harry H. Byrer, Asst. U. S. Atty., of Philippi, W. Va. (Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., on the brief), for the United States.

Before PRITCHARD and KNAPP, Circuit Judges, and SMITH, District Judge.

PRITCHARD, Circuit Judge. The plaintiff in error, hereinafter referred to as defendant, was indicted at the October term, 1913, of the District Court of the United States for the Northern district of West Virginia for a violation of the "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]). No demurrer to the form of indictment was filed. This case was here at the May term, 1914, of this court, at which time the judgment of the lower court was reversed, upon the ground that the court below had refused to grant a continuance in order to afford the defendant an opportunity to produce in his behalf certain witnesses whom he claimed had been with him at the "fishing camp" on the Little Kanawha river, and by whom he expected to prove that he had not left the fishing camp and thereby establish an alibi.

The indictment charges the defendant in three several counts with

having transported and caused to be transported, with having procured transportation and assisted in procuring transportation for, and with having induced, persuaded and enticed, and thereby having caused, one Mabel Roan, a colored girl over the age of 18 years, to go and be transported in interstate commerce from Parkersburg, in the Northern district of West Virginia, to Marietta, in the state of Ohio, for the purpose of prostitution, debauchery, and other immoral purpose, with the intent and purpose on the part of the defendant to induce, entice, and compel the said Mabel Roan to become a prostitute, and to give herself up to debauchery, and otherwise to engage in immoral practice. The offense is charged to have been committed on the ——— day of September, 1912.

On the 25th day of May, 1916, the defendant tendered his plea in abatement, alleging therein that the grand jury which found the indictment had not been legally drawn; that the court did not order a venire facias to issue as required by law, and that no venire facias was actually issued as the law requires, and that the illegal proceeding complained of tended to his injury and prejudice in the respects therein alleged; that said plea was tendered at the first opportunity after the facts set out therein became known to the defendant; that the defendant is a colored person, and no colored jurors were on the grand jury that found the indictment. Defendant in error, hereinafter referred to as plaintiff, objected to the filing of this plea, for the reasons that it was not sufficient in form, and was tendered too late, and the court refused to permit the same to be filed, to which the defendant excepted.

Thereupon the defendant moved for a change of venue, and supported his motion by certain affidavits, and the plaintiff resisted the same and filed certain counter affidavits. The court overruled the motion, and the defendant excepted.

The defendant moved to quash the panel of petit jurors then in attendance at that term of court, for the reason that no special order of the court had been entered directing the summoning of the panel at that term. This motion was resisted by the plaintiff, and counsel, among other things, presented a general order of the court directing the summoning of petit jurors for all courts. This motion was also denied, and the defendant excepted.

The defendant then moved the court to direct that at least one man of colored or African blood be included in the jury to try him, which motion was also overruled, and the defendant excepted thereto. The defendant then moved the court to quash the indictment, because there were no members of the African race upon the grand jury that found the indictment. The court refused to grant this motion, and the defendant excepted.

Thereupon a jury was impaneled, a trial had, and the defendant convicted for the second time. During the progress of the trial the defendant excepted to the ruling of the court in admitting certain testimony to which he objected, and in refusing to permit the defendant to testify in reply to certain questions, and saved his exceptions to the ruling of the court by bills of exception. A motion to set aside the verdict of the jury, and grant a new trial, for reasons set out, was made by the defendant, which motion was overruled, to which action

of the court the defendant excepted, and thereupon the defendant was sentenced. The case comes here on writ of error.

[1, 2] It is contended by counsel for defendant that the government failed to show that Parkersburg is located in the Northern district of West Virginia, and that therefore the court was without jurisdiction. While no one testified directly that Parkersburg is situated in the district in which it is alleged that the offense was committed, nevertheless we think that the evidence bearing on this point was sufficient to establish the fact that the offense was committed within the jurisdiction of the court below. It should be borne in mind that the act of Congress (Act Jan. 22, 1901, c. 105, 31 Stat. 736) establishing the Northern district of West Virginia provides that regular terms of the United States District Court be held at Parkersburg, and it being shown that this was the point from which Mabel Roan was induced to go to Marietta, in the state of Ohio, this alone, we think, was sufficient to show that the offense had been committed within the territorial limits of the court. In addition to this, the court below in its charge, stating what was necessary to constitute an offense, said:

"Therefore I charge you that if you believe from the evidence in this case that this defendant induced, or persuaded, or enticed the girl, Mabel Roan, to go from Parkersburg, in the state of West Virginia, to Marietta, in the state of Ohio, by means of the Baltimore & Ohio Railroad and the traction line operating between Parkersburg and Marietta * * * that he is guilty under the statute."

Here was a positive, unequivocal statement by the court to the effect that Parkersburg was located in the state of West Virginia, and if the statement had been incorrect the defendant then and there, before the jury had retired from the box, had the right to object to the same upon the ground that no evidence had been introduced to support such statement. However, counsel remained mute and made no objection whatever, and under these circumstances we think that it is now too late to undertake to raise this question. It would, indeed, be an absurdity, in a case where it was shown that an offense had been committed at a point within a district at which regular terms of the court were held annually, to hold that the proof was not sufficient to establish the fact that the offense had been committed within the jurisdiction of the court.

"The venue may be proved by circumstantial evidence, and proof beyond a reasonable doubt is not required." Underhill's Criminal Evidence, § 36, p. 45.

Also in the same work (section 45, p. 45) it is stated:

"The trial court will take judicial notice of general geographical facts, and therefore will take judicial notice of the fact as to the location of a city."

[3] It is also urged that the court erred in striking out the plea in abatement tendered by the defendant. The court below held that this plea was tendered too late. The indictment in this case was found at the October term, 1913. The defendant was first tried thereon at the November term, 1913, at which time he entered a plea of not guilty. The jury returned a verdict of guilty, and the case was brought here by writ of error, as we have stated, and the judgment of the court below was reversed. No plea in abatement was filed or ten-

dered until the May term, 1916, at which time nearly three years had elapsed, and also at a time after the offense would have been barred, if the plea had been sustained. The action of the court below in refusing to consider the plea, under the circumstances, was eminently proper. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; Hyde and Schneider v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; United States v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857.

[4] Even if the plea had been tendered in due time, we think the grounds upon which it was based were insufficient. It simply stated that "there was no colored person of African descent on the grand jury which found said indictment." This allegation fails to state that colored jurors were excluded solely because of their race. In other words, it was not shown that the negro race had been discriminated against. In other words, it was not alleged in the plea that in the preparation of the jury list for the term at which the defendant was indicted the negro race had been discriminated against, nor was it shown by the plea or the evidence proffered that the name of any colored man who was otherwise qualified had been stricken from the grand jury list on account of his race. The following statement is to be found in the Encyclopedia of United State Supreme Court Reports, volume 3, pages 831 and 832:

"No person charged with a crime involving life, liberty, or property is entitled, by virtue of the Constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the petit jury that may try him. So far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several states may be restricted to citizens of the United States. But while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as a matter of right, that his race shall have representation on the grand or petit jury, and while a mixed jury, in a particular case, is not, within the meaning of the Constitution, necessary to the equal protection of the laws, it is a right to which he is entitled that, in the organizing of the grand jury and in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."

[5] It is also insisted that the court below erred in refusing to grant a change of venue. It was within the sound discretion of the court to determine this question. The affidavits in support of this motion, as well as the affidavits filed in opposition thereto, were considered by the court in disposing of the same. We find nothing in the record to show that there was an abuse of discretion in this instance, nor do we find that the refusal of the court to grant this motion prejudiced the rights of the defendant. Therefore we think this contention is without merit.

[6] It is further insisted that the court erred in refusing to require the attendance of a member of the colored race to serve on the jury at the trial of the defendant. We think that what we have said in regard to the plea in abatement disposes of this point. However, it may not be amiss to quote from the case of Virginia v. Rives, 100

U. S. 313, 25 L. Ed. 667, the seventh syllabus of which is in the following language:

"The defendant moved in the state court that the venire be so modified that one-third or some portion of the jury should be composed of his own race. The denial of that motion was not a denial of a right secured to him by any law providing for the equal civil rights of citizens of the United States, or by any statute, or by the Fourteenth Amendment. A mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of his color. But that is a different thing from that which was claimed, as of right, and denied in the state court, viz., a right to have the jury composed in part of colored men."

Counsel for defendant, before the trial commenced, asked the court below to certify that no colored man was a member of the grand jury that found the indictment, that the colored man was being discriminated against, and he further asked the court to certify that there had been no colored man on the grand jury in the Northern district of West Virginia within ten years prior to that date. In response to these requests the court said:

"Court: I will not certify anything of the kind, because I happen to know that that is not true. There have been colored men drawn. I don't know whether they have served or not, but I know I have seen them in my court.

"Mr. Blizzard: Will you, then, allow us to show that we offer to prove it?

"Court: No; I will not. I will certify that I overruled this motion, and I will further allow you to prove that there was no colored man on the jury that found this indictment and that there is no colored man summoned here at this term; but that is as far as I can go."

As we have stated, there is nothing in the record to show that colored jurors were excluded by the court or those acting under it. Under these circumstances, we do not think the assignment of error as to this point has any merit.

[7] It is further insisted that there was a fatal variance, in that it is alleged in the indictment that the offense was committed on the ——— day of September, 1912, and that the proof shows that the transportation occurred the latter part of August or the first of September, 1912, the date not being positively established, although the proof tends to show that it occurred between the 4th and 5th of September. In the case of Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, the Supreme Court said:

"Good pleading undoubtedly requires an allegation that the offense was committed on a particular day, month, and year; but it does not necessarily follow that the omission to state a particular day is fatal upon a motion in arrest of judgment. Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient."

The case of Matthews v. United States, 161 U. S. 500, 16 Sup. Ct. 640, 40 L. Ed. 786, is also very much in point.

[8] Counsel for plaintiff made a strong appeal to this court on the ground that the evidence was not sufficient to satisfy the jury beyond a reasonable doubt as to the defendant's guilt. This is a matter which

could only have been considered by the court below on a motion to set the verdict aside. The witness, Mabel Roan, testified positively as to the guilt of the defendant. This evidence was contradicted by the defendant, and there was also evidence offered by the defendant tending to establish an alibi; but even on this point there was a conflict. There being a conflict, and the jury having determined the matter, this court will not interfere.

We have carefully considered the assignments of error which relate to the testimony that was excluded by the court below, but find no error in the action of the court as respects the same.

For the reasons stated, we are of opinion that the judgment of the court below should be affirmed.

STULTZ et al. v. COUSINS.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2961.

1. COURTS ⟸323—FEDERAL COURTS—CITIZENSHIP OF PARTIES—EVIDENCE.
In an action by a citizen of North Carolina, brought in November, 1914, against defendants, sued as citizens of Tennessee, the testimony of one of the defendants that in July, 1914, he and his family moved to the District of Columbia, that he went there indefinitely, and did not have any certain length of time to stay, and that he had never since lived in Tennessee, did not sustain the burden of establishing a change of domicile, and a consequent loss of his citizenship in Tennessee.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886.]

2. COURTS ⟸319—FEDERAL COURTS—CITIZENSHIP OF PARTIES—CHANGE PENDING SUIT.
The jurisdiction of a federal court, once acquired on the ground of citizenship, continues, regardless of any change in citizenship.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 864.]

3. DISMISSAL AND NONSUIT ⟸26—DISMISSAL AS TO ONE JOINT TORT-FEASOR.
As an injured party may sue one or more or all joint tort-feasors, he may dismiss as to any defendant, and an action for libel was properly dismissed as to a defendant of whom the court did not have jurisdiction.
[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48–59.]

4. APPEAL AND ERROR ⟸272(2)—NECESSITY OF EXCEPTIONS—DENIAL OF DIRECTED VERDICT.
The refusal of a request to instruct for the defendant on certain counts could not be reviewed, where no exception was taken to such refusal at the time, or at the trial in open court.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 680.]

5. EVIDENCE ⟸380—PICTURES—CRAYON PORTRAIT.
On the question of whether plaintiff was a white or a colored person, a crayon portrait of his great-uncle, identified as a true picture of the uncle, was admissible; the fact that it was a crayon representation, and not a photograph, going only to its weight.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657.]

6. LIBEL AND SLANDER ⟸19—CONSTRUCTION OF LANGUAGE USED.
A letter written to the master mechanic of a railroad by members of a railroad brotherhood, stating that evidence had come into their possession

that plaintiff was not a full-blooded white, that he had been expelled for falsely answering questions, and that if the master mechanic desired further evidence "of the above being one-fourth negro" it would be furnished, amounted to a clear charge that plaintiff was of one-fourth negro blood.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99.]

7. LIBEL AND SLANDER ⟸6(1)—CHARGING WHITE PERSON WITH BEING NEGRO.

Whatever the rule as to spoken words, the publication of a writing containing a false statement that a white man is of one-fourth negro blood is libelous per se, at least in a community in which marked social differences between the races are established by law or custom.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 6, 8½, 10, 15.]

8. APPEAL AND ERROR ⟸1033(5)—EVIDENCE ⟸5(2)—JUDICIAL NOTICE—ERRORS FAVORABLE TO APPELLANT.

On the trial of an action for falsely charging that plaintiff was of one-fourth negro blood, any error in leaving it to the jury to determine as a fact whether or not the relation of the two races in eastern Tennessee was such that a negro did not have the same esteem of his white neighbors as a white man, or that his race connections, if known, would hurt and lessen his standing in the community generally as a matter of social intercourse, and deprive him of the standing which he would otherwise have as a white man, was favorable to defendant, as the trial judge might have taken judicial notice of the racial situation in eastern Tennessee, and instructed that the charge was libelous per se.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Evidence, Cent. Dig. § 4; Trial, Cent. Dig. § 587.]

9. LIBEL AND SLANDER ⟸44(1)—PRIVILEGE—DISCHARGE OF DUTY.

Defendants were members of a railroad brotherhood, and employed as firemen on a railroad which confined its preferred runs and promotions to white men, and gave such runs and promotions on the basis of seniority. Plaintiff was senior to most of the defendants. Defendants caused a letter to be written to the master mechanic of the railroad, stating that plaintiff was one-fourth negro, and asking that his run be vacated on the ground that he was a nonpromotable man. *Held*, that the communication was in no sense privileged, as defendants owed no duty, contractual, customary, or moral, to notify the railroad that a fireman holding a promotional job had negro blood, but gave such information gratuitously and voluntarily, and in their own interest.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 133, 134.]

10. LIBEL AND SLANDER ⟸56(2)—DEFENSES—BELIEF AS TO TRUTH.

Defendants' honest, but erroneous, belief in the truth of their written statement that plaintiff had negro blood was no defense to an action for libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 153.]

11. APPEAL AND ERROR ⟸1004(1)—REVIEW—EXCESSIVENESS OF VERDICT.

An alleged excess in the verdict is a matter to be dealt with by the trial court, and not on writ of error by a federal appellate tribunal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944.]

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

Action by Isaac S. Cousins against B. Peter Stultz and others. Judgment for plaintiff, and defendants bring error. Affirmed.

H. H. Shelton, of Winston-Salem, N. C., for plaintiffs in error.

James B. Cox and W. W. Belew, both of Johnson City, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. Action of libel by defendant in error against the 35 plaintiffs in error and Slagle, who was subsequently dismissed from the case, resulted in a verdict and judgment thereon for $3,400.

The parties were all members of the Erwin, Tenn., local of the Brotherhood of Locomotive Firemen and Enginemen and were employed as firemen on the Carolina, Clinchfield & Ohio Railway, which had its operating headquarters there. By custom, the preferred runs and promotion to enginemen were confined to white men, and, subject to examination, were given on the basis of seniority. Cousins was senior to 32 of the 36 defendants. As only white men were admitted to the brotherhood, applicants for membership were required to answer the question of race. Cousins had stated that he was a white man. After an investigation of rumors that he was a mulatto, he was expelled from the local on the charge of having falsely answered questions. Thereupon the following letter, which constituted the alleged libel, was written and sent on behalf and at the request of all of the defendants to the master mechanic of the railway:

Brotherhood of Locomotive Firemen and Enginemen,
Clinchfield Lodge No. 763.

December 30, 1913.

Mr. H. F. Staley, M. M., Erwin, Tenn.—Dear Sir: Some time ago evidence came into our possession of Isaac Cousins not being full-blooded white, and by a unanimous vote of the members of the B. of L. F. & E. he, Isaac Cousins, was expelled from the Brotherhood on account of falsely answering questions. By request of the Brotherhood I, as chairman, ask that the run he holds be vacated on the grounds that he is a nonpromotable man. If you desire any further evidence of the above being one-quarter negro, please notify us at once, and we will furnish you with same.

Yours respectfully, W. L. Spratt, Chairman.

This letter resulted in Cousins' loss of the preferred run and his transfer to a nonpreferred run.

In the caption of the declaration Cousins was alleged to be a citizen of North Carolina and the defendants citizens of Tennessee. The declaration was in three counts: The first, which the jury was in substance instructed to disregard, was based upon the theory that the letter charged a crime in plaintiff's having married and lived with a white woman in Tennessee, contrary to the Tennessee statute. The third count was based upon the theory of malicious interference with plaintiff's contract of employment. The second, upon which the trial clearly appears to have proceeded, alleged the libel in general terms, and also specified the loss of the preferred run as special damages. We proceed to a consideration of the alleged errors.

[1, 2] 1. Diversity of citizenship was properly averred; no issue was tendered thereon, and no inquiry instituted by the court. Defendant Martin, a citizen and resident of Tennessee prior to July, 1914, testified, however, that at that time he and his family moved to the Dis-

trict of Columbia; that he "went there indefinitely; I didn't have any certain length of time to stay"; that he never lived in Tennessee since then; and that he had moved to North Carolina after the action had been begun. This indefinite residence in the District of Columbia in November, 1914, when the action was brought, falls far short of sustaining the burden placed on defendant (Chase v. Wetzlar, 225 U. S. 79, 86, 32 Sup. Ct. 659, 56 L. Ed. 990) of establishing change of domicile, and a consequent loss of citizenship in Tennessee. There is no evidence that the change of residence was anything but temporary, and without an intention either to give up the old or to remain in the new home. As the jurisdiction of the court, once acquired, continues, regardless of any change in citizenship (Clarke v. Mathewson, 12 Pet. 164, 9 L. Ed. 1041) the subsequent removal to North Carolina is immaterial.

[3] 2. As an injured party may sue one or more or all joint tort-feasors, so, too, he may dismiss as to any defendant; and, as the court was without jurisdiction of Slagle, his dismissal before submission of the cause to the jury was entirely proper.

[4] 3. Whether a single request to instruct for the defendant on the second and third counts may be deemed equivalent to separate requests for such a charge on each of these counts, so as to require the reversal of a judgment on a general verdict, under the authority of Wilmington Mining Co. v. Fulton, 205 U. S. 77, 27 Sup. Ct. 412, 51 L. Ed. 708, because the third count was unsupported by the evidence, need not be determined, inasmuch as the record fails to disclose that an exception was taken to the refusal of the court to grant this request, either at the time (Johnson v. Garber, 73 Fed. 523, 19 C. C. A. 556; Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643; Miller & Lux, Inc., v. Petrocelli, 236 Fed. 846, 852, 150 C. C. A. 108; and cases cited), or at the trial in open court (Gandia v. Pettingill, 222 U. S. 452, 459, 32 Sup. Ct. 127, 56 L. Ed. 267). Furthermore, it is apparent that both sides tried the case as alleged in the second count.

4. The evidence, while conflicting, so abundantly justified the submission of the issues made in this count to the jury, that it is unnecessary to review it here.

[5] 5. The admission in evidence of a crayon portrait of plaintiff's great-uncle and his white wife, made before the controversy arose and testified to by the plaintiff, who knew him, to be a true picture of the uncle, was entirely proper. That it was a crayon representation, and not a photograph, went only to its weight, not to its admissibility, as tending to show that the great-uncle was a white man. 1 Wigmore, Evidence, § 792 (3).

[6-8] 6. The letter was a clear allegation that plaintiff was of one-quarter negro blood. Whatever be the rule as to spoken words (see 36 L. R. A. [N. S.] 947, note), the authorities establish that the publication of a writing containing such a statement in respect to a white man is libelous per se, at least in a community in which marked social differences between the races are established by law or custom. Axton Fisher Tobacco Co. v. Evening Post, 169 Ky. 64, 76, 183 S. W. 269, L. R. A. 1916E, 667; Spencer v. Looney, 116 Va. 767, 82 S. E. 745; Flood v. News & Courier Co., 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas.

685, and cases cited. The refusal to instruct for the defendants on the theory that the charge was libelous per se was therefore clearly proper. While the trial judge might have taken judicial notice of the racial situation in eastern Tennessee, and based thereon might have instructed the jury that the charge was libelous per se, he gave the defendants an opportunity to persuade the jury that the statement made in that particular section of Tennessee might not be libelous per se; he left it to the jury to determine as a fact whether or not the relation of the two races in eastern Tennessee was such that the negro does not have the same esteem of his white neighbors as a white man, or that his race connection, if known, hurts and lessens his standing in the community generally as a matter of social intercourse, and deprives him of the standing which he would otherwise have as a white man. Obviously, no complaint can be made by defendants of a charge which erred, if at all, in their favor.

[9, 10] 7. Defendants further contend that the court erred in not charging that the communication was conditionally privileged and in refusing, therefore, to submit to the jury the issue of actual malice. The defendants, however, owed no duty, contractual, customary, or moral, to notify the railroad that a fireman holding a promotional job had negro blood; this information was not sought; the giving of it was purely gratuitous and voluntary; it was done solely in the interest of all but four of the defendants, who were likely to benefit by the expected change in his position. Under these circumstances, the communication was in no sense privileged. Over v. Schiffling, 102 Ind. 191, 26 N. E. 91. Defendants' honest, but erroneous, belief in its truth, even if established, would furnish them no defense. "If the publication was libelous, the defendant took the risk." Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075.

[11] 8. An alleged excess in the verdict is a matter to be dealt with by the trial court, and not on writ of error by a federal appellate tribunal. Southern Ry. Co. v. Bennett, 233 U. S. 80, 87, 34 Sup. Ct. 566, 58 L. Ed. 860; Texas & Pacific Ry. Co. v. Hill, 237 U. S. 208, 215, 35 Sup. Ct. 575, 59 L. Ed. 918.

9. We are unable to understand the persistence of counsel in assigning as error the refusal of the court to give an alleged requested instruction, despite the statement of the trial judge, in his memorandum opinion on the motion for a new trial, that no such instruction was requested at the conclusion of the charge. The record fails to disclose such a request at any time.

Judgment affirmed.

GREAT NORTHERN RY. CO. v. PHILADELPHIA & READING COAL & IRON CO.

PHILADELPHIA & READING COAL & IRON CO. v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1917.)

Nos. 4760, 4761.

1. WHARVES ⟸9—LEASE OF COAL DOCK—CONSTRUCTION.
A provision in a lease of a coal dock that on its expiration the lessor should take and pay for, at a fair valuation, "all the machinery and apparatus" placed and used on the premises with the lessor's consent, *held* to include within its meaning all appliances and structures, although of a permanent character, so placed on the dock with the lessor's consent.
[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 4, 5.]

2. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS OF FACT.
A finding of fact made by a trial court on conflicting evidence is presumptively correct, and will not be disturbed, in the absence of serious mistake in the consideration of the evidence or error in the application of the law.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

3. DAMAGES ⟸68—BREACH OF CONTRACT—INTEREST.
A lease of a coal dock provided that on its expiration the lessor should take and pay for, within 30 days, at a fair valuation, all machinery and apparatus placed on the premises with its consent. On expiration of the lease the parties were widely divergent in their estimates of the value of such property, and an attempt at arbitration having failed, the lessee brought a suit in equity, in which, without objection, the question was litigated. *Held* that, while the suit was in equity, complainant's demand was a purely legal one for breach of contract, and within the general rule that interest was not recoverable until the amount was liquidated by the decree.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by the Philadelphia & Reading Coal & Iron Company against the Great Northern Railway Company. Decree for complainant, from which both parties appeal. Modified on defendant's appeal, and affirmed.

S. H. E. Freund, of St. Paul, Minn., and Oscar Mitchell, of Duluth, Minn. (E. C. Lindley, of St. Paul, Minn., and A. McC. Washburn, of Duluth, Minn., on the brief), for Great Northern Ry. Co.

M. H. Boutelle, of Minneapolis, Minn. (A. M. Higgins, of Minneapolis, Minn., on the brief), for Philadelphia & Reading Coal & Iron Co.

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

CARLAND, Circuit Judge. On February 1, 1890, the Eastern Railway Company of Minnesota leased to the Silver Creek & Morris Coal Company dock No. 6, located in Superior, Douglas county, Wis.,

for the term of 10 years, with the privilege to the Coal Company to renew the same for a further period of 10 years. The lease contained the following provision:

"Said Railway Company covenants and agrees that upon the expiration of the lease hereunder, without default or breach on the part of the lessee, it will take all the machinery and apparatus on the premises demised, established, and operated thereon from time to time with its approval and consent, and within 30 days thereafter pay said Coal Company therefor on the basis of a fairly appraised valuation, which, if it cannot be agreed upon between the parties hereto, shall be determined by an arbitrator, if one can be promptly agreed upon, or otherwise by three competent and disinterested arbitrators, selected in the customary manner, whose decision shall be conclusive and binding: Provided, that the foregoing covenant shall not be binding upon said Railway Company unless said Coal Company shall have given said Railway Company notice in writing not less than 6 months, nor more than one year, before said expiration, of its desire that said Railway Company should so take said machinery and apparatus. And it is agreed that after such notice said Railway Company shall have a right to take said machinery and apparatus on the terms above set forth."

The Great Northern Railway Company is the successor of the Eastern Railway Company in the ownership of the leased premises. The Philadelphia & Reading Coal & Iron Company is the successor of the Silver Creek & Morris Coal Company. At the expiration of the lease the Reading Company and the Great Northern could not agree upon the valuation of the machinery and apparatus on the demised premises and an attempt at arbitration proved abortive. Thereupon both parties agreed that the Reading Company should surrender possession of the leased premises together with the machinery and apparatus established thereon to the Great Northern, with the understanding that such surrender should not work a forfeiture of the rights of the Reading Company under the paragraph of the lease above quoted, but that an action should be commenced by it for the purpose of establishing the fair value of the machinery and apparatus surrendered. In pursuance of such understanding this suit was instituted. It was brought as an action in equity and has been prosecuted as such without objection. The trial court decreed the value of such property to be $37,500, allowed interest thereon at 6 per cent. from the date of the filing of the bill, which was March 19, 1914, and also established a lien on the leased premises for the amount of the decree. The Great Northern appeals generally, and the Reading Company as to the question of interest. We will first consider the appeal of the Great Northern.

Assignments of error Nos. 1, 2, and 3 relate to the exclusion of evidence. In this connection we call attention to the provisions of equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi), prescribed for the District Courts by the Supreme Court November 4, 1912. The rule provides:

"* * * When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result

from an affirmance, in which event it shall direct such further steps as justice may require."

No attempt was made to comply with the requirements of the rule mentioned by court or counsel, and the assignments of error might be disregarded for that reason. We have examined the errors complained of, however, and we are not clearly satisfied that material prejudice would result in affirming the ruling of the trial court; for instance, the testimony sought to be elicited from the witness Fellows, and which is assigned as error in assignment No. 1, was received without objection from the witness Somershield.

Assignments of error Nos. 2 and 3 relate to the refusal of the court to permit the witnesses Fellows and Somershield to testify as to the cost of handling coal on and off the dock with the machinery and apparatus now in controversy. This evidence, standing alone, was irrelevant, unless, perhaps, the cost was to be compared with the cost of some other and different kind of machinery and apparatus, and no such offer was made.

The fourth assignment of error complains that the trial court erred in refusing to hold and decide that the basis of a fairly appraised valuation of the property was the value of the machinery and apparatus at the expiration of the lease as a coal handling plant. There is nothing whatever in the record to show that the court valued the plant for anything else than a coal handling plant.

The fifth assignment of error complains that the court erred in holding and deciding that by the terms of the lease the Great Northern was bound to purchase the machinery and apparatus which had been installed and established upon the dock, without regard to its operative efficiency at the date of the expiration of the lease. The record before us does not show that the court did not take into consideration the operative efficiency of the machinery and apparatus. The finding as to the value was a general one. The Great Northern introduced evidence upon this subject without objection, and in the absence of any showing to the contrary we must presume that the court considered it. Discussion between court and counsel during the trial cannot control the final judgment. Both sides introduced evidence touching the fair value of the property in controversy, but the court did not adopt the evidence of either side.

Assignment of error No. 6 complains that the court limited its finding as to the value of the property to the cost of reproduction of the various pieces of machinery, less a percentage for depreciation from deterioration of material, and without further allowance for depreciation due to obsolescence and comparative loss of efficiency through age. There is evidence in the record of the value of the property as compared with modern machinery, and the testimony introduced by the Great Northern was to the effect that it was worth little or nothing; one witness claiming that all the property situated on the dock, which in 1910 received a tonnage of 30,544 tons of hard and 10,390 tons of soft coal, was worth nothing. The court could hardly be expected to follow this evidence in making up its judgment, as the answer of the Great Northern admitted the value to be $5,000. The value placed

upon the machinery and apparatus by the trial court was about half of the lowest figure placed upon it by the evidence of the Reading Company. The court no doubt found the value to be not as low as claimed by the Great Northern nor as high as claimed by the Reading Company. The finding was a general finding and we must assume that the court considered all the evidence in the record.

[1] Assignment of error No. 7 relates to the same subject. Assignment No. 8 complains that the court erred in holding and deciding that the trestles and cable system of the Mead apparatus, the wooden understructure of the same, the tracks and wooden understructure of the Brown hoists, the anthracite coal pockets, and other permanent structures were included within the meaning of the terms "machinery and apparatus" as contained in the lease. We are of the opinion that the words referred to fairly included all appliances which the lessee with the consent of the lessor placed upon the dock, and therefore hold that there was no error in the court ruling as it did upon this subject.

[2] Assignment of error No. 9 relates to the same subject. Assignments Nos. 10 and 11 have no merit. Assignment No. 12, to the effect that the court erred in finding the value of the property in the amount of $37,500, has no merit. The amount was arrived at by the trial court upon the consideration of conflicting evidence, and there is substantial evidence to sustain it. It is presumptively correct, in the absence of serious mistake in the consideration of the evidence, or error in the application of the law, and we find no such mistake or error to exist.

[3] The other assignments of error relate to the allowance of interest. Counsel for the Great Northern claim that the court erred in allowing interest at 6 per cent. from the date of the filing of the bill. It is urged that, as the damages were unliquidated, no interest could be allowed prior to the date of the decree. Counsel for the Reading Company on its appeal claim that the court below erred in failing to decree interest from December 1, 1910, being 30 days from the date of the expiration of the lease. The claim of the counsel for the Reading Company is based upon that part of the excerpt from the lease hereinbefore quoted which provides that the lessor, within 30 days after the expiration of the lease, will take and pay for all the machinery and apparatus on the premises demised on the basis of a fairly appraised valuation.

The question of the allowance of interest has been exhaustively argued in the briefs of counsel on both sides, but we are of the opinion that the question of the allowance of interest on the record before us is not so difficult as counsel would seem to make it. While this action has been prosecuted as an action in equity, we must not lose sight of the fact that the demand of the Reading Company against the Great Northern is purely a legal one. There is no contract between the parties, express or implied, that interest shall be paid, prior to the ascertainment of the value of the property. It is true the lease provided that the value of the machinery and apparatus should be paid within 30 days after the expiration of the lease, but it appears beyond dispute that the parties could not agree upon this value, and that the attempt

of the arbitrators to agree failed, whereupon both parties found it necessary to institute a proper proceeding in court for the purpose of establishing the value. The value that has been established by the decree below was greater than the Great Northern thought it ought to pay, and much less than what the Reading Company demanded. The general rule is that no interest can be recovered for the breach of a contract, where the damages are in their nature unliquidated and there is no reasonably certain standard by which the amount can be determined until the amount has been ascertained. Gray v. Central R. R., 157 N. Y. 483, 52 N. E. 555; Mansfield v. New York Cent. Ry. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327. Many other cases could be cited in support of this rule.

The general rule is not open to controversy, but there is an exception to it in cases where the unliquidated claim is subject to an exact computation by reference to available data, or where the amount is subject to reasonably certain calculation by reference to existing market values. Wright v. City of Tacoma, 87 Wash. 334, 151 Pac. 837; Laycock v. Parker, 103 Wis. 161, 97 N. W. 327. We are of the opinion that this case comes within the general rule, and not within the exception. The claim of the Reading Company against the Great Northern does not depend for its existence upon any principle of equity jurisdiction; therefore the trial court had no discretion to allow interest as a matter of equity and as a part of the relief granted.

The decree below should be modified, so as to allow interest from the date of the decree, and, as thus modified, should be affirmed; and it is so ordered.

On the appeal of the Reading Company, we affirm the decree below, as modified on the appeal of the Great Northern Company.

MIDLAND VALLEY R. CO. v. BELL.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1917. Rehearing Denied June 22, 1917.)

No. 4752.

1. MASTER AND SERVANT ⊂⊃286(26)—RAILROADS—ACTION FOR DEATH OF EMPLOYÉ—QUESTIONS FOR JURY.

Evidence, in an action against a railroad company to recover for the death of an engineer caused by the collapse of a bridge over which he was passing with a train, *held* to warrant the submission to the jury of the question of defendant's negligence in permitting the bridge to become decayed, out of repair, and unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1031.]

2. TRIAL ⊂⊃140(1)—DIRECTION OF VERDICT.

A motion for direction of a verdict is in the nature of a demurrer to the evidence and is to be tested by the same rules; if there are any questions as to the credibility of witnesses or the proper deductions to be drawn from the evidence, they are for the jury, and not for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334.]

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3. MASTER AND SERVANT ⊂=105(3)—STANDARD OF CARE—CUSTOM.
The standard of reasonable care on the part of a railroad company to keep a bridge in safe condition for its employés is not fixed by the custom of inspection of well-managed companies generally, but, while such custom is admissible, the question is one of fact in each case.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 188–190.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Armor Bell, administratrix of the estate of John Bell, deceased, against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

O. E. Swan, of Muskogee, Okl. (Farrar L. McCain, of Tulsa, Okl., on the brief), for plaintiff in error.

C. B. Randell, of Sherman, Tex. (Randell & Randell, of Sherman, Tex., on the brief), for defendant in error.

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

RINER, District Judge. This action was brought, under the federal Employers' Liability Act, by Armor Bell, as administratrix of the estate of John Bell, deceased, defendant in error, against the Midland Valley Railroad Company, plaintiff in error, to recover damages for the death of said John Bell, which she alleges was caused by the negligence of the railroad company. For convenience the defendant in error will hereafter be referred to as the "plaintiff," and the plaintiff in error as the "defendant." The case was commenced in the state court and removed by the defendant to the United States District Court for the Eastern District of Oklahoma.

The acts of negligence on the part of the defendant, complained of, are set out in the amended petition as follows:

"Fourth. That the wreck of said train and the said resulting injuries to and death of said John Bell, deceased, came about in the following manner, to wit: That on said date and at said place while deceased was riding in the cab of the engine pulling said train, and while carefully and properly discharging his said duties as engineer, a trestle, or bridge, in defendant's said track, over which said engine and train was then and there running, broke, gave way and fell beneath said engine and train, thereby overturning said engine and wrecking it and said train, and causing the injuries to and death of said John Bell, as aforesaid.

"Fifth. That the said injuries and death of the said John Bell were caused by no fault on his part, but by the gross negligence and want of ordinary care of the defendant, its officers, agents, servants and employés.

"Plaintiff alleges that the said engine upon which deceased was riding and all the parts thereof, were old, worn, unbalanced, and insufficiently fastened, out of gauge and out of plumb; and that the track, bridge, trestle, abutments, roadbed, ties, supports, rails, spikes, bolts, braces, timbers, piling, and all the parts, appliances and fastenings of said bridge, trestle and track at the time and place plaintiff was injured, as aforesaid were insufficiently supported, old, worn, warped, bent, broken, cracked, rotten, weak, out of line, and each and all of said conditions directly and proximately caused and contributed to deceased's injuries, as aforesaid.

"Plaintiff charges that the defendant, its officers, agents, servants, and employés in causing and permitting the conditions aforesaid, and in using the track, bridge, trestle, and engine, as aforesaid, was guilty of gross negligence and want of ordinary care, which directly and proximately caused and contributed to deceased's said injuries, and deceased would not have been injured but for same; that the defendant well knew of each and all of said conditions hereinbefore stated, or by the exercise of ordinary care would have known of same, but the same were unknown to plaintiff."

The answer contained a general denial, and also charged that the deceased was guilty of contributory negligence. No proof was offered, however, in support of the charge of contributory negligence, and, as counsel say in their brief, for the purposes here the answer may be treated as a general denial. There was a trial, verdict, and judgment for the plaintiff in the sum of $12,240.

The record shows that the plaintiff was the duly appointed administratrix of the estate of John Bell, deceased; that she was a resident and citizen of the Eastern district of the state of Oklahoma; and that the defendant was a corporation organized and existing under the laws of the state of Arkansas and a citizen and resident of that state.

The petition charges that on the 12th day of September, 1913, the defendant owned and operated a line of railroad in the state of Arkansas, extending into and through the state of Oklahoma; and it is admitted in the brief of counsel for the defendant that both the deceased and the defendant were at that time engaged in interstate commerce.

The following facts were established by the evidence:

[1] That at the time mentioned in the pleadings, on the line, and forming a part of, defendant's railroad near the town of Kanima, Okl., there was a wooden bridge known as a pile and frame bent trestle, about 225 feet in length, across a ravine, or "branch," as some of the witnesses called it; that the height of the bridge from the bottom of the ravine to the base of the rail was 35 feet. The bridge consisted of 16 bents. Bents 1 and 2 and 14, 15, and 16 are what the witnesses call "pile bents"; that is, the bridge rested upon oak piling driven into the ground. All of the other bents were framed bents. These framed bents rested upon mud sills and mud blocks embedded in the ground. The timber used in the construction of these framed bents was No. 2 Arkansas pine and 12x12 inches square, except the stringers, which were 8x16 inches. The deck of the trestle was 3-ply cord under each rail, consisting of three 8x16 inch stringers and spread sufficiently far apart to permit of 2x16 inch packing boards 5 feet in length to be placed between the line of stringers. These and the stringers were bolted together over each bent with 3/4 inch bolts. Upon this deck the ties and rails were placed, the ties being 8x8 inches, spaced 12 ties to the panel, the panels being 14 feet 9 inches each between the bents. Extending from one bent to the other crosspieces or sway braces were fastened to the bents to hold the main members of the bridge in position and prevent them from vibrating.

In March, 1912, more than a year before the accident complained of, the bridge was repaired by taking out some of the timbers which had become decayed and sap rotted, and replacing them with new tim-

bers; about 15 per cent. of the timbers being thus taken out and replaced.

On the 12th of September, 1913, John Bell, husband of the plaintiff, was a locomotive engineer in the employ of the defendant and on that date was in charge of one of its engines hauling a freight train consisting of flat cars, loaded oil cars, and some empty coal cars. The train left Muskogee about 9 o'clock in the evening of the 11th, and had proceeded eastward toward Ft. Smith, about 55 miles, arriving at this bridge near 1:25 on the morning of the 12th. When the train was upon the bridge in question and the engine about 25 or 30 feet from the east end thereof, that part of the bridge under and for some distance back of the engine collapsed and with the engine and a few cars fell to the ground below, and Bell, the engineer, was caught under the engine and instantly killed. After the bridge fell, it took fire, and the entire structure was destroyed so that it was impossible to determine, from an examination, the condition of the timbers at the time of the accident. In addition to the foregoing facts, which were not disputed, the plaintiff offered testimony tending to prove that many of the timbers in the bridge were badly rotted and a large part of them more or less decayed and unsound. The testimony on behalf of the defendant tended to prove that a general inspection of the bridge was made a short time before it was repaired in 1912; that it had been inspected several times between that date and the date of the accident; and that the timbers at the time of the accident were not decayed to such an extent as to render the bridge unsafe. Plaintiff also offered evidence tending to show that the sway braces consisted of pine boards 10 and 12 inches wide and 2 inches thick; that these braces were fastened to the upright pieces with iron bolts; that some of them were split where the bolts went through and, as one witness stated it: "And down near the end they would be busted where the bolts went through them into the piling." Mr. Kaighn, chief engineer of the defendant, testified that the braces were necessary to the safety of the bridge. Having his attention especially called to these braces, he was asked:

"Q. Then suppose they are loose, would that be safe or dangerous? A. If they are loose sufficiently that they don't support, they are not doing their work and weakens the efficiency of the bridge. Q. And it would be likely to fall by reason of not being supported in the proper way? A. That is true. Q. And the running of a train over it would be likely to cause it to fall? A. Have that tendency, yes. Q. And if the braces where the bolts go through, if they are worn, that would make it loose wouldn't it? A. Yes. Q. And a split would make it very much weaker? A. Yes. Q. That would be practically taking away the brace? A. Yes. Q. Because if there was any swing at all the bridge couldn't stand and the brace has got to be held exactly in place, or else, when it begins to give, it would have the effect of making it continuous and progressive? A. Yes, that is the tendency of it."

We do not deem it necessary to quote more at length from the testimony, as the references already made are quite sufficient to show that the case was properly one for the determination of the jury, and we think the motion for a directed verdict in favor of the defendant at the close of the evidence was rightly overruled.

[2] A motion of this character, as has often been said, is in the nature of a demurrer to the evidence.

"It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits, not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom." Schuchardt v. Allens, 1 Wall. 359, 370, 17 L. Ed. 642.

In deciding such a motion, the trial court is bound to assume that all of the evidence in the case is true and that the witnesses were all credible. If there are any questions in the case as to the credibility of the witnesses or the proper deductions to be drawn from the evidence, they are questions, not for the court, but for the jury under the direction of the court. In Railroad Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, Mr. Justice Brewer states the rule in these words:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

It is quite true, as the court charged the jury in this case, that the defendant was not an insurer of the safety of its bridges or trestles as far as its engineers and other employés were concerned, and the mere fact that a bridge or trestle falls is not sufficient of itself to establish the liability of the company to pay resultant damages. It was its duty, however, to see to it, by the exercise of ordinary care, that this bridge was kept in good repair and in a safe condition, and this duty could not be delegated so as to exonerate the defendant from liability to its servants resulting from the omission to perform it or through its negligent performance; and, in view of the conflicting character of the testimony in relation to the condition of the timbers and braces, we think the question whether the defendant was negligent in the matter of keeping this bridge in repair was clearly a question to be determined by the jury. So long as the laws provide for a jury trial of issues of fact, the right should be guarded and preserved in all cases where there are controverted facts pertinent to the issues.

[3] It is also insisted that the court erred in refusing to give to the jury the following instructions requested by the defendant:

"You are instructed that if you find from the evidence that the defendant had inspected this bridge prior to the accident, and that such inspections as to time and manner were in accordance with the custom of other well-regulated railroad companies and that such inspection failed to disclose any defects in the bridge, then your verdict must be for the defendant."

"You are instructed in this case that if the defendant had caused the bridge to be inspected a short while before its collapse by men experienced in that line of work, and that the inspection made was such as is ordinarily and customarily made of bridges of similar character by other well-regulated railroads in the state of Oklahoma, and that said inspection did not disclose any defects alleged in plaintiff's petition, then and in that event the defendant discharged its duty, and the plaintiff cannot recover in this case."

We think these requests were properly denied. They confuse the controlling standard of ordinary care with what is only evidence of it. Unquestionably it was permissible, as was done in this case, to show what inspections were made by other railroads of their bridges, for that is some evidence of what could have been and ought to have been

done by the defendant in this case; but evidence of that character is not indispensable, for the ultimate and controlling test always is, not what has been the practice of others in like situations, but did the defendant in this case exercise reasonable or ordinary care, that is, such care as a reasonably prudent person would ordinarily have exercised in such a situation. As was said by this court in Chicago, Milwaukee & St. Paul Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962:

"The law is not so unreasonable as to afford no test where there has been no practice by others by which the conduct in question can be compared; nor does it permit common sense and reason to lose their sway because, through ignorance, inattention or selfishness, an unreasonable practice has prevailed." Chicago Great Western Ry. v. McDonough, 161 Fed. 657, 665, 88 C. C. A. 517, and authorities there cited.

See, also, Rickerd v. Chicago, St. P., M. & O. Ry., 141 Fed. 905, 73 C. C. A. 139.

In Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605, the Supreme Court, speaking through Mr. Justice Harlan, said:

"If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law."

And in Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, Mr. Justice Holmes states the rule as follows:

"Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Shandrew v. Chicago, Milwaukee & St. Paul Ry. Co., 142 Fed. 320, 73 C. C. A. 430.

Some other requests for instructions were made by the defendant and denied by the court, but we do not deem it necessary to discuss them separately. We think the instructions given by the court to the jury fairly stated the law and were quite as favorable to the defendant as it had a right to ask.

The action of the trial court in declining to admit in evidence testimony tending to show that some eight months or more prior to the time of this accident, and at a place a mile or more distant from this bridge, an obstruction was placed upon the track, was also assigned for error. The testimony related to matters altogether too remote to be considered by the jury, as there was nothing in the evidence tending even remotely to prove that there was any obstruction on the track at the time of the accident. The fireman, who was in the best possible position to know, was called as a witness for the defendant, but was not questioned in regard to the matter.

The other assignments of error have all been thoughtfully considered and found to be without merit.

The judgment of the district court is affirmed.

VIRGINIA C. MINING, MILLING & SMELTING CO. et al. v. CORRIGAN.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1917.)

No. 2924.

1. CORPORATIONS ⟸210—ACTION BY STOCKHOLDERS—NECESSARY PARTIES.
A Mexican corporation was organized to hold the legal title to mining property, and all of its capital stock, consisting of 10 shares, was turned over to an Arizona corporation, which was to finance and operate the mines. The Arizona corporation sold 4 shares of the Mexican corporation's stock to the M. Company, and C., the organizer and president of the Arizona and Mexican corporations, pledged the remaining 6 shares to secure an indebtedness which he was unable to pay. The pledgee thereof obtained possession of the 6 shares of stock, assumed control of the Mexican corporation, which he reorganized, and which, through a board of directors controlled by him, contracted to sell the property to defendant. The M. Company and the Arizona corporation sued defendant to restrain him from consummating his purchase of the property, on the ground that the pledgee's possession of the stock and his control of the Mexican corporation were fraudulent. *Held*, that the Mexican corporation was an indispensable party, and the pledgee would also seem to be a necessary party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808–813.]

2. CORPORATIONS ⟸210—ACTION BY STOCKHOLDERS—NECESSARY PARTIES.
The suit could not be maintained, without the presence of the Mexican corporation, on the theory that, since plaintiffs owned all the stock of that corporation, its entity and corporate existence might be ignored, as those under whom defendant claimed were denying the Arizona corporation's ownership and right of control of the 6 shares of stock, and a prime object of the suit was to establish such ownership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808–813.]

3. INJUNCTION ⟸137(2)—TEMPORARY INJUNCTION—INJURY TO DEFENDANT.
Such suit could not be maintained, to the extent of giving relief through a temporary injunction, to maintain the status quo, as ancillary to a pending suit and possible later proceedings, where it did not affirmatively appear that defendant could not be injured thereby, it appearing by answer that defendant had contracted to pay for the property in installments; thus, because of the injunction not being binding upon his vendor, he might lose his rights as a result of an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307.]

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 the Virginia C. Mining, Milling & Smelting Company and another against James W. Corrigan. From a decree dismissing the bill of complaint, plaintiffs appeal. Affirmed.

Kline, Clevenger, Buss & Holliday, of Cleveland, Ohio, and Sturdevant & Sturdevant, of St. Louis, Mo., for appellants.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. This is an appeal from a decree dismissing a bill of complaint under general equity rule No. 29 (198 Fed. xxvi, 115 C. C. A. xxvi). For immediate purposes, the allegations of the bill may be thus sufficiently summarized:

In 1905, one Clayton had a verbal option for the purchase, from the owners, of the Hidalgo Mines, socalled, in Chihuahua, Mexico, at a price of 50,000 pesos. Clayton sold this option to one Chew (the written option being taken for his benefit, in the name of one Raines); Chew assuming to pay to the owners the purchase price mentioned in three equal annual installments, beginning January 15, 1906. The mines were then conveyed to a Mexico corporation called the Virginia C. Mining, Milling & Smelting Company, capitalized at 10,000 pesos, and organized for the purpose merely of holding the legal title to the mines. All the capital stock of the Mexico corporation was immediately turned over to an Arizona corporation of the same name (one of the plaintiffs here), which was to finance, manage, and operate the mines. The Arizona corporation was capitalized at $1,250,000, and all of its capital stock was turned over to Chew, who, as an additional payment for the option mentioned, gave one-eighth of it to Clayton, agreeing also to give the latter 10,000 pesos, in three annual installments, maturing at the same time as the installments of purchase price of the mines. Chew was president and Clayton vice president of both the Mexico and Arizona corporations; Chew being also treasurer of the Arizona corporation. Raines was an officer of both corporations. The plaintiff Mexican-Pacific Mining Company is a corporation organized under the laws of Arizona, and is a citizen of that state as well as of Missouri. It duly purchased from its coplaintiff and took over the remaining 4 shares of the Mexican corporation, and still owns them. The first two installments of the purchase price of the mines, as well as of Chew's agreed payment to Clayton, were met; but Chew was unable to meet the third installment of either of these payments, and to avoid forfeiture of the mines obtained from Clayton a loan of 24,000 pesos to cover both items of indebtedness, and, as security for that loan, pledged, for Clayton's benefit, without the authority, knowledge, or consent of the Arizona corporation, the 6 shares of the Mexico corporation's stock held by the Arizona company. This indebtedness to Clayton was not paid, and, in 1910, he obtained possession of the pledged 6 shares of stock, assumed control of the affairs of the Mexico corporation and of the management and operation of the mines, and effected a reorganization of the Mexico corporation which, through a board of directors controlled by him, contracted, in 1915, to sell the mines to the defendant, Corrigan, for $200,000. The bill alleges that Clayton's possession of the 6 shares of stock in the Mexico corporation, and the control thereby obtained of its affairs resulting in the contract of sale to Corrigan, was fraudulent, and that Corrigan knew it; also, that the mines, when sold to Corrigan, were worth more than $1,250,000. The bill prays that defendant be temporarily and permanently restrained from attempting to make or consummate any propos-

ed purchase of the mining properties through Clayton or the Mexico corporation, and from receiving the title to the properties. The paragraph of the answer under which hearing was had raised the defenses of nonjoinder of a necessary party defendant, and of failure to state a case entitling to equitable relief. The present Mr. Justice Clarke, who heard the case, was of the opinion that Clayton, at least (and probably the Mexico company), was an indispensable party defendant, and for this reason dismissed the bill.

[1, 2] As was well said by Judge Clarke, the case presented is certainly an anomalous one. It is plain that, unless the case is in some way taken out of the usual rule, the bill was rightly dismissed; for Corrigan, the contract purchaser of the mines, would, on the face of things, clearly be entitled to demand that his vendors be made parties, for only so could he be protected as against them by a decree in plaintiff's favor. The Mexico corporation, which was the actual vendor, would thus be an indispensable party, and in view of the allegations made in the bill Clayton would seem equally so. The proposition that plaintiffs own all the capital stock of the Mexico corporation, and that thus the entity of the latter may be ignored, and the case treated as if there were no corporate existence, is sufficiently answered by the fact that it appears upon the face of the bill that those under whom defendant claims (and, impliedly, defendant also) are denying ownership and right of control in the plaintiff Arizona corporation of the 6 shares in question which constitute a majority of the capital stock of that corporation, and that a prime object of this suit is to establish such ownership in the complainant Arizona corporation.

Plaintiffs, however, attempt to avoid the effect of lack of parties defendant by alleging that the Arizona corporation has, without avail, exhausted every possible effort to secure a settlement between itself and Clayton respecting the 6 shares; that that corporation, in 1913, began suit in St. Louis against Clayton to recover their possession, and for an injunction restraining their sale, pledge, or other disposition, as well as the disposition of the mines, or any interest therein; that appellee was notified of the pendency of the St. Louis suit, and of plaintiffs' claimed rights, before he contracted for the purchase of the property; that the St. Louis case is still pending and at issue, but that testimony of witnesses in Mexico is needed before hearing can be had, and that such testimony cannot now be taken because of the suspension of all civil authority in Mexico; that Clayton and the directors of the Mexico corporation are all in Mexico, and beyond the jurisdiction of this court, and not amenable to its process, or to that of any other American court; that there are now in Mexico no courts having civil jurisdiction over transactions of this character, or in which plaintiff could obtain relief, either against Clayton or the directors of the Mexico corporation, and, moreover, that it is unsafe, by reason of the revolution there prevailing, to go to Mexico for the purpose of relief to plaintiffs; and they urge that if, for lack of necessary parties, the court below could not determine the ownership of the disputed shares, it yet has full power to hold matters in statu quo until appellant can litigate the question with Clayton in a court which has jurisdiction, as the St.

Louis court apparently has. Mallow et al. v. Hinde, 12 Wheat. 193, 6 L. Ed. 599.

Normally, plaintiffs' remedy respecting this mining property—situated as it is in a foreign country, and whose legal title and right of disposition are governed by the laws of that country—is to be found through the courts of that foreign country, and, before plaintiffs can obtain in the courts of this jurisdiction the extraordinary relief asked, their right thereto should be made clear.

[3] It may be that, if it affirmatively appeared defendant could not be injured by such temporary holding of matters in statu quo, the bill might be maintained to the extent of giving relief through a control of the defendant's person, temporary in character and as ancillary to the suit pending in St. Louis and to possible later proceedings in Mexico. This question, we are not called upon to decide, because it does not appear by the bill that defendant would suffer no injury from such temporary delay; on the other hand, it affirmatively appears by the answer, filed March 7, 1916, that defendant, under agreement of January 24, 1915, was to pay, on January 21, 1916, the first installment of the purchase price of $200,000, the remaining payments being distributed over a period of three years following January 24, 1915 (the last payment falling due on or before January 24, 1918), as well as an additional payment of $12,000 in monthly installments; that default in any one of the installments forfeits defendant's contract rights and all payments made thereunder; and that, when answer was made, defendant had met all the monthly payments, of $1,000 each, called for. The answer (which denied that plaintiffs' claims have any merit), by implication, at least, treats the unmatured payments as unpaid. Indeed, the bill alleges merely a contract of sale (a "promise to sell") to defendant. It is thus seen that the injunction, forbidding defendant to proceed with his purchase, might, because not binding upon his vendor, readily result in the loss of his rights through a cancellation of the option and the forfeiture of all payments made thereunder.

Moreover, there is nothing in the record furnishing any assurance that conditions will so change in the near future as to permit the effective prosecution either of the St. Louis suit or of new proceedings in Mexico, and thus that a mere temporary injunction against the carrying out of defendant's contract of sale would benefit plaintiffs. Indeed, if, as plaintiffs allege, defendant made his contract of purchase with knowledge of their claimed rights, they are not shown to be entirely remediless.

We think it clear that plaintiffs have not stated a case entitling them to relief here, in the absence of other interested parties.

The decree of the District Court must be affirmed.

ENGLAND v. COMMERCIAL BANK OF NEW MADRID, MO.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1917.)

No. 4762.

1. CONTRACTS ⟸136—ILLEGALITY—PARTIES ENTITLED TO OBJECT.
That an exchange of notes by two banks, with an agreement for a re-exchange on demand, was for the purpose of evading the banking laws of the state, did not inure to the benefit of the bank refusing to make such re-exchange, where the state was not seeking to enforce any obligation or penalty for a violation of its laws, as it was the only party who had a right to complain.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700.]

2. BANKS AND BANKING ⟸114—REPRESENTATION BY OFFICERS—RATIFICATION OF ACTS.
That the president of a bank, in exchanging notes with another bank, had no authority to agree to re-exchange on demand, did not defeat the right of the other bank to recover its note or the proceeds, since if the bank adopted the act of its president, and thus got possession of the note, it adopted the entire transaction, while, if the president did not act for it, it had no right to the note or its proceeds.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 277–280.]

3. BANKS AND BANKING ⟸101—EFFECT OF ACTS—ULTRA VIRES.
That the contract was ultra vires did not defeat the right to recover the note or its proceeds, since, while the courts will not sustain an action on the unlawful contract, they strive to do justice so far as can be done by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 237, 238.]

4. BILLS AND NOTES ⟸207—TRANSFER—CONSIDERATION.
Where the note transferred to one of the banks was never the property of the other, and moreover was worthless, there was no consideration passing to the first bank for its note, and it was entitled to the return of the note or its proceeds.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 496, 511.]

5. COSTS ⟸207—COUNSEL FEES—NECESSITY OF EVIDENCE AS TO VALUE.
An order allowing attorney's fees will be reversed, where there is no proof of the value of the legal services in the amount allowed or any other amount.
[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 781–787.]

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

Suit by Lloyd England, receiver for the State National Bank of Little Rock, Ark., against Murray Phillips and another, who interpleaded the Commercial Bank of New Madrid, Mo. From a decree in favor of the Commercial Bank, and from an order allowing an attorney's fee, plaintiff appeals. Decree affirmed, and order reversed, with instructions.

Chas. Claflin Allen, of St. Louis, Mo. (George J. Breaker, of St. Louis, Mo., on the brief), for appellant.

Thomas Gallivan, of New Madrid, Mo. (Riley & Riley, of New Madrid, Mo., on the brief), for appellee.

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

RINER, District Judge. This was a suit brought by Lloyd England, receiver for the State National Bank of Little Rock, Ark., against Murray Phillips and Annie M. Phillips, to recover the sum of $10,000, together with interest, upon a promissory note dated June 25, 1913, signed by Murray Phillips and Annie M. Phillips. The note by its terms became due one year after its date, and drew interest at the rate of 8 per cent. per annum. It was made payable to the order of the makers, and by them indorsed in blank. Murray Phillips and Annie M. Phillips filed an answer in which they admitted that they executed the note in controversy and delivered the same to the Commercial Bank of New Madrid, Mo. They further alleged that the Commercial Bank of New Madrid had notified them that it was the owner of the note, and that the receiver of the State National Bank had no right, title, claim, or interest therein, and that they should not pay the amount due upon the note to the receiver or to any other person except to the Commercial Bank of New Madrid. They further alleged in their answer that they were ready and willing to pay the note, and that they had deposited the funds for the payment thereof in the Commercial Bank of New Madrid, the place of payment designated in the note, and that they had, prior to the suit, asked that the note be forwarded to the State Bank for delivery to them; that they had no interest whatever in the funds except to pay the same to the party to whom the same was due; that they did not know who was the proper party to whom the money should be paid, and asked that they be permitted to pay into court the amount due on the note, and that the receiver and the Commercial Bank of New Madrid be required to interplead therefor for the purpose of determining to whom the money should be paid. Upon the written stipulation of the parties in interest, consenting thereto, the court entered an order directing Murray Phillips and Annie M. Phillips to pay the sum due upon the note into court, and directed that the Commercial Bank of New Madrid interplead in the suit, and show cause, if any, why the money placed in the hands of the court by Murray Phillips and Annie M. Phillips to take up the note should not be paid to the receiver. Pursuant to the terms of the order of the court, the Commercial Bank of New Madrid filed an interplea, in which it admitted that Lloyd England was the duly appointed and acting receiver of the State National Bank of Little Rock, Ark., and then alleged that it was a corporation duly organized, existing, and doing business at New Madrid, Mo., under and by virtue of the laws of the state of Missouri. It further alleged that on the 22d of September, 1913, and at the time the interplea was filed, it was the owner of the note in controversy. It further alleged that the State National Bank of Little Rock, Ark., had possession of the note under and by virtue of an agreement made and entered into between that bank and the Commercial Bank, by the terms of which the State National Bank of Little Rock was to take possession of the note and hold the same until requested by the Commercial Bank to return it, and to deliver to the Commercial Bank a note, the property of the State National Bank, of equal value, to be held by the Commer-

cial Bank until the note delivered to said State National Bank was returned to the Commercial Bank; that, pursuant to the terms of the agreement, the Commercial Bank sent the note in controversy to the State National Bank, and received in lieu thereof from the State National Bank a note for $10,000 executed by the State Trust Company, a corporation organized under the laws of Arkansas; that this last-mentioned note was not the property of the State National Bank, was worthless, and was sent to the Commercial Bank for the purpose and with the intent to cheat and defraud it out of the note in suit; that prior to the bringing of this suit the Commercial Bank returned the note of the State Trust Company, together with the collateral, to the State National Bank at Little Rock, and demanded a return of the Phillips note pursuant to the terms of the agreement; that the State National Bank, in furtherance of its purpose to cheat and defraud the Commercial National Bank, refused to return the Phillips note; that after the appointment of the receiver the Commercial Bank tendered the note of the State Trust Company and collateral to the receiver, and again demanded the return of the Phillips note, and that this request was refused by the receiver. It then tendered the note and collateral in court to be returned to the receiver. It was further alleged in the plea that there was no consideration whatever passing from the State National Bank to the Commercial Bank for the note in suit, and it prayed that the Commercial Bank be adjudged the owner thereof, and that the proceeds deposited in court be ordered paid to it.

To this plea the receiver filed an answer denying the agreement between the State National Bank and the Commercial Bank to re-exchange the notes, and alleging that the State National Bank was the owner of the note in suit. He further alleged that the contract and agreement set out in the plea filed by the Commercial Bank, if made, was wholly ultra vires of the powers conferred upon both the State National Bank and the Commercial Bank.

At the final hearing the court found the facts as set forth in the interplea filed by the Commercial Bank, and ordered the moneys deposited in the registry of the court by Murray Phillips and Annie M. Phillips paid to the Commercial Bank, and directed that the note of the State Trust Company and the collateral be delivered to the receiver.

We think the evidence supports the finding made by the trial court. The record shows that at the time the notes were exchanged the makers of the note in controversy were indebted to the Commercial Bank of New Madrid in the sum of $40,000. This was in excess of the amount the bank could loan to any one person or party under the laws of Missouri. The State Bank Examiner had complained of this excess loan, and had directed the bank to reduce it, and in order to meet the requirement of the State Bank Examiner it was agreed between the State National Bank, through Mr. Garanflo, its president, acting for it, and the board of directors of the Commercial Bank, acting for it, that the banks would exchange notes, the Phillips note here in suit to be sent to the State National Bank, and the State National Bank to send from its notes to the Commercial Bank a note of like amount to be substituted for the Phillips note, with the agreement that upon de-

mand these notes should be re-exchanged; that the Phillips note was sent to the State National Bank, and that bank forwarded to the Commercial Bank, in lieu of the Phillips note, a note executed by the State Trust Company of Little Rock, together with some shares of the capital stock of the State National Bank as collateral; that the Commercial Bank tendered to the State National Bank the State Trust Company note and collateral, and demanded a return of the note in suit, but this demand was refused by the State National Bank; that after the appointment of a receiver a like tender and demand were made upon him and by him refused.

[1] It was insisted at the argument that as the Commercial Bank had engaged in this transaction for the purpose of getting the Phillips note out of its assets, and thus diminishing its holdings of the Phillips paper, which was at that time in excess of the amount permitted by law, the agreement for a re-exchange of the notes could not be enforced in equity, for the reason that the very purpose of the agreement was to evade the laws of the state of Missouri and to deceive the State Bank Examiner. Even if such was the purpose of the agreement, as it undoubtedly was, we are wholly unable to see how that fact can in any way inure to the benefit of the State National Bank. The state of Missouri, the only party, if any, who had a right to complain of the transaction, is not a party to this suit, and is not here seeking to enforce any obligation or penalty for a violation of the laws of Missouri by the Commercial Bank.

[2, 3] It was also suggested in argument that the president of the State National Bank had no authority, either express or implied, to make any agreement for the retransfer of the notes, and that his knowledge cannot be imputed to the bank; that the agreement for the retransfer of the notes, in fraud of the laws of the state of Missouri, was wholly ultra vires of the State National Bank. This contention is, we think, without merit. If Garanflo, the president of the State National Bank, did not act for the bank, the bank would have no right to the possession of the note or to its proceeds. On the other hand, if the bank adopted his act as the act of the bank, and thus got possession of the note, it must be held to have adopted the entire transaction, including the agreement to re-exchange the notes upon demand. In other words, the bank cannot affirm a part of the transaction, which is to its advantage, and repudiate the rest. And the fact that the agreement was ultra vires would not defeat the right of the Commercial Bank to recover the note or its proceeds. In Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 60, 11 Sup. Ct. 488, 35 L. Ed. 55, Mr. Justice Gray, speaking for the Supreme Court, said:

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right

to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

And in Pennsylvania R. R. v. St. Louis, etc., R. R., 118 U. S. 317, 6 Sup. Ct. 1106, 30 L. Ed. 83, Mr. Justice Miller, in discussing a similar question, said:

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract." Logan County National Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107, and cases there cited.

The rule is very clearly stated by Mr. Justice Harlan in the case last cited. That was a suit to recover bonds held by a bank under an agreement to replace them at a fixed price, upon tender back of the amount it had paid for them. The bank, upon the amount being tendered, refused to carry out the terms of the agreement and suit was brought by the vendor to recover possession of the bonds. The court, in the course of its opinion, said:

"From the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract—and we are assuming, for the purposes of this case, that it may be—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in Marsh v. Fulton County, 10 Wall. 676, 684 [19 L. Ed. 1040], 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'" Citizens' National Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443.

[4] The record shows that the note executed by the Trust Company and forwarded by the State National Bank to the Commercial Bank in exchange for the Phillips note was never the property of the State National Bank; that that bank never had any interest in it, and that the note was worthless. The receiver, when called as a witness, testified:

"That there were no entries in the books of the State National Bank showing that the Trust Company note sent to the Commercial Bank was the property of the State National Bank at the time that it was sent to them, and that there was nothing on the books of the State National showing any liability on the part of that bank to the Commercial Bank on account of the purchase of the Phillips note."

That being true, there was no consideration passing from the State National Bank to the Commercial Bank for the Phillips note, and common honesty requires that the State National Bank return either the note or its proceeds to the Commercial Bank. Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43

L. Ed. 108; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; United States v. State Bank, 96 U. S. 30, 24 L. Ed. 647; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153.

The decree of April 21, 1916, made and entered by the district court, directing that the money deposited in the registry of the court pursuant to the stipulation of the parties and order of court be paid to the Commercial Bank, is affirmed.

[5] After the entry of the decree just affirmed, and on the 5th of May, 1916, the district court made a further order in the cause allowing the Commercial Bank an attorney's fee of $750, and directing that the same be taxed as a part of the costs. We are unable to find in the record any basis whatever for the allowance of this attorney's fee, and counsel for the Commercial Bank conceded at the argument that the bank was not entitled to it. Moreover, there was no proof of the value of legal services in the amount stated in the order, or any amount, in favor of any of the parties to the litigation, and this order of the district court must be reversed, with instructions to set it aside.

UNITED STATES v. FLETCHER et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4781.

1. EQUITY ⊂⊃67—LACHES IN PROSECUTION OF SUIT.
A party is as much open to the charge of laches for failure to prosecute a suit diligently as for undue delay in its institution.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196.]

2. PUBLIC LANDS ⊂⊃120—CANCELLATION OF GRANT—LACHES.
While the United States is not barred by laches from maintaining a suit brought to enforce a public right, or to assert a public interest, and in which it is a real party in interest, it is so barred from maintaining suits in which it is merely a formal party, brought to enforce the rights of individuals, and involving no interest of the government, such as a suit to cancel grants of public lands in the interest of another claimant.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335.]

3. PUBLIC LANDS ⊂⊃120—CANCELLATION OF GRANT—LACHES.
In 1874 a person claiming the right to enter land as a pre-emption filed his final proofs, which were allowed and a patent was issued. The final proofs were allowed, however, subject to appeal by F., who was in possession of the land, having made a preliminary homestead entry thereon. The Land Office decided in favor of F., and suit was brought to cancel the patent. After some preliminary steps no further steps were taken to prosecute the suit for 30 years. *Held*, that the suit was barred by laches, as the government was a mere nominal party, and the object of the suit was to perfect F.'s title, especially where in the meantime a party claiming under the patent had recovered a judgment awarding the ownership and possession of the land to him, and in reliance on such judgment a third party had purchased and paid for the land and improved it.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335.]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by the United States against Nathan R. Fletcher and others. From a decree (231 Fed. 326) for defendants, the United States appeals. Affirmed.

E. W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D. (Robert P. Stewart, U. S. Atty., of Sioux Falls, S. D., and George Philip, Asst. U. S. Atty., of Rapid City, S. D., on the brief), for the United States.

Edward E. Wagner, of Sioux Falls, S. D. (Alan Bogue, Jr., of Centerville, S. D., on the brief), for appellees.

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

MUNGER, District Judge. This suit was begun in 1879 by a bill of complaint filed by the United States in the District Court for the territory of South Dakota, against Nathan R. Fletcher. It alleged that Fletcher had filed his declaratory statement and made final proof, claiming the right to enter 160 acres of land in South Dakota as a pre-emption, and had delivered a military bounty land warrant in payment, and that the officers of the land department, relying upon his compliance with the pre-emption laws and his proofs thereof, had issued a patent to him for the land. It was alleged that Fletcher had not complied with the laws relating to settlement, residence, and cultivation, that his declaratory statement and final proof statements were false and fraudulent, and the prayer was for a cancellation of the patent. In 1880, an amended bill was filed making Hannah Jones a party, alleging that Fletcher had conveyed the land to her. Hannah Jones filed an answer in 1880, and in 1881 she took and filed the depositions of some witnesses. In 1884, a demurrer was overruled. No further steps were taken in the prosecution of this suit for the next 30 years, when the United States applied for and was granted leave to file an amended bill making Charles Gors, as the holder of the legal title, a party defendant. Gors answered, denying the charges of fraud and mistake in issuance of the patent to Fletcher, alleging the conveyances by which he derived title, and pleading the defense of laches in the prosecution of the suit. The result of a trial of these issues was a decree in favor of the defendant Gors, and the United States has appealed, claiming the decree to be erroneous because the proofs showed the patent to have been erroneously issued, and that Gors had notice of the suit when he obtained his conveyance. If the defense of laches bars the maintenance of this suit, it will be unnecessary to determine the other questions argued. It was established that Fletcher filed his declaratory statement at the United States Land Office on December 18, 1873, claiming the right to enter this land as a pre-emption and alleging that he had made settlement thereon. On September 5, 1874, Fletcher filed his final proofs and delivered a military bounty land warrant in payment for the land. On October 15, 1875, a patent was issued to him. Between the date of the filing of Fletcher's declaratory statement and the date of his final proofs, one Daniel Farnum made a preliminary homestead entry of this land, on April 4, 1874. He began residence upon the land in April or May of that year, establishing himself in a rude, but habitable, dwelling thereon, and has

resided on the land ever since. He built a more substantial house on the land after he had resided in the first one for two or three years, and that has been his home since it was erected. Farnum began the cultivation of a portion of the land as soon as he first moved upon it, and soon had 20 acres under plow.

When Fletcher's final proofs were allowed by the officers of the land department, it was subject to an appeal by Farnum; but the Commissioner of the General Land Office on December 6, 1877, found that no notice had been given to Farnum, and that Farnum was the rightful claimant to the land and that his entry was intact. The register and receiver were directed to demand of Fletcher the return of the patent.

[1] The bill in this case was filed on January 13, 1879. Has the United States been guilty of such laches as bars its right to the relief prayed? A party is as much open to the charge of laches for the failure to prosecute a suit diligently as if he had unduly delayed its institution. Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; Willard v. Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; Northrup v. Browne, 204 Fed. 224, 122 C. C. A. 496; Drees v. Waldron, 212 Fed. 93, 128 C. C. A. 609. The delay of 30 years in the prosecution of this suit is unexplained.

[2] While the United States is not barred by laches from maintaining a suit brought to enforce a public right or to assert a public interest, and in which it is the real party in interest, it is so barred from maintaining suits in which it is merely a formal party, brought to enforce the rights of individuals, and involving no interest of the government. This distinction has often been declared in suits brought in the name of the United States to cancel grants of the public lands. United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. Des Moines Navigation & Railway Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; Moran v. Horsky, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. Ed. 1038; United States v. Chicago, M. & St. P. Ry., 195 U. S. 524, 25 Sup. Ct. 113, 49 L. Ed. 306; Curtner v. United States, 149 U. S. 662, 13 Sup. Ct. 1041, 37 L. Ed. 890; United States v. Chicago, M. & St. P. Ry. Co., 116 Fed. 969, 54 C. C. A. 545. In the case last cited the United States sought to recover land claimed to have been certified improperly to the state as part of a grant, when there was an existing homestead entry. One Donovan had lodged a contest against this claim of homestead and had filed an application to enter it as a homestead, if the contested entry were canceled. When the cancellation occurred, his application was refused; but Donovan used the land for 18 years, in connection with other lands of his own, and then possession was taken by one who claimed title through the original grantee. Eight years later the suit was filed. This court held that it conclusively appeared that the United States had no interest in the land, and that the object of the suit was to restore the land to the United States, in order that it might convey it to Donovan, as the claimant of a right of homestead thereon, and that the bar of laches was complete.

[3] The principles announced and applied in that case are conclusive in the determination of this case. This suit was begun, after the

land department had upheld the entry of Farnum, had found that he had complied with the homestead law, and was in aid of his entry. Farnum has ever since resided upon this land, claiming it as his homestead. The object of this suit is not to recover the land for the public domain, but to remove an obstacle to the perfection of Farnum's title. The government is therefore a mere nominal party, and the delay in the prosecution of the suit for 30 years, when the analogous statute of limitations applying to suits brought to annul patents limits the bringing of suits after 5 or 6 years (Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 [Comp. St. 1916, § 4992]), is fatal to the granting of the relief asked, unless it would be inequitable to allow the defense in this case. The evidence shows that a suit was brought in the United States Circuit Court for South Dakota against Farnum by Allen, the grantee of Hannah Jones, and in that suit a judgment was rendered in 1896, finding and awarding the ownership and possession of the land to the plaintiff. Gors purchased the land of Allen's devisee in 1900, and paid $3,500 for it, relying upon this judgment against Farnum. Since that time he has occupied the land, except a small portion adjacent to Farnum's house, and has expended over $4,000 in improvements on the land. He has not sought to evict Farnum, because of his advanced age. Regardless of any questions of estoppel by reason of this judgment, or of the right of Gors to be called an innocent purchaser, or of the notice of this suit, the position of Gors appeals favorably to a court of equity as against the long and unexplained delay of the government in the prosecution of this suit.

The decree of the lower court will be affirmed.

LAKE VIEW STATE BANK v. JONES et al.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917.)

No. 2389.

1. BANKRUPTCY ⟸306—ACTIONS BY TRUSTEE—APPEAL—REVIEW.
Where the findings of the District Court that a bill of sale and a chattel mortgage by a bankrupt operated as a preference, and that the transferee knew of the bankrupt's insolvent condition, and had reasonable cause to believe that it was intended to give a preference, and that their enforcement would give a preference, are based upon inferences drawn from undisputed facts, and the statements of the transferee's officials and representatives, they will not be reversed merely because the answer was verified.

2. BANKRUPTCY ⟸303(3)—ACTIONS BY TRUSTEE—WEIGHT AND SUFFICIENCY OF EVIDENCE.
In a suit to set aside as a preference a bill of sale given by the bankrupt on November 16th to secure a loan made on the 13th, the evidence fails to show that an agreement was made on the 13th to give a bill of sale to secure the loan so made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462.]

3. BANKRUPTCY ⟸165(3)—PREFERENCES—SECURITY FOR PRESENT ADVANCES.
Security given by a bankrupt within four months before bankruptcy, if otherwise valid, will be enforced to protect a present advancement, even

though the borrower was insolvent, and was known to be so by the party advancing the money.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260.]

4. CHATTEL MORTGAGES ⟸6—NATURE OF TRANSACTION—BILL OF SALE AS SECURITY.

A bill of sale of personal property, given to secure a loan, was in effect a chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23–41.]

5. BANKRUPTCY ⟸151—TITLE OF PROPERTY.

As against the rights of a chattel mortgagee under an unfiled mortgage, a trustee in bankruptcy stands in the position of an attaching creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239.]

6. BANKRUPTCY ⟸152—TITLE OF TRUSTEE—TIME OF VESTING.

The rights of a trustee in bankruptcy, as against an unfiled mortgage, are determined as of the day the petition in bankruptcy is filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194.]

7. CHATTEL MORTGAGES ⟸156—FAILURE TO FILE—TAKING POSSESSION.

St. Wis. 1915, § 2313, provides that no chattel mortgage shall be valid, except against the parties, unless the possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage or a copy be filed. *Held*, that where a bill of sale was given to secure a loan, and subsequently a chattel mortgage covering additional property and securing an additional indebtedness was given to confirm the bill of sale, a seizure of the property under the chattel mortgage was not a taking of possession under the bill of sale, so as to make the bill of sale valid, though not filed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 265, 271.]

8. BANKRUPTCY ⟸165(3)—PREFERENCES—SECURITY FOR PRESENT ADVANCES.

On November 16th a bankrupt procured a loan from a bank, and as security executed a bill of sale. The bank immediately sent its representative from Chicago to Wisconsin, where the property was located, to examine conditions and report, and upon his return, and on learning from an attorney the legal effect of the bill of sale, it sent its attorney to Wisconsin, and on the 20th he obtained a chattel mortgage covering all of the bankrupt's property and securing the loan and other indebtedness; the mortgage reciting that it was for the purpose of confirming the bill of sale. The chattel mortgage was filed, but the bill of sale was not filed. When the chattel mortgage was given, the bank knew the bankrupt was insolvent, and had reasonable cause to believe that a preference was intended and would result from the mortgage. *Held*, that under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (Comp. St. 1916, § 9651), providing that liens given or accepted in good faith, and not in contemplation of, or in fraud upon, that act, and for a present consideration, which have been recorded according to law shall, to the extent of such present consideration only, not be affected thereby, the bill of sale and the chattel mortgage, taken together, constituted a valid lien on the property covered by the bill of sale to secure the payment of the loan, as up to the date when the mortgage was given the bank could have filed its bill of sale and perfected the lien thereby created, and the surrender of a valid lien is of itself a present consideration to the extent of the security released.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260.]

Sanborn, District Judge, dissenting.

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

Suit by John M. Jones, as trustee in bankruptcy of William P. Burke and another, copartners as Burke & Hunt, and William P. Burke, individually, against the Lake View State Bank. From a decree in favor of plaintiff, defendant appeals. Reversed, with directions.

From the decree setting aside the bill of sale dated November 16, 1914, executed by William P. Burke, to J. J. Connors, for the benefit of appellant, and setting aside a certain chattel mortgage bearing the date of November 20, 1914, executed by William P. Burke and Eva May Burke to appellant, this appeal is taken.

The copartnership, organized June, 1914, dissolved in December, 1914, was adjudged a bankrupt in December upon a petition filed the 3d of the month. Without capital from the beginning, the company's financial condition grew steadily worse. At its demise, the liabilities were approximately $33,000, and its assets, including disputed accounts, only $16,000. It operated quarries in Wisconsin, and early and continuously and in ever-increasing amounts borrowed money from appellant. Certain of its accounts were from time to time assigned to the bank for security. Early in their dealings there was "talk" of giving security for their loans, but the "talk" never approached the dignity of an agreement.

On November 12th, when bankrupts' indebtedness to the bank was $11,289.02, a further loan of $7,750 was sought. It was over the appellant's loan of $7,750 thereafter made and the security subsequently taken that the issues involved in this suit arose. After first refusing, and only when bankrupts had vainly sought a loan elsewhere, appellant advanced $4,000 on November 13th, and certain open accounts were then and there assigned as security for this loan. On the 16th, after a hurried trip to Wisconsin, Burke returned for more money and secured $3,750. A bill of sale was given to secure this last loan, covering nearly all of bankrupts' property, and the bank claims it was given pursuant to an agreement made on November 13th when the $4,000 was advanced.

Immediately thereafter appellant sent its representative to Wisconsin to examine conditions and report. Upon the return of this representative, an attorney was consulted, and discovering the legal effect of the bill of sale, and learning also that the property at one quarry had been omitted therefrom, appellant sent its attorney to Wisconsin. He obtained a chattel mortgage covering all the bankrupts' property, and given to secure all of the bankrupts' indebtedness to the bank, and reciting among other things the following: "For the purpose of confirming a certain bill of sale in the nature of a mortgage to J. J. Connors, dated November 16, 1914," etc. The chattel mortgage was promptly and properly filed and directions given to foreclose at once. This bill of sale was never "filed."

Burke, to whom the partnership had transferred its assets and business, having learned that a foreclosure was imminent, left Wisconsin to seek a loan with which to pay this mortgage. While Burke was thus absent, appellant seized bankrupts' property under its chattel mortgage and advertised the sale thereof for December 7th. In the meantime, but after the seizure under the chattel mortgage, proceedings in bankruptcy were instituted and the sale was stayed.

Upon all the evidence the court made findings of fact as follows: "As above indicated, I do not think the proofs sufficient to avoid the assignment of accounts made on November 12th and 13th. I therefore find with respect to these two instruments (speaking of the two in controversy): (1) That the bankrupt gave them as conveyances of his property, while insolvent, and within four months of bankruptcy, and that their giving operated at the time as a preference. (2) That their effect was to enable the defendant to get a larger percentage of its debt than any other creditor of the same class. (3) That the defendant, at the time of receiving such transfers, knew of the insolvent condition of the bankrupt, and that at the same time it had reasonable cause to believe that it was intended thereby to give it a preference, and that their enforcement would give a preference. (4) That the allegations of mat-

ter of fact contained in the complaint essential to avoid the mortgage are proven and true."

Samuel B. King, of Chicago, Ill., for appellant.
Maurice A. McCabe, of Milwaukee, Wis., for appellee.

Before MACK and EVANS, Circuit Judges, and SANBORN, District Judge.

EVANS, Circuit Judge (after stating the facts as above). Appellant first assails the findings of fact made by the learned District Judge. We have carefully examined the evidence, and find it well supports the findings as announced. It would serve no useful purpose to set forth the facts in detail.

[1] The mere fact that the answer was verified does not strengthen appellants' claim in this respect. The findings are based on inferences drawn from undisputed facts and the statements of bank officials and representatives. In the face of such support, findings will not be reversed because the denial in the answer is supported by an oath.

[2] Appellant's further claim that the bill of sale given on the 16th was executed pursuant to an agreement alleged to have been made on the 13th is not supported by the evidence. It may have been appellant's intention to obtain such security, but no agreement was reached on the subject. The witness Burke described the occurrence as follows:

"At the time I got the $4,000, Mr. McCabe told me to come back on Monday. He wanted to make some further arrangements to protect the bank, and in the meantime he would draw up something for me to sign. I do not know just what the conversation was."

Burke further says:

"When I signed this assignment on the 13th, and the note for $4,000, I agreed to be back on Monday, but the time was so short I did not enter into any conversation at all. We were a mile from the depot. I had 20 minutes to get there."

These answers, while somewhat qualified, in response to a leading question put to him, contain a fair statement of the situation so far as it concerns the alleged prior agreement to execute the particular bill of sale as security for the loan made on the 13th. This fact being established, the bill of sale and the chattel mortgage, having been given by the bankrupts while insolvent, and within the prohibited four months period prescribed by the statute, cannot be sustained so far as the $4,000 loaned November 13th is concerned, in view of the court's further finding that on November 16th the appellant had reasonable cause to believe that the bill of sale would constitute a preference.

[3] But it is claimed that as to the $3,750 advanced November 16th the decree must be reversed. The loan of $3,750 was unquestionably made on the 16th, and the bill of sale was given to secure such advancement. If the security is otherwise valid, it will be enforced to protect a present advancement made as in this case, even though the borrower was insolvent, and was known to be so by the party advancing the money. In re Metropolitan Dairy Co., 224 Fed. 444, 140 C. C. A. 646; In re Clifford (D. C.) 136 Fed. 475.

[4] But it is claimed that the bill of sale, being a mere chattel mortgage, was not valid, because never filed as provided by the laws of Wisconsin, nor was possession of mortgaged property taken thereunder as provided by section 2313, R. S. of Wisconsin.

The bill of sale was in effect a chattel mortgage. First Nat. Bank of Madison v. Damm, 63 Wis. 249, 23 N. W. 497; Manf. Bank v. Rugee, 59 Wis. 221, 18 N. W. 251. That it was subject to the provision of the Wisconsin statute respecting chattel mortgages is conceded.

The Wisconsin statute bearing on the validity of chattel mortgages reads as follows:

Section 2313: "No mortgage of personal property shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee or unless the mortgage or a copy thereof be filed as provided in section 2314, except when otherwise directed in these statutes. Nor shall a chattel mortgage of personal property which is by law exempt from seizure and sale upon execution be valid unless the same be signed by the wife of the person making such chattel mortgage, if he be a married man and if his wife at the time be a member of his family, and unless such signature of such wife be witnessed by two witnesses."

[5] As against the rights of a chattel mortgagee under an unfiled chattel mortgage, a trustee in bankruptcy stands in the position of an attaching creditor. In re Pittsburg Big Muddy Coal Co. (C. C. A. 7th Circuit) 215 Fed. 703, 132 C. C. A. 81.

[6] The rights of such trustee are determined as of the day the petition in bankruptcy is filed. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. Having never been filed, the bill of sale was valueless as to third persons, unless possession of the mortgaged property was "delivered to and retained by the mortgagee." In this case there was obviously no possession of the mortgaged property "delivered to and retained by the mortgagee," unless the possession taken by virtue of the chattel mortgage was such possession.

[7] The seizure under the chattel mortgage cannot be construed as the taking of possession under the bill of sale. The chattel mortgage was an entirely different security. It covered different property. It secured a different indebtedness. The notice of sale following the seizure read:

"By virtue of a chattel mortgage executed by William Burke and Eva May Burke, his wife, to the Lake View State Bank of Chicago, Ill., dated this 20th day of November, 1914," etc.

It thus appeared that the notice described the seizure "by virtue of the chattel mortgage." The date named is the date of the chattel mortgage. The appellant (named as mortgagee in the chattel mortgage) seized the property, whereas it was a stranger to the bill of sale.

The appellant alleges in its complaint that it—

"took possession of all said assets and property in said chattel mortgage described * * * for the purpose of satisfying the lien claimed by it under such chattel mortgage."

Appellant, therefore, cannot rely upon its claim that the seizure was under the bill of sale, or that the bill of sale was a valid lien at the time

the bankruptcy proceedings were begun. The chattel mortgage given November 16th, disconnected from the sale of November 16th, likewise furnishes no basis for a lien in appellant's favor, for it was given for a past indebtedness, and under the finding, standing alone, was clearly a preference.

[8] But the bill of sale and the chattel mortgage taken together may well constitute a valid lien to secure the payment of $3,750. Section 67d of the Bankruptcy Act provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

Under the evidence in this case, the bill of sale made on November 16th would have been brought within the provisions of this subdivision of section 67d, had it been filed as required by section 2313 of the Revised Statutes of Wisconsin. Lindley v. Ross, 200 Fed. 733, 119 C. C. A. 177; Remington on Bankruptcy, § 1314. Taking the chattel mortgage on the 20th, "for the purpose of confirming a certain bill of sale in the nature of a mortgage to J. J. Connors, dated November 16, 1914," etc., transferred to the mortgagee the protection afforded by the bill of sale. In re Mahland (D. C.) 184 Fed. 743; Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269.

There may be instances when a chattel mortgage, taken in lieu of a prior unrecorded bill of sale, would not be given the same lien effect as the prior security; but in the case under consideration only four days marked the difference in the dates of the two instruments. No rights were lost or prejudiced during that period. The $3,750 went to pay laborers. The distance between the place where the property was located and Chicago—the place where the business was conducted—made more rapid progress impossible. The bank acted with the utmost diligence after securing the bill of sale. Up to the date when the chattel mortgage was given, the bank could have filed its bill of sale and perfected the lien thereby created, so far as the Wisconsin statute was concerned. In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248. A surrender of a valid lien is of itself a present consideration to the extent of the security released. Remington on Bankruptcy (2d Ed.) § 1326.

Again the chattel mortgage, executed and filed on November 20th, in connection with the bill of sale of November 16th, may well be deemed to secure a substantially contemporaneous advance to the extent of $3,750 and as to the property covered by the bill of sale. Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419 (decided Jan. 8, 1917, by U. S. Supreme Court); Martin v. Hulen & Co., 149 Fed. 982, 79 C. C. A. 492. The chattel mortgage did not permit the mortgagors to make sales from the mortgaged property for their own use and benefit, and was therefore not fraudulent in fact, as declared in Blakeslee v. Rossman, 43 Wis. 116, Durr v. Wildish, 108 Wis. 401, 84 N. W. 437, and Bank of Kaukauna v. Joannes, 98 Wis. 321, 73 N. W. 997; nor does the evidence outside of the written instrument establish any such agreement or understanding.

It follows, therefore, that the chattel mortgage, upon being promptly filed, became a valid lien for the amount and to the extent that the bill of sale would have been a valid lien, if filed. So far as it includes additional security and attempts to secure an indebtedness in excess of $3,750, it is a preference, properly avoided by the court. The mortgage, however, should not have been entirely set aside. As appellant wrongfully refused to surrender its preference, even in this court, no costs will be allowed in this court.

The decree is reversed, with directions to enter a decree in accordance with the views here expressed. No costs shall be allowed to either party.

SANBORN, District Judge, dissents.

HUME et al. v. MYERS et al. *

In re PIEDMONT MANGANESE CORP.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1917.)

No. 1496.

1. BANKRUPTCY ⟸36—ORDERS—FINAL JUDGMENT—WHAT CONSTITUTES.
An order in bankruptcy, dismissing the petition for compensation filed by receivers appointed prior to bankruptcy, who had delivered the property of the bankrupt to the trustee, which authorized the filing of another petition asserting their claims on other grounds, is not a final order, and a second petition cannot be denied on the ground that the proper remedy should have been by appeal from the denial of the first.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 36.]

2. BANKRUPTCY ⟸36—ORDERS—FINALITY.
A court of bankruptcy is always open, and until distribution the bankruptcy court may open and reconsider on the merits its orders concerning petition for payment of claims out of funds of the bankrupt estate.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 36.]

3. BANKRUPTCY ⟸347—RIGHTS OF RECEIVER PRIOR TO BANKRUPTCY—CLAIMS.
An assignee under a deed of assignment, or a receiver acting under judicial authority, will be allowed compensation as a preferred claim in the administration of the property, to the extent that his services have benefited the estate.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538.]

4. RECEIVERS ⟸199—ALLOWANCE OF COMPENSATION—ORDERS.
Orders allowing receivers compensation are purely administrative, subject to disallowance or change with the development of the administration.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 391.]

5. BANKRUPTCY ⟸317—COMPENSATION OF RECEIVERS—ORDERS.
Where, after the appointment of receivers of a corporation on the ground of insolvency, the corporation was adjudicated a bankrupt, and the receivers were by the appointing court directed to deliver the corporate property to the trustee in bankruptcy, their compensation and allowances for their counsel being fixed by the same order, but without directions for payment, the order of the appointing court is not conclusive on the court of bankruptcy, for such an order is administrative, and, while the court of bankruptcy may by comity indulge a presumption in favor of the correctness of the allowance, yet it must exercise its independent judgment.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493–495.]

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

*Rehearing denied July 20, 1917.

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

In the matter of the bankruptcy of the Piedmont Manganese Company, a corporation. Petition by A. C. Hume and another, opposed by D. W. Myers, F. W. Whitaker, trustee in bankruptcy, and others. From a judgment denying the petition, petitioners appeal. Affirmed.

G. E. Caskie, of Lynchburg, Va., and James Mann, of Norfolk, Va. (Caskie & Caskie, of Lynchburg, Va., and Mann & Tyler, of Norfolk, Va., on the brief), for appellants.

S. V. Kemp, of Lynchburg, Va., for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. The Piedmont Manganese Company, a Delaware corporation, on November 29, 1913, filed a bill in the District Court for the Eastern District of Virginia against the Piedmont Manganese Corporation, a Virginia corporation having an office in that district, the Lynchburg Trust & Savings Bank, and the Philadelphia Trust, Safe Deposit & Insurance Company. The complainant, as owner of a large majority of the stock of the Piedmont Manganese Corporation, alleged the pecuniary embarrassment of the corporation and the necessity, for the preservation of its property, that receivers should be appointed, the corporate debts and assets ascertained, and that in the meantime the Lynchburg Trust & Savings Bank and the Philadelphia Trust, Safe Deposit & Insurance Company, as trustees of its mortgages, should be enjoined from foreclosing the mortgages. The trust companies were not served; but upon the bill and answer of the Piedmont Manganese Corporation the District Court for the Eastern District of Virginia on the same day granted a temporary restraining order, appointed Arthur C. Hume and Charles Hall Davis temporary receivers, and required the defendants named in the bill to show cause why the injunction and the receivership should not be made permanent. The hearing of the order to show cause was by consent postponed from day to day and was never acted upon. In the meantime, on December 15, 1913, the unsecured creditors of the Piedmont Manganese Corporation petitioned the District Court for the Western District of Virginia, where its plant was located, that the corporation be declared a bankrupt, under the allegation that it had procured the appointment of a receiver on the ground of insolvency. On March 3, 1914, the corporation was accordingly adjudged a bankrupt on the ground stated in the petition. Thereupon, on March 7, 1914, the District Court for the Eastern District directed its receiver Hume, Davis having retired from the receivership, to file his final report, to turn over to the trustee in bankruptcy in the Western district all the assets, books, and records of the bankrupt corporation; and in the order, as compensation for services rendered, allowed Hume and Davis, as receivers, each $400, James Mann, as counsel for the receivers, $500, and Wm. H. Mann, as counsel for the Piedmont Manganese Corporation, $250. Other allowances were made for those who had been employed by

the receivers for the preservation of the property. The order did not express any intention to specifically charge the property with the payment of the allowances.

The receivers, having no fund in hand to pay allowances to themselves and their counsel, turned over the entire property to the trustee in bankruptcy, and thereafter filed their petition in the court of bankruptcy, alleging the order of the District Court for the Eastern District to be an adjudication of their claims binding on the bankruptcy court, conferring on them a right to have the allowances to them and their counsel paid in preference to the lien creditors. The bankruptcy court, finding that the liens under the deeds of trust would more than absorb the entire property, leaving nothing for unsecured creditors, allowed the trustee under the deeds of trust to take and sell the property, after depositing an amount sufficient to meet the claims of the receivers and their counsel. The bondholders under the trust deeds filed an answer to the petition of the receivers, denying that the allowances made to the receivers and their counsel by the District Court for the Eastern District were binding on the court of bankruptcy. The issue thus made was heard by the referee, who held that the allowances in question made by the District Court for the Eastern District were not binding on the court of bankruptcy, and dismissed the petition without prejudice to the right of the petitioners to assert any claim for compensation by a new petition or other proceedings. This order of the referee was affirmed. A new petition was then filed, elaborating the position taken in the first, and indicating an intention to set up the further ground that the principal bondholder was estopped by the fact that he was represented by counsel before the court and made no objection to the continuance of the receivership. This petition was dismissed by the referee, and his action was approved and affirmed by the order of the court of bankruptcy. The appeal is from this last order.

[1, 2] The position is taken by the appellees that the appeal should be dismissed, because the second petition was merely an effort to reopen the question of the effect of the order of the District Court for the Eastern District making the allowances, which had been adjudged against the petitioners by the order dismissing the first petition, from which there was no appeal. This position is untenable. The order dismissing the first petition was not a final order, because it provided for another petition to be filed, asserting the claims on grounds other than those set out in the first; and the second petition indicates an intention to set up the additional ground of estoppel. But, aside from that, the court of bankruptcy is always open, and until the distribution of the fund in controversy the court had the power to open and reconsider on the merits its own orders. In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126. The language of the order of Judge McDowell clearly indicated that he did reopen the issue and consider it anew on the merits.

[3-5] Stripped of mere incidental facts, the case made by the appeal is this: A court of equity appoints receivers of a corporation on the ground of insolvency, at the instance of a stockholder owning nearly all the stock, in a proceeding to which no creditor, secured or unsecured, was made a party by service. While the property is undisposed of

in the hands of the receivers, the corporation is adjudicated a bankrupt. The court of equity then orders its receivers to turn over the corporate property to the trustee in bankruptcy, and by the same order fixes the compensation of the receivers and their counsel, without making provision for its payment. Is the order of the court of equity, making the allowances, binding as res adjudicata on the court of bankruptcy?

There is a distinction between the effect of the order before us and an order of a court of equity making such allowance, where the property has, through the instrumentality of the receivers, been disposed of, and the purchase money is in the hands of the receivers. In the latter situation there is reason in the view, though we do not commit ourselves to it, that the court of equity turns over only the net fund in its hands after deducting the expenses incurred in its production, including the compensation of its receivers and their counsel. It is true that in many of the cases broad language is used in favor of the authority of courts to fix the compensation of their officers; but these cases related to allowances and payment from funds in hand, not to fixing charges upon specific property to be turned over to the bankruptcy court. Kennedy v. American Tanning Co., 81 N. J. Eq. 109, 85 Atl. 812; Singer v. National Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868; State v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570; In re Board of Directors Suburban Co., 143 N. Y. Supp. 363; Mauran v. Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Id., 23 R. I. 324, 50 Atl. 331; Wilson v. Parr, 115 Ga. 629, 42 S. E. 5. The distinction is forcibly stated in Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028. When the court of equity has not reduced the property to money, it is not in possession of that definite knowledge of the value of the property which is an important factor in finally fixing compensation.

Any real services, either of an assignee under a deed of assignment or of a receiver acting under judicial authority, will be allowed as a preferred claim in the administration of the property and the distribution of its proceeds to the extent that the services have benefited the estate. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. But orders for such allowances are purely administrative, subject to entire disallowance or change by either increase or decrease with the development of the administration. The order of Judge Waddill of the Eastern District making allowance to the receivers was purely administrative. It was subject to change at his discretion at any time at least before actual payment, as long as he had the responsibility of administration. When the responsibility of administration fell upon Judge McDowell, with it came the power to exercise the same discretion. The point of logical contradiction, not to say absurdity, is reached when it is said that an allowance which Judge Waddill could have revoked, or increased or diminished, at his discretion, attached to the property as it passed to the bankruptcy court as an unalterable judgment beyond the control of the judge of the bankruptcy court.

The true rule is this: When a court of equity appoints receivers of corporate property, its allowance to its receivers and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the corporate property falls by operation of law into

the bankruptcy court, that court by comity will indulge the presumption in favor of the correctness of the allowance; but the court of bankruptcy, having the responsibility of administration, must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the court of equity. This, we think, is what the Supreme Court meant in the case of In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, when it said:

"It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way."

The rectification of errors in due course and in the designated way here referred to must mean rectification by the bankruptcy court, for after the assets are turned over to that court all orders relating to the matter must emanate from that court.

The judgment of the District Court is affirmed, without prejudice to the right of the petitioners to apply to that court for the allowance of such compensation to themselves and their attorney as it may think fit.

Affirmed.

HOLSBERRY et al. v. CLARK.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1917.)

No. 1497.

CONTRACTS ⇐129(1)—VALIDITY—UNLAWFUL USE OF BANKRUPTCY PROCEEDING.

A contract whereby defendant was to pay plaintiffs the amount of their claim against an insolvent, in event that defendant, upon the institution of bankruptcy proceedings by plaintiffs, should be enabled to procure the assets of the insolvent at a sum sufficiently less than their value to cover defendant's unsecured claim, is unenforceable, and the court will leave the parties in the situation it finds them; such a contract, which provided for the selection of defendant's attorney as trustee and that of plaintiffs as attorney for the bankrupt's creditor, and contemplated a division of fees and commissions with plaintiffs, offering an opportunity to pervert the processes of the Bankruptcy Act.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616, 619–621, 625–632.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Action by F. A. Holsberry and H. L. Ewing, copartners trading as the Upshur Supply Company, against H. E. Clark. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

W. B. Maxwell, of Elkins, W. Va. (E. L. Maxwell, of Elkins, W. Va., and H. Roy Waugh, of Buckhannon, W. Va., on the brief), for plaintiffs in error.

U. G. Young, of Buckhannon, W. Va. (Young & McWhorter and J. M. N. Downes, all of Buckhannon, W. Va., on the brief), for defendant in error.

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

SMITH, District Judge. The plaintiffs in error brought an action in the court below against the defendant in error, one of the counts in the declaration wherein, viz., the fifth count, was for the recovery of $7,000, for that a concern known as the Newell Bros. Lumber Company owning property to the value of $300,000 was insolvent, and among the creditors included the plaintiffs in error, to whom it owed about $7,000, and the defendant in error, to whom it owed about $110,000, neither of which debts were in any way or manner secured, and that the defendant in error proposed to and agreed with the plaintiffs in error that, if they would devise a means whereby the defendant in error could secure the lumber plant and property of Newell Bros. Lumber Company at such a price as would save to the defendant in error his debt, then the defendant in error would pay to the plaintiffs the amount of the debt to them of $7,000; that accordingly the plaintiffs procured to be instituted and prosecuted by themselves, and other creditors associated with them, proceedings in bankruptcy whereunder the said Newell Bros. Lumber Company was adjudicated bankrupt, and all its property sold, and the defendant in error was enabled to purchase all this property at such price, less than the reasonable value thereof, as secured to him his large debt in that he was enabled to secure, for not exceeding $170,000, plant and property of the reasonable value of not less than $300,000 to $350,000, whereby the defendant under his promise and agreement was indebted to the plaintiffs for $7,000.

The action having gone to trial the plaintiffs introduced testimony to the effect that they had made an agreement with the defendant that if plaintiffs instituted suit to put Newell Bros. Lumber Company in bankruptcy as compensation for so doing defendant would reimburse plaintiffs or pay them the amount that Newell Bros. Lumber Company owed them provided the property of Newell Bros. Lumber Company should sell at less than $110,000; that one S. T. Spears, the attorney of the defendant Clark, was to be elected trustee in bankruptcy, and C. W. Maxwell, an attorney of plaintiffs, to be attorney for the bankrupt's creditors; and that the commissions of the trustee, Spears, and the fees of the attorney, Maxwell, were to be divided by them equally with the plaintiffs. The plaintiffs did associate other creditors with themselves and file proceedings in bankruptcy under which Newell Bros. Lumber Company was after a contest adjudicated bankrupt. Spears, the attorney of Clark, was appointed trustee and divided with, or at least paid a portion of his commissions to the plaintiffs. In order to procure Spears' appointment some arrangement was made with J. M. N. Downes (one of the defendant's attorneys in this cause), whereby Maxwell shared his fees with Downes and no part was paid to the plaintiffs. An appraisement of the property of the bankrupts, Newell Bros. Lumber Company, was had. The appraisement does not appear in the record. According to a statement in the brief of argument of counsel for appellants the appraisement was for about $85,000. The defendant Clark proved a secured claim against the bank-

rupts for $95,550.05. This claim constituted a first lien on the property of the bankrupts, and had been purchased by Clark for $60,000 from one C. E. Specht, the original holder. Clark also submitted an application to the bankrupt court, setting out that the bankrupt owed him some $23,441.16 for which he was entitled to a lien on the lumber and lumber products at the mill of the bankrupt. What action was taken on this application does not appear in the record. The trustee in bankruptcy—Spears—reported to the court, recommending a sale of all the property of the bankrupt at the earliest possible date, and on the 21st of February thereafter the referee in bankruptcy directed a sale to be made by the trustee of all the property at public auction. At this sale the defendant Clark purchased all the property for $89,500.

At the trial the presiding judge, on motion of the defendant's counsel, excluded from the jury all of the testimony introduced under the fifth count to recover $7,000 and refused to allow the jury to consider it or return any verdict thereon. To this ruling of the court the plaintiffs in error duly excepted, and this writ of error was sued out to correct the judgment of the court below on this point.

Taking the testimony at the trial for the plaintiff, it shows a wide variance from the contract alleged in the declaration, and a contract of most uncertain character. The contract alleged in the declaration was one whereby, if by the institution of the bankruptcy proceedings the defendant was enabled to purchase the property of Newell Bros. Lumber Company at a price that would save him an unsecured debt of $110,000, he would pay plaintiffs' debt of $7,000; it being alleged that plaintiffs had executed this contract by enabling defendant to so acquire property for $170,000 which exceeded in value $300,000. The testimony showed an alleged agreement that, if the property sold at less than $100,000 or $110,000, then the defendant would pay plaintiffs' debt. The testimony also showed that the defendant had a comparatively inconsiderable unsecured debt to save, that he had a prior lien debt of over $98,000, and that he bought for $89,500, or less than his lien, property appraised according to the statement of plaintiffs' counsel at $85,000. The testimony thus fails to support the plaintiffs' allegations that the defendant was enabled to buy the property at a figure so much less than its value as would save him his unsecured claim. The court below does not seem to have ruled that the testimony varied too greatly from the allegations, or that the testimony was wholly insufficient to establish the alleged contract, but excluded all the testimony as much so as if the entire pleading on that point had been struck out as not stating any contract on which plaintiffs could recover. The assignments of error bring up the question whether the plaintiffs had the right to introduce any testimony to support their alleged cause of action.

Assuming that the gravamen of the charge in this fifth count is that the plaintiffs and defendant made an agreement whereby plaintiffs were through legal proceedings to have Newell Bros. Lumber Company adjudicated bankrupt, and then to work or contrive so as that the defendant should acquire the bankrupt property at less than its real value: Is that a contract based on a consideration which is enforceable in a court of law? The whole plan as alleged and testified to smacks

of an agreement to so initiate and control the bankruptcy proceedings as to procure a result not contemplated or permitted by the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 544). The agreement that Spears, the attorney for Clark, was to be made trustee, and to divide his legal commissions with the plaintiffs, who were also to receive a part of the compensation to be allowed by the court to the attorney for the creditors, gives color to the transaction. If Spears was to use his position as trustee to further the acquisition by Clark of the bankrupt property at less than its value, the whole plan was still more questionable. The impression left by the testimony as a whole is that the agreement was that two creditors acting together should use the processes of the bankrupt law so as to compel the liquidation under circumstances that would enable one of them to acquire this property at less than its value to the consequent loss of the other creditors.

The contract seems one that a court of law should decline to give effect to, leaving the parties as they chose to place themselves. If the defendant Clark had paid the plaintiffs the amount claimed, and then brought an action to recover back on the ground that it was money paid without consideration under an illegal contract, the court would, under the general rule, decline to interfere, and it would be logical that conversely the court would not sanction a recovery by the defendant in the first instance. Inasmuch, however, as the testimony fails to show performance with the alleged contract, in that it fails to show that the defendant was enabled to purchase the property at a price so much beneath the value as would secure to the defendant his unsecured claim, the judgment below might well be affirmed on that ground. The bill of exceptions brings up the question not of the sufficiency of the evidence to support a verdict, but the right of the plaintiff to recover at all, even if the testimony introduced had supported the allegations of their declaration. The ruling of the learned judge below excluded the entire testimony, and practically refused to allow any testimony to be introduced for submission to the jury to sustain the allegations of the fifth count. This could only be on the theory that the fifth count, and the testimony attempted to be introduced in its support, presented no cause of action upon which the plaintiffs had a right to recover. We are of opinion that a contract for remuneration, based on the consideration that the proceedings and adjudication of the court of bankruptcy will be used by joint action for the purpose of enabling one party to the contract to procure the assets of the bankrupt at much less than their value, is not one that should be enforced in a court of justice. To do so would be to offer too great incentive to parties, by combination for that purpose, to warp and twist the objects sought to be obtained by the Bankruptcy Act from being effected, through a misuse of the process of the bankrupt court.

The judgment of the court below is accordingly affirmed.

Affirmed.

ORVIS et al. v. BRITISH AMERICAN COTTON CO.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1917.)

No. 1489.

1. ESTOPPEL ⊂=117—EVIDENCE—ADMISSIBILITY—MODIFICATION OF CONTRACT.
Under a contract whereby defendants were to pay drafts by plaintiff for the purchase of cotton for resale in England, $8 a bale was deposited as a margin and was to be held by defendants until they had disposed of the spot cotton and the futures cotton sold to hedge. In an action on the contract, evidence was admitted that, before plaintiff's manager went to England to attend to the delivery of the cotton to purchasers, defendants agreed to credit plaintiff for each lot of cotton delivered with the $8 a bale. *Held*, that this evidence was admissible, since, while there was no additional consideration for the modification of the original agreement, the testimony that plaintiff's manager went to England believing in the promise was sufficient to raise the issue of estoppel.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307.]

2. EVIDENCE ⊂=457—PAROL EVIDENCE TO VARY WRITING—MEANING OF LANGUAGE.
Where such contract contained no explicit statement of the grade of cotton called for, but stated that sales of cotton had been made to various persons "on May/June," letters and parol evidence were admissible to show that the word "on" in the quoted expression meant a high and not a low grade of cotton.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108.]

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Suit by the British American Cotton Company against Charles E. Orvis and others, copartners as Orvis Bros. & Co. Judgment for plaintiff, and defendants bring error. Reversed.

J. S. Duncan, of Greensboro, N. C., and Joseph E. Johnson, of Warsaw, N. C., for plaintiffs in error.

Thomas S. Beall, of Greensboro, N. C. (King & Kimball and R. C. Strudwick, all of Greensboro, N. C., on the brief), for defendant in error.

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

WOODS, Circuit Judge. The defendants, Orvis Bros. & Co., cotton brokers in New York, made a contract with the plaintiff, British American Cotton Company, looking to the payment of drafts made by the plaintiff on defendants for the purchase of cotton for shipment to England. Omitting features not involved, the letter from the plaintiff to defendants which expressed the agreement contained this representation, that plaintiff had sold 500 bales of cotton in England:

"I have sold 500 b/c for January shipment as follows: 200 b/c to William Calvert & Sons, Ltd., Preston, England, 93 points on May/June. 100 b/c to William Calvert & Sons, Ltd., Preston, England, 110 points on May/June 100 b/c to Tootal, Broadhurst & Lee, Bolton, England, 100 points on May/

June. 50 b/c to Tootal, Broadhurst & Lee, Bolton, England, 110 points on May/June. 50 b/c to Copster Mill Co., Ltd., Oldhan, England, 65 points on May/June."

The undertaking of the plaintiff to buy the cotton to fill these contracts, to secure both itself and the defendants by hedging, and to further secure the defendants by margins, was thus expressed:

"This cotton I will buy from reputable shippers in the South, and at once sell contracts against it through you in Liverpool or New York, as I may prefer. I then desire to draw upon you for the full amount of the sale price as described above, with properly certified bill of lading, freight prepaid, and insurance certificate for the value of the cotton plus 10 per cent. attached, having first placed in your hands a margin of $8 per bale in cash."

It was provided that the contract should apply "in all particulars to the 500 bales of cotton above specified as well as to all subsequent transactions." The contract also contained this provision:

"It is understood that these arrangements are revocable at the pleasure of either you or ourselves, upon 20 days' written notice."

The plaintiff, through J. M. Hause, its manager, purchased 800 bales of cotton in the South, and defendants paid drafts, with bills of lading attached, for the price at which plaintiff represented it had sold this cotton in England. The drafts and bills of lading were sent to Parr's Bank, Manchester, defendants' agent in England, where they were to be taken up by payment of the English buyers of the cotton at the prices represented by plaintiff to defendants as the prices at which it had sold. Four hundred bales of the cotton were delivered, and the price advanced by defendants for them was repaid. The plaintiff was unable to dispose of the remaining 400 bales and repay the purchase money to defendants. The defendants afterwards exercised their option to close the contract on 20 days' notice, sold the cotton at considerably less than the amount of the drafts drawn on them for it and expenses, and credited the plaintiff with the net proceeds. The hedging contracts the defendants closed out at a different time for a considerable profit. In the progress of the matter the defendants released $500 of the $6,400 margin of $8 a bale deposited by the plaintiff.

The complaint is to recover $11,739.12 and interest, being the alleged balance due plaintiff on account after crediting plaintiff with the 400 bales of cotton sold by defendants at its alleged true value $31,341.59, and crediting also the alleged profit of $7,060.75 made by defendants in closing out the futures sold against the spot cotton purchased. The action is not for conversion. On the contrary, the complaint connotes that the defendants exercised their contractual right in undertaking to sell the cotton as pledgees. The defendants alleged in their answer false and fraudulent representations of the plaintiff as to the quality of the cotton, false representation that it had made sales of all the cotton at the prices represented by its drafts, the failure of the plaintiff to deliver and sell on account of the inferior quality of the cotton, and their own inability from the same cause to sell, after diligent efforts, for a greater price than that actually realized. Their claim is that, after allowing credit for the greatest price they could get for the cotton and for $5,834.56 profit on the hedges, the plaintiff

still owes them $5,161.16 balance on the account. For this sum they set up a counterclaim. The verdict was in favor of the plaintiff for $6,400, and the case is brought up on assignments of error in the admission and exclusion of testimony and in the charge of the District Judge.

[1] The case hinges on the question whether the plaintiff or the defendant is responsible for the failure to have the drafts and bills of lading for 400 bales of the cotton taken up in England, and the subsequent sale of the cotton by defendants at much less than the amount of the drafts of the plaintiff which the defendants paid. On this issue the plaintiff was allowed to introduce parol testimony to the effect that, after the execution of the contract and after purchase of the cotton, but before Hause went to Europe to attend to the delivery of the cotton to the supposed purchasers, the defendants agreed in a conversation with Hause to credit plaintiff at Parr's Bank on drafts and bills of lading for each lot of cotton delivered with the $8 a bale paid to defendants as margin at the beginning, and that, if the defendants had not refused to perform their agreement, the plaintiff would have been able to deliver the cotton at a price sufficient to take up the drafts. This testimony tended to modify the original agreement, which contemplated that the defendants should hold the $8 a bale until they had disposed of the spot cotton and the futures sold to hedge, and there was no additional consideration for the alleged promise. Nevertheless, it was competent, since the testimony of Hause that he went to England, believing in the promise, was sufficient to raise the issue of estoppel against the defendants. The objection that a contract so material, not alleged in the original complaint, should not have been brought in by amendment at the trial, to the manifest surprise of the defendants, is not without force. But the decision of the point is unnecessary, since the defendants will have the opportunity to meet the issue at the new trial, which must be ordered on another ground.

[2] On the pivotal point stated, the defendants introduced evidence tending to show that the failure of the plaintiff to deliver the cotton and make payments of the drafts was not due to any refusal on their part to release the $8 a bale margin, but to the fact that the plaintiff had not made contracts of sale upon which it could make delivery, and to the further fact that the cotton was of such inferior grade that there was no market for it at a price approximating that at which the plaintiff had falsely represented to the defendants it had been sold. Bearing, also, on this point of inferior grade, was the evidence to the effect that plaintiff, in buying the cotton, had drawn on defendants for the large profit of $18 or $19 a bale above the cost price. All this testimony was admitted as competent. In further proof that plaintiff's inability to deliver the cotton and pay the drafts was due to its own breach of its contract with the defendants, testimony was offered by the defendants, and excluded by the court, to the effect that the word "on" in such expressions as "100 b/c to William Calvert & Sons, Ltd., Preston, England, 93 points on May/June," meant a high and not a low grade of cotton. This testimony was erroneously excluded. In the absence of an explicit statement in the contract of the grade of cotton called for, parol evidence was admissible of trade terms indicating the

grade. Salmon Falls M. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493; Robinson v. United States, 13 Wall. 363, 20 L. Ed. 653.

The District Judge seems to have taken the view that the written contract covered all the transactions between the parties, and that, as it was apparently silent as to grades of cotton which the plaintiff represented he had sold in England, parol evidence on that subject was inadmissible. No discussion is necessary to show that in the sale of cotton grade is of primary importance. The plaintiff had a right to meet the contention that the contract was silent as to grade by introducing letters and parol evidence showing the grade of cotton intended. Especially is this so, since the plaintiff alleged in its complaint that the cotton was "of the kind and quality in and by said contracts contemplated." The principle is familiar that such evidence does not tend to alter the contract, but to supply that which the parties had in mind, but failed to express, in the instrument. 17 Cyc. 662. The evidence offered on this subject was erroneously excluded.

The assignments of error relating to the exclusion and admission of evidence not particularly discussed, are unimportant, and, we think, not well founded.

The charge was to the effect that the obligation imposed on the pledgees by the contract was to exercise good faith and due diligence in disposing of the spot cotton and to credit the pledgor with the net proceeds of the cotton so handled, and that the plaintiff was entitled to credit for the profit actually realized from the hedges. As bearing on this issue of the amount for which the defendants were accountable as pledgees, the court gave the instruction that the defendants would be required to account for any price the pledgor would have sold the cotton for, but for the failure of the defendants to release the margin deposited, if the defendants agreed to release it in furtherance of the sale, There can be no dispute that these were sound legal propositions.

There was no request to submit to the jury the issue whether the evidence was insufficient to show estoppel by reason of any action of plaintiff in reliance on defendants' alleged promise to release the margin in furtherance of the completion of the alleged sales by the plaintiff.

On the testimony before the court, the charge was not subject to exception.

Reversed.

WOO VEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2984.

1. ALIENS ⟸26—CHINESE PERSONS—EXCLUSION.

The son of a Chinese merchant, born in the United States, in which place his father was engaged in business, is, though he becomes a laborer, entitled to remain.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 83.]

2. ALIENS ⟸32(5)—DEPORTATION PROCEEDINGS—CHINESE PERSONS.

That a Chinese person in deportation proceedings asserted that he was a citizen of the United States, because born therein, does not cast upon

the government the burden of showing him not born within the United States; Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1916, § 4317), and Act April 29, 1902, c. 641, 32 Stat. 176, providing that every Chinese person or person of Chinese descent shall be adjudged unlawfully within the United States, unless such person shall, by affirmative proof, establish his right to remain.

3. ALIENS ⟸32(12)—DEPORTATION—REVIEW.
The finding of the trial judge, in proceeding for deportation of Chinese person, which was in accordance with the conclusion of the commissioner, is entitled to great weight on appeal.

4. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION.
In a proceeding for the deportation of a Chinese person, who claimed he was born in the United States and was a citizen, evidence *held* insufficient to sustain his contention.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84.]

5. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR.
Testimony by a witness for the government as to a conversation had with one of the defendant's witnesses is harmless, where defendant's witness had substantially admitted the facts referred to in the conversation, as is testimony, by such witness that he had a conversation with another of defendant's witnesses, where the nature of the conversation was not mentioned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

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

Proceeding by the United States against Woo Vey. Defendant was found by the commissioner to be a Chinese person unlawfully in the United States, and ordered deported, and on trial de novo in the District Court the commissioner's decision was sustained, and defendant ordered deported. From that judgment, defendant appeals. Affirmed.

Chas. W. Savage, of Cleveland, Ohio, for appellant.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. By due procedure under the Chinese Exclusion Act, appellant was by a commissioner adjudged to be "a Chinese person and a person of Chinese descent, and * * * a laborer unlawfully within the United States," and was accordingly ordered deported to China. Upon a trial de novo in the District Court, the commissioner's decision was sustained, and deportation ordered.

[1] It is admitted that appellant is of Chinese parentage. The only meritorious question arises over his contention that he was born in the United States. If he was born here, then under the testimony otherwise presented he is entitled to remain. United States v. Wong Kim Ark, 169 U. S. 649, 653, 705, 18 Sup. Ct. 456, 42 L. Ed. 890; Ng You Nuey (C. C. A. 6) 224 Fed. 340, 343, 140 C. C. A. 26. If he was not born in this country, the order of deportation was rightly made.

[2] At the opening of the trial appellant's counsel, in reply to a question of the district attorney, stated that appellant "is a citizen of the United States, of Chinese descent, that is, of Chinese parents";

and appellant contends that thereby the burden was placed upon the government of showing that appellant was not born within the United States. This contention is directly in the teeth of the statute, which provides that every "Chinese person or person of Chinese descent arrested under" its provisions "shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of" the judge or commissioner, "his lawful right to remain in the United States." 27 Stat. 25, § 3; 32 Stat. 176, Chap. 641; Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121; Lum Kim v. United States (C. C. A. 6) 225 Fed. 31, 34, 140 C. C. A. 357; Bak Kun v. United States (C. C. A. 6) 195 Fed. 53, 55, 115 C. C. A. 55; Ng You Nuey v. United States, supra, 224 Fed. at page 343, 140 C. C. A. 26. To hold that the burden thus distinctly imposed upon appellant is shifted by the assertion of a claim of domestic birth would be to emasculate the statute.

[3, 4] The important question is whether appellant has sustained the burden of proof imposed upon him. The testimony was all taken in open court before the then District Judge (the present Mr. Justice Clarke), who was decidedly of the opinion that appellant's birth in the United States was not satisfactorily shown. This conclusion of the trial judge, fortified as it is by the findings of the commissioner, is, to say the least, entitled to very great weight, and should not be lightly disturbed. Tom Hong v. United States, 193 U. S. 517, 522, 24 Sup. Ct. 517, 48 L. Ed. 772; Bak Kun v. United States, supra, 195 Fed. at page 55, 115 C. C. A. 55. Appellant testified that he was 30 years of age, and was born in San Francisco, Cal.; that he lived there until he was 9 years old, when his father and mother both returned to China, leaving him in charge of Woo Shing, an uncle, who took him to Ashland, Ky. (where the uncle died), and where appellant lived with one Woo Jan; that his parents died in China several years after returning to that country, and that appellant has no brothers or sisters. Appellant's own testimony is not necessarily convincing. Before the District Judge he testified that he was born in a building on Dupont street in San Francisco; that he did not know what his father "was doing, but he was engaged in builder's business." Before the inspector he testified that he was born on a farm, but could not say whether the farm was in San Francisco or outside of that city. Neither before the District Judge nor before the inspector was he able to tell the name of any street in San Francisco (except that in the District Court he mentioned Dupont street as his place of residence); nor does he seem to have had any definite recollection regarding San Francisco, its streets, or general conditions. He refers to no one there who would know him, or who ever knew him. No one else testified to his residence in Ashland.

Appellant produced but two witnesses to sustain his claim of birth in the United States. Both these witnesses testified they were cousins of appellant—one of them, Woo Kong, that appellant was a son of Woo Yeh; the other, Woo Shang, gave the name of appellant's father as Woo Sen. The one said the father was in the general merchandise business, and was agent for a railroad and a steamship company; he seemed to know nothing of the father's being a farmer. The other

said the father had a store at which he sold "Chinese clothes and groceries and such things"; says he may have had other business, but does not appear to have known of any other. Each claimed to have been living in San Francisco about 30 years ago, and at the time appellant was born, and to have known of his birth. But the testimony of these witnesses, at the most, comes substantially to this: That the Chinaman who appellant says was his father had a child born in San Francisco at the time appellant claims he was born; for the witness Woo Kong had not seen appellant from the time he was 2 years old until he was 14 or 15 years of age (and then in Charleston, W. Va.), and naturally did not then recognize him. The other witness had never seen appellant from the time he was 2 months old until he was about 28 years old, 2 years before the trial in the District Court, and then in Cleveland, Ohio. Manifestly, neither of these witnesses would be able to identify appellant as the child born in San Francisco at the time alleged, except for appellant's statement that he was the son of the Chinaman referred to, and that he was born on the date claimed, unless to the extent that statements made regarding persons or facts within the knowledge of the witnesses might have some persuasive force in that direction.

The trial judge refused to credit the testimony of the two corroborating witnesses, saying:

"The manner of these two witnesses on the witness stand and their contradictions in the course of their direct examination, as they testified before this court, and particularly the manner and contradictions of this doctor [Woo Kong], lead this court to believe that no credit can be given to their testimony at all."

In the opinion of the trial judge appellant's claim to citizenship was finally left to rest solely upon his unsupported statement. Careful consideration of the testimony convinces us that we would not be justified in disturbing the conclusion of the court below. It is, of course, entirely possible that appellant has told the entire truth, and that he is entitled to remain here. If so, his deportation is a serious hardship. But the absence of satisfactory evidence to prove it, through death of witnesses or otherwise, is his misfortune, and not the fault of the courts, which are not at liberty to disregard the express statute, requiring affirmative and satisfactory proof of his right to remain, nor the settled rules governing appellate administration. Ng You Nuey v. United States, supra, 224 Fed. at page 343, 140 C. C. A. 26.

[5] Exception is taken to the overruling of objections to certain testimony of the inspector, as to his conversations with certain persons at Ashland, Ky., and with the witness Woo Kong in Charleston, W. Va. Of the latter testimony it is enough to say that the fact testified to had before been substantially admitted by Woo Kong. The statement that the witness had a talk with Woo Chan was harmless, as it was not said what the conversation was. It is doubtful if the testimony as to the statement of Ah Hay was objected to. If the objection was intended to apply to that testimony, it was not good.

The judgment of the District Court must be affirmed.

WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO. v. WACZAK.

(Circuit Court of Appeals, Third Circuit. May 24, 1917.)

No. 2193.

1. MASTER AND SERVANT ⟸278(5)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an employé's action for injuries, there was testimony to show that a pneumatic drill or chisel operated by him, and which, when in proper order, would operate only when a spring or lever was pressed, and would cease operating when such pressure was withdrawn, was defective, in that it would not respond properly to the lever mechanism, but would start when it should stop, and stop when it should start, that, when an attempt was made to stop it, it continued to operate, with the result that the chisel stuck and the blade broke, a portion of it striking plaintiff in the eye, and that the employer was informed of this defect in the apparatus. *Held*, that these facts, if true, were sufficient proof of the employer's negligence in failing to provide a safe and suitable instrument with which to work, to support the action, and the case was not one in which an attempt was made to deduce negligence from the happening of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961.]

2. MASTER AND SERVANT ⟸189(7)—FELLOW SERVANTS—FOREMAN.

Where there was testimony that an employé in the conduct of his work was wholly subject to a foreman's orders and that the foreman, though not having the power of final discharge, had the power to select men for discharge, and that discharges were made by another upon his recommendation, the court properly refused to hold the foreman a fellow servant of the employé, without power to speak for the employer in directing the employé in his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 448.]

3. MASTER AND SERVANT ⟸289(8)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Reasonable reliance by a servant on a master's promise to repair, and continued use of a defective instrument for a reasonable period pending performance, is not contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1097.]

4. MASTER AND SERVANT ⟸289(8)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employé's action for injuries, there was evidence that a pneumatic drill or chisel, intended to operate only when a spring or lever was pressed, did not respond properly to pressure, in that it would start when it should stop, and stop when it should start, that the employé operating it told his foreman that it was no good, that the foreman after examining it and trying it for himself, said it was all right, and for the employé to go to work, and that he would fix it when he got a chance, that the employé continued to work with it for about three hours, and that he was then injured by its failure to work properly. There was no evidence to show that, after the promise to repair, there was any change in the defective operation, or anything to indicate that the danger was greater or more imminent after the promise than before. *Held*, that the court properly refused to hold as a matter of law that plaintiff relied upon the promise for an unreasonable period, and imprudently continued in the employment in the face of obvious and imminent danger, and was therefore guilty of contributory negligence, as what is a reasonable period to continue in the employment, in reliance on a promise of repair, is ordinarily a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1097.]

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

Action by Adam Waczak against the William Cramp & Sons Ship & Engine Building Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Graham & Gilfillan and Joseph Gilfillan, all of Philadelphia, Pa., for plaintiff in error.

B. D. Oliensis, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action for personal injuries sustained by the plaintiff, in consequence, it is alleged, of the negligence of the defendant in ordering and directing him to use a tool known by the defendant to be defective and dangerous.

The plaintiff was a chipper and caulker in the shipyard of the defendant. He worked with a pneumatic drill or chisel called an "air gun." The mechanism of this appliance was such that when in proper order it would operate only when a spring or lever was pressed and it would cease operating the instant pressure was withdrawn.

Shortly after going to work on the day of the accident, the plaintiff found that the air gun did not respond properly to pressure, in that it would start when it should stop and stop when it should start. He took it to his foreman and had the following conversation with him. The plaintiff said:

"'Charlie, that machine no good, he don't drive regular.' And Charlie Ginhart said to me—he got hold of the machine to look at it, and he started it himself. He said, 'The machine is all right. You go to work. When I get a chance I will fix it right.'"

The plaintiff returned to work with the tool in this condition and continued to work with it for about three hours, when, as he testified, the chisel of the gun stuck against the iron, the gun refused to stop upon release of pressure, and the chisel broke, one part remaining in the iron, and the other flying through the air struck him in the eye and inflicted the injury complained of. These facts were vigorously controverted, but are now established by the verdict of the jury.

[1] The first error assigned was the court's refusal to direct a verdict for the defendant on the ground that the plaintiff had failed to prove negligence. In support of this contention, the defendant urges that evidence which showed that the spring would not work, but did not show why it would not work, was not evidence of the defective condition of the appliance, and in default of other evidence left the jury to find negligence from the fact of the accident.

This was not a case where the act which caused the injury was unknown or left in doubt, as in those cases in which attempts have been made to deduce negligence from the happening of the accident (Ceen v. Cramp, 249 Pa. 415, 95 Atl. 101; Montgomery v. Rowe, 239 Pa. 321, 86 Atl. 923; Brynelson v. Concrete Steel Co., 239 Pa. 346, 86 Atl. 924); for here the testimony showed that the tool was defective and wherein it was defective, and how the accident happened in conse-

quence of the defect. It showed that the defect in the appliance was its refusal to respond properly to the lever mechanism; that in the lever mechanism was the seat of the trouble, and that because it would not respond it continued to operate when an attempt was made to stop it, with the result that the chisel stuck and the blade broke, and in that way caused the injury. It further appeared that the defendant was informed of the defect. Assuming this to be a true narrative of the facts, it was proof of the master's negligence in failing to provide the servant with a safe and suitable instrument with which to work, amply sufficient to support the action. Whether it was true was a question wholly for the jury. Gerding v. Standard Pressed Steel Co., 220 Pa. 229, 69 Atl. 672.

Error is charged to the court for submitting to the jury the question of the plaintiff's right to recover after returning to work with a known defective appliance upon the direction of the foreman and in reliance upon his promise to repair. This error is assigned upon several grounds, the first of which is that the foreman was the plaintiff's fellow servant and therefore was without authority to bind the defendant by his order and promise.

[2] In presenting this question, counsel did not invoke the law of vice principal as declared by the Pennsylvania Employers' Liability Act (P. L. 1907, p. 523), but relied generally upon the sufficiency of the testimony to take the foreman out of the class of fellow servants. Considering the point along the line of the argument, we are satisfied that there was testimony in abundance that the plaintiff, in the conduct of his work, was wholly subject to the foreman's orders, and that the foreman, though not having the power of final discharge, had the power to select men for discharge, and upon his recommendation discharges were formally made by another. Upon the evidence as to the relative positions of the plaintiff and the foreman and as to the foreman's control of the plaintiff, we are of opinion that the court committed no error in refusing to hold the foreman a fellow servant of the plaintiff without power to speak for the defendant in directing the plaintiff in his work.

[3, 4] The defendant contends finally that even if the foreman was authorized to speak for and bind the defendant, his promise to fix the appliance when he got a chance was not sufficiently definite in point of time for the plaintiff to rely upon it, and if in reliance upon it he continued to work with the tool for something more than three hours, knowing its defects all the while, he was guilty of contributory negligence, and therefore the court should have directed a verdict for the defendant. This contention is controlled by well settled principles. In Glass v. College Hill Borough, 233 Pa. 457, 82 Atl. 771, the court said:

"That a servant may be guilty of contributory negligence in continuing to use a machine which he knows to be in a dangerous condition, notwithstanding he has protested against such use, and received the master's promise to repair, is not to be questioned; but, after all, the test of contributory negligence in such case is whether the danger in using the machine was so imminent that no man of ordinary prudence would assume the risk. Except where the danger is so imminent that a reasonably prudent man would not incur it, the servant may, in reliance on the promise of the employer to

remedy it, remain for a reasonable period in the employment without forfeiting his right to recover for injuries received because of these conditions."

In Seaboard Air Line v. Horton, 239 U. S. 595, 599, 36 Sup. Ct. 180, 182 (60 L. Ed. 458) the court said:

"To relieve the master from responsibility for injuries that may befall his servant while remaining at his work, in reliance upon a promise of reparation, there must be something more than knowledge by the employé that danger confronts him, or that it is constant. The danger must be imminent —immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise."

We do not understand that the defendant questions these general principles, or that it objects to the manner in which they were stated to the jury. Its complaint is that the court did not itself apply them to the facts of the case and determine as matters of law the questions to which they were applicable. We find no evidence tending to show that after the master's promise to repair and after the plaintiff resumed work with the defective instrument, there was any change in its defective operation or anything to indicate that the danger was greater or more imminent after the promise than before. Reasonable reliance by the servant on a promise of reparation and continued use of the defective instrument for a reasonable period pending performance cannot be regarded as contributory negligence as a matter of law. Seaboard Air Line v. Horton, supra. What is such reasonable period is ordinarily a question for the jury. Meade v. Pittsburg Rys. Co., 223 Pa. 145, 72 Atl. 263; Glass v. College Hill Borough, 233 Pa. 457, 82 Atl. 771; Pavan v. Worthen, 80 N. J. Law, 567, 78 Atl. 658. The court, therefore, committed no error in refusing to hold as a matter of law, that the plaintiff relied upon the promise of the defendant for an unreasonable period, and imprudently continued in its employment in the face of danger both obvious and imminent, and therefore was guilty of contributory negligence.

As we find no merit in the assignments of error,

The judgment below is affirmed.

THE MOHAWK.

THE TRANSFER NO. 20.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

Nos. 138, 139.

1. COLLISION ⇐95(2)—MEETING STEAM VESSELS—NEGLIGENT NAVIGATION.
When a long tow was lying in East River above the Battery and about 600 feet off the Manhattan piers, tailing upstream with a strong flood tide, the steamer Ragnarok came around the Battery under tow and stopped some distance off the Brooklyn piers opposite, waiting for the vacation of her slip and leaving enough space between her and the tow for the passage of one vessel, but not for two. Behind the tow the tug Transfer No. 20, with a car float on each side, was coming down, as near

the piers as the tow, when the steamer Mohawk rounded the Battery, and after signaling the Transfer with one whistle started to pass up between the tow and the Ragnarok. The Transfer paid no attention to the first signal and crossed the second, heading out toward the Brooklyn shore, so that when one of her car floats came into collision with the Mohawk they were on crossing courses, with the Mohawk on the starboard side of the Transfer and the privileged vessel under the rules. The blow struck the Mohawk caused her to swing around, and she came into collision with the tug of the Ragnarok. The Mohawk kept her course and speed until just before the collision. *Held*, that she was not in fault, but that the Transfer was solely in fault for both collisions, for not waiting until the Mohawk had passed and for changing her course.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

2. COLLISION ⊜91—CROSSING VESSELS—STARBOARD HAND RULE.

The exception to the starboard hand crossing rule in case of vessels coming around bends in channels applies only in case of short bends, where for some reason approaching vessels cannot see each other within half a mile.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192.]

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

Suit in admiralty for collision by Eliza A. Fernald and Jennie T. Gerting, owners of the steam tug Leader, against the steamer Mohawk, the New England Steamship Company, claimant, and the tug Transfer No. 20, the New York, New Haven & Hartford Railroad Company, claimant, impleaded, with cross-libel by the owner of the Transfer. Decree against both the Mohawk and the Transfer, and the latter claimant appeals. Modified.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for Eliza Fernald and others.

Haight, Sandford & Smith, of New York City (Clarence Bishop Smith, of New York City, of counsel), for the Mohawk.

James T. Kilbreth, of New York City, for the Transfer No. 20.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This suit grows out of collisions at a place in the East River between the Whitehall ferries and the old Wall Street ferry in New York. The District Judge in his opinion refers to this region as one "fruitful of disaster." The collision occurred on August 20, 1914, about 6 p. m. The weather was clear. The tide was strong flood. There was no wind to interfere with navigation.

There were two collisions, one immediately following the other. The first collision was between the steamer Mohawk, owned by the New England Steamship Company, and Transfer No. 20, owned by the New York, New Haven & Hartford Railroad Company. The impact of this first collision caused the Mohawk to head toward the steam tug Leader, which it hit, and which sank within 15 minutes. The owners of the Leader then filed this libel against the Mohawk, and alleged that the collision was due solely to the fault of that steamer. Decrees have been entered accordingly, and from them the New York, New Haven & Hartford Railroad Company appeals.

The New England Steamship Company as the owner of the Mohawk then filed a petition in which it was alleged that the collision between the Mohawk and the Leader was not due in any respect to any fault or negligence on the part of the Mohawk or those in charge of her, but was wholly due to the fault and negligence of Transfer No. 20, and asking that Transfer No. 20 be brought in as a party to the suit. The New York, New Haven & Hartford Railroad Company filed a cross-libel as the owner of Transfer No. 20.

The District Judge found both Transfer No. 20 and the Mohawk in equal fault on the Leader's libel and directed that the damages in the sum of $7,212.76 and costs in the sum of $50.24 be divided; and on the libel of the New England Steamship Company and cross-libel of the New York, New Haven & Hartford Railroad Company the damages and costs were ordered divided for the like reason, the damages and costs of the New England Company being $2,212.73, and those of the Railroad Company being $304.97.

[1] The question which is presented to this court is to determine whether this collision was due to the equal fault of the Mohawk and Transfer No. 20, and, if not, to place the fault where it rightly belongs.

The steamship Mohawk, 265 feet long, left her pier in the North River about 5:45 p. m. on the day in question, rounded the Battery about halfway between South Ferry and Governor's Island and proceeding under one bell straightened on her course up the East River on her way to New Bedford. Transfer No. 20 was coming down the East River on the New York side, having in tow two car floats, one on each side, lashed alongside. The car floats were fully loaded with freight cars, there being 20 or 21 cars on each float. The car floats were 250 feet long. The Transfer was bucking the tide, and proceeding at the rate of 3 or 4 miles an hour, and was on its way to New Jersey. As the Mohawk rounded the Battery the steamship Ragnarok was ahead of her, with the tug Leader on her starboard side, forward of amidships. The Leader was a steam tug 68 feet in length, 17.4 feet beam, with 7.5 feet draft. The Leader was a tight, staunch, and seaworthy steam tug, and was well and sufficiently manned and equipped. The Ragnarok, a Norwegian cargo boat, was lying off Bedloe's Island, when the tug made fast on her starboard side just abaft her forecastle head. The Ragnarok left her anchorage, accompanied by the Leader, about 5:30 p. m., and proceeded up the East River. This steamer was bound for Pier 12, Brooklyn. After rounding the Battery, the Ragnarok headed toward Brooklyn, and, finding that her pier was occupied for the time, she lay in the stream, waiting for her berth to be vacated at 6 o'clock, having stopped her engines about 150 feet off the pier. While lying there the pilot on the Ragnarok discovered the Mohawk coming around the Battery. His attention was called to her by the blowing of her alarm whistle. The Mohawk was headed across toward Brooklyn, and toward Pier 12.

At the time of the collision there was lying in the East River off Piers 5 and 6 what is described as the Albany or Pocahontas tow. It was headed about even with the pier head line, and the stern of the tow trailed in toward the shore. There is testimony to the effect that the tow was perhaps 700 feet long. The trial judge thought that it

was lying 600 feet off the Manhattan shore, or a little more than one-fifth of the distance across the river at that point. The Pocahontas tug in charge of this tow was headed south and using her engines merely to stem the flood tide, so that she would remain stationary while other tugs brought out scows to make up the tow. The captain of the Transfer stated that he first saw the Mohawk when he got abreast of the first tier of the tow. The Mohawk was then rounding the Battery. As the Ragnarok turned towards Brooklyn, she left room for one vessel to pass between her and the Pocahontas tow. The Transfer, which had been waiting for the Ragnarok to leave room for her to pass, changed her course, and, without hearing or answering the Mohawk's whistle, entered into the gap. The result was a collision; the space not being sufficient for her to pass. The space between the Ragnarok and the Pocahontas tow was wide enough for one to pass, but not for two. The Mohawk had the right of way, and kept her course until danger of collision became apparent.

As the Mohawk straightened on her course toward the Brooklyn side of the channel, and between the Pocahontas tow and the Ragnarok, she saw, lying directly behind the tow, Transfer No. 20. At that time the Transfer was lying about off Pier 10, on a course parallel with the New York piers, the distance from the New York piers being slightly less than that of the tow. The Mohawk at this time was on her course up the river, and when she was about off the New York ferry slip of the Thirty-Ninth Street ferry to Brooklyn, her master blew one whistle to the Transfer. He then waited a reasonable time, and, on receiving no answer, stopped the engines of the Mohawk and blew alarm whistles. He then repeated the signal of one blast, which the Transfer immediately answered with two, crossing the signal given, and directing her course out into the river. The master of the Transfer maintains that he blew a signal of one blast to the Mohawk, and that the two-blast signal was blown to one of the tugs of the tow; but the master of the Mohawk testified he saw the Transfer change her heading to cross his bows, and supposed that the two blasts were blown to him.

At this time the Mohawk was drifting with the tide and her own momentum. There was not room for her to pass between the Transfer and the tow, and reversing would have increased the risk of collision. The proctors for the Transfer agree that the Mohawk should have passed the Transfer on the Brooklyn side. To do this, and to avoid the Transfer as she headed away from New York, the master of the Mohawk put his helm hard aport and his engines full speed ahead. He blew his alarm whistle again, and then a single blast of his whistle, to indicate that it was necessary for him to proceed ahead. This maneuver was almost successful; but, before the Mohawk had quite cleared the car floats, the latter struck her just abaft of the after gangway, within about 50 feet of her stern. The Mohawk's engines were immediately put full speed astern, but the impact forced the Mohawk's stern downstream and her bow up, causing her to head toward the tug Leader, which, seeing her approach, let go of the Ragnarok and started ahead, but was struck by the Mohawk before she had proceeded far.

The District Judge found, and the testimony shows, that when the Mohawk blew her first signal of one whistle the Transfer was lying in a place of safety, close to the New York piers, off Pier 10, and headed down the river. The District Judge found, and the testimony shows, that the Transfer did not answer this whistle, or pay attention to the navigation of the Mohawk, which was proceeding on her course up the river, so as to pass between the tow and the Ragnarok. The District Judge found, and the testimony shows, that from the position of safety off Pier 10, the Transfer changed her course, so as to proceed out into the river and go past the tow, and, though the Mohawk at once put her helm hard to port and her engines full speed ahead, the Transfer proceeded sufficiently far out into the river so that her car floats struck the Mohawk near the Mohawk's stern.

To summarize, we have these three undisputed facts: (1) The Transfer was in a place of safety, and headed in a direction which would have avoided collision. (2) The Mohawk in ample time blew a blast of one whistle for the two vessels to pass as they were headed, and the Transfer did not answer or pay any attention to this whistle. (3) The Transfer, on the contrary, changed her course, and shortly thereafter collision resulted.

It is claimed that the collision might have been avoided if the Mohawk had gone still further to the east, and objection is made to the finding of the District Judge that the Transfer proceeded out as far as the middle of the river, and to his further finding that the Ragnarok was sufficiently close, so that the effect of the blow was to turn the Mohawk's bow into collision with the tug Leader. The findings of fact, made by the District Judge, that the Transfer proceeded out as far as the middle of the river, were correct, as was the further finding that the vital fault of the Transfer, which makes her responsible for the collision, is that she neglected to answer signals and changed her course so that collision resulted. The Mohawk and the Transfer were on crossing courses, the Transfer having the Mohawk on her starboard bow. The fact that the Mohawk struck the starboard corner of the starboard float shows that the Transfer was under a starboard helm, and not heading down stream. This made the Mohawk the privileged vessel, and gave her the right to continue her course until danger was imminent.

The District Judge found the Mohawk at fault for going into a crowded space and proceeding on her course too long. This court, however, sees no fault in what the Mohawk did. There was ample space for her to go between the tow and the stern of the Ragnarok, if the Transfer had not starboarded and made the place dangerous. The Mohawk, going with the tide, could not safely stop; whereas the Transfer, bucking the tide, could do so.

[2] The Supreme Court in The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519 (1897), held that the starboard hand rule, that when two vessels are crossing, so as to involve risk of collision, "the vessel which has the other on her own starboard side shall keep out of the way," is not ordinarily applicable to vessels coming around bends in channels, which may at times bring one vessel

on the starboard of the other. The District Judge thought the Plymothian doctrine applicable; but in our opinion this was not a case of rounding a bend under rule 5 of the Inland Regulations of 1897. That rule contemplates a short bend or curve, where for some reason approaching vessels cannot see each other within half a mile.

The decree below should be modified, and Transfer No. 20 be held solely to blame for both collisions. It is so ordered.

O'BRIEN v. LAS VEGAS & T. R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 28, 1917.)

1. MASTER AND SERVANT ⊂⊃403—ACTIONS FOR INJURIES—INSTRUCTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Under Workmen's Compensation Act Nev. March 15, 1913 (St. 1913, c. 111), creating a presumption of negligence in cases of personal injuries to an employé in the course of his employment, and placing upon an employer declining to come within the act the burden of proof to rebut this presumption, there was no error in charging that, in determining whether the presumption had been overcome, the jury might properly consider all the evidence, both that of plaintiff and that of defendant.

2. APPEAL AND ERROR ⊂⊃1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an employé's action for injuries, the admission of written statements signed by him after the accident was not error, where they contained nothing materially different from his testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

3. MASTER AND SERVANT ⊂⊃270(6)—ACTION FOR INJURIES—EVIDENCE—CONDITION OF APPLIANCE AFTER INJURY.

In an action for injuries to a driver of a gasoline motor car, sustained in endeavoring to close a drain cock, which was permitting gasoline to escape and ignite, evidence that some eight or ten days after the accident the drain cock was defective, permitting gasoline to escape and ignite, should have been admitted, although plaintiff, not having possession of the machine or access thereto in the meantime, could not prove that there had been no intermediate change in the drain cock, as it was within defendant's power to produce evidence of any change in its condition, and the question of admissibility must be governed largely by the circumstances, the nature of the appliance, the material of which it is constructed, and the use to which it is devoted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917.]

4. MASTER AND SERVANT ⊂⊃270(7)—ACTION FOR INJURIES—EVIDENCE—CONDITION OF APPLIANCE AFTER INJURY.

Plaintiff should also have been permitted to prove that when the car was turned over to a witness eight or ten days after the accident the drain cock was wired, since, while evidence of repairs or changes subsequent to the injury and precautions to prevent recurrence of like injuries is not admissible to show negligence, it is admissible as tending to show the condition of the appliance at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918.]

In Error to the District Court of the United States for the District of Nevada.

Action by William O'Brien against the Las Vegas & Tonopah Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

A. Grant Miller, of Reno, Nev., for plaintiff in error.
C. O. Whittemore, of Los Angeles, Cal., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was the plaintiff in the court below in an action to recover damages for personal injuries sustained while he was in the employment of the defendant as a carpenter on the defendant's railroad. The jury found for the defendant. The plaintiff testified that he was proceeding on a gasoline motor section car to his place of work; that the motor car was defective, in that the drain cock of the gasoline tank was defective, worn, and out of repair, so that it permitted gasoline from the tank to escape and fall upon the heated portions of the machinery of the car, whereby the gasoline ignited; and that the plaintiff, while endeavoring to close the drain cock and to stop the car, was thrown off the car and injured.

[1] The Workmen's Compensation Act of Nevada of March 15, 1913, places upon an employer who declines to come within its provisions, as is the case with this defendant, the burden of proof to rebut the presumption of negligence created by the statute in cases of personal injury to an employé in the course of his employment. We find no error in the instruction of the court that, in determining whether the presumption of negligence has been overcome, the jury may properly take into consideration all of the evidence, both that of the plaintiff and that of the defendant.

[2] Nor do we find error in the admission in evidence of the written statements signed by the plaintiff soon after the accident. It is sufficient to say of them that they contain nothing materially different from the plaintiff's testimony on the trial of the case.

[3] The drain cock was not visible from the position in which the plaintiff sat while driving the car. After the gasoline had ignited, he leaned over and observed the gasoline escaping from the drain cock in a stream which he testified was about one-third of its capacity to discharge. He had then proceeded about a mile and a half on his way. The circumstances strongly suggest that by the jar of the machinery the drain cock had worked loose, and that it was defective. The plaintiff offered to prove by the witness Holland, who was directed to use the car some eight or ten days after the accident, the condition in which he found the drain cock, and offered to prove by him that the drain cock was defective at that time, and that the escaping gasoline ignited as before. Counsel for plaintiff admitted that it could not be shown by the witness that the car had not been handled or used during the interval. The court excluded the evidence, stating that:

"A great many things can happen to a stopcock in ten days, and it don't seem to me the company should be held responsible for that unless it was shown it was in that condition at the time of the accident."

We think that the testimony should have been admitted, as tending to show the defective condition of the stopcock at the time of the accident, under the general rule that the condition of an appliance in

the use of which the plaintiff was injured may be shown within a reasonable time after the accident, as tending to show its condition at the time of the injury, in the absence of evidence of a change in the meantime. 29 Cyc. 614. It is true that it has been held in some cases, where a considerable time has elapsed after the accident, that the plaintiff must accompany the evidence of the subsequent condition of the machine or appliance with proof that the condition has not changed in the meantime. But obviously there can be no hard and fast rule to that effect. The question of the admissibility of the evidence in such a case must be governed largely by the circumstances, the nature of the appliance, the material of which it is constructed, and the use to which it is devoted. A drain cock, composed of metal designed to be used continuously as a permanent fixture on a motor car, should not be expected to develop suddenly a defect from wear. If, in this case, it were the fact that eight or ten days after the accident the drain cock worked loose and the gasoline ignited in precisely the same way in which they did when the plaintiff was injured, that fact was strongly corroborative of the plaintiff's evidence that the drain cock was defective at the time of the accident, and we think that he should not be deprived of the benefit of such evidence merely because he, not having had the possession of the machine or access thereto in the meantime, is in no position to prove there has been no intermediate change in the drain cock. His inability to produce such evidence may affect the value, but not the competency, of his proffered testimony. If, in fact, the condition of the drain cock had changed, it was within the power of the defendant to produce evidence of that fact. "Where, in an action for personal injuries, the condition of machinery, appliances, or places for work, as they appeared within a reasonable time after the accident, warrants an inference as to the conditions existing at the time of the accident, such condition may be given in evidence." 26 Cyc. 1427. Among the cases illustrating that rule are Mackie v. Central R. R., 54 Iowa, 540, 6 N. W. 723; Alabama Great Southern R. Co. v. Yount, 165 Ala. 537, 51 South. 737; G., C. & S. F. Ry. v. Johnson, 83 Tex. 628, 19 S. W. 151; Laplante v. Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294; Droney v. Doherty, 186 Mass. 205, 71 N. E. 547; Boyd v. Taylor, 207 Mass. 335, 93 N. E. 589; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281; Brooke v. Chicago Ry. Co., 81 Iowa, 504, 47 N. W. 74; Meyers v. Highland Boy G. M. Co., 28 Utah, 96, 77 Pac. 347; Jackson Lumber Co. v. Cunningham, 141 Ala. 206, 37 South. 445; Mrozevich v. Western Steel Corp., 61 Wash. 668, 112 Pac. 925; Western Union Tel. Co. v. Thorn, 64 Fed. 287, 12 C. C. A. 104; Boston Excelsior Co. v. Sweatt, 229 Fed. 321, 143 C. C. A. 441; Potlatch Lumber Co. v. Anderson, 199 Fed. 742, 118 C. C. A. 180; Blevins v. Cotton Mills, 150 N. C. 493, 64 S. E. 428.

[4] We think, also, that the plaintiff should have been permitted to show, as he offered to show, by the same witness, that at the time when the car was turned over to him the stop cock was wired. While the decided weight of authority is that evidence of repairs or changes made subsequent to the injury, and of precautions to prevent recurrence of like injuries, is not admissible to show negligence or an ad-

mission of negligence, it is held that such evidence may be admitted as tending to show the condition of the appliance at the time of the accident. In 3 Bailey on Personal Injuries (2d Ed.) 2101, it is said:

"So the fact that a defective appliance was repaired after an accident may be shown upon the question of what was broken, and how, and what was wanting, although improper for the purpose of showing the employer was negligent in not making repairs and alterations before the accident."

See, also, Dow v. Sunset Telephone & Telegraph Co., 157 Cal. 182, 106 Pac. 587; Titus v. Anaconda Copper Min. Co., 47 Mont. 583, 133 Pac. 677; Pullen v. City of Butte, 45 Mont. 46, 121 Pac. 878; Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W. 650; Norris v. Atlas Steamship Co. (C. C.) 37 Fed. 426; St. Jos. & D. C. Rld. Co. v. Chase, 11 Kan. 47; City of Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; Osborne v. City of Detroit (C. C.) 32 Fed. 36.

"If there is any evidence tending to show that an injury was the result of a defect, and the repairs follow soon after, and the condition of the appliances at the time of the repairs is such as to throw any light upon its condition at the time of the accident, considered with or without the character of the repairs made, then the fact of repairing and the character of repairs made are all proper facts before the jury, to determine its condition at the time of the injury or accident." Louisville & Nashville R. R. Co. v. Malone, 109 Ala. 509, 518, 20 South. 33, 37.

The judgment is reversed, and the cause is remanded for a new trial.

BERGER MFG. CO. v. HUGGINS et al. *

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4759.

1. CONTRACTS ⟸284(4)—BUILDING CONTRACTS—CONSTRUCTION.
A contract between a general contractor and the subcontractor declared that, should any of the work done or materials provided by the subcontractor be unsatisfactory to the architects, then such subcontractor should immediately remove such unsatisfactory work or materials and supply the place thereof with other work and materials satisfactory to the architects or general contractor. The contract further declared that should any question arise during the progress of the work, it should be referred to the architect, whose decision should be binding on both parties. The specifications contained a test for concrete floors to be made after they had been in place for 45 days, but the architect, before the laying of floors, disapproved floor joists constructed by the subcontractor. *Held*, that such disapproval by the architect was binding on the subcontractor, though the architect rejected the joists without waiting for the construction of the floors, as they would have been rejected if constructed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1330.]

2. CONTRACTS ⟸284(4)—BUILDING CONTRACTS—CONSTRUCTION.
Where the general contractor and subcontractor agreed that the work of the subcontractor should be satisfactory to the architect, his judgment made in good faith is conclusive.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1330, 1331.]

3. CONTRACTS ⟸303(5)—PERFORMANCE—DEFENSES.
Where a subcontractor in turn sublet the manufacture of some of the materials which were to be installed in a building, such subcontractor

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

*Rehearing denied August 9, 1917.

cannot excuse his own nonperformance by reason of the default of his chosen agency.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1434–1439½.]

4. INTEREST ⟸12—FILING OF LIEN—DAMAGES.

A subcontractor filed a mechanic's lien against a building, and the owner withheld a large balance due the general contractor. Rev. St. Mo. 1909, § 8233, authorized the owner to withhold such sum. The subcontractor's claim for lien was disallowed, but there was no showing that it acted maliciously or without probable cause. *Held* that, as the subcontractor was not required to give bond on the filing of its lien claim, and as there was no showing that it acted maliciously, etc., the general contractor is not entitled to recover from the subcontractor the value of the use of the balance withheld by the owner during the period of withholding.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 23.]

Appeal from the District Court of the United States for the Western District of Missouri.

Suit by the Berger Manufacturing Company against trustees of the William Jewell College and George W. Huggins, who counterclaimed. From a decree for the last-named defendant, plaintiff appeals. Modified.

John L. Wheeler and John C. Nipp, both of Kansas City, Mo., for appellant.

William C. Michaels, of Kansas City, Mo. (Delbert J. Haff, Edwin C. Meservey, and Charles W. German, all of Kansas City, Mo., on the brief), for appellees.

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

MUNGER, District Judge. Appellant, the Berger Manufacturing Company, brought suit in the court below against George W. Huggins and the trustees of William Jewell College, seeking to establish and foreclose a mechanic's lien. Mr. Huggins was a contractor, and had made a successful bid to the trustees for the erection of a dormitory building according to plans and specifications that had been prepared by Felt & Co., architects, for a building not of fireproof material. The Berger Company induced the college trustees to adopt its system of fireproof construction, and the contract as finally entered into between Huggins and the college trustees required the contractor to use the Berger system. Huggins made a written contract with the Berger Company for the installation of its materials and out of the construction of that contract have grown the controversies involved in this suit.

In general, the contract bound the Berger Company to furnish the materials and to put in place the structural steel and iron work, iron stairs, and the metal fireproofing, according to the plans and specifications of the architects and within a time limited. An addendum to these plans and specifications attempted to cover the changes made necessary by the substitution of metal for lumber. The Berger Company was unable to reach a satisfactory settlement for the service and materials it supplied, and filed a lien for the balance it claimed to

be due. The college trustees have acknowledged owing a balance either to Huggins or the Berger Company, and averred a readiness to pay it to the one to whom it may belong. Huggins has contested the claim of lien of the Berger Company, and has presented a counterclaim. The case was referred to a master, whose findings and report stated an account between Huggins and the Berger Company, found a balance due to Huggins, and disallowed the lien.

The trial court, after argument on exceptions to the report, entered a decree canceling the lien, and awarding a balance to Huggins. The court disallowed some items found to be due by the master and allowed some items the master had rejected. The briefs cover a wide field in argument, but the real issues of the case are found in smaller area. One of the master's findings, approved by the court, allowed the sum of $1,500 to Huggins because the Berger Company delayed in the performance of the work. The contract required the work to be begun at once, to be done within three months, and to be so performed as not to cause any delay or inconvenience in other construction work. Appellant contends that it caused no delays that injured Huggins, but was itself delayed by him. A number of claimed delays are in issue. The evidence has been examined relating to them, and no useful purpose would be served by detailing it, as questions of fact only are involved. It is sufficient to sustain the findings of the master, approved by the court, that the delays were the fault of the Berger Company, and that the contractor complied with the requirements of his contract. The decree allowed this amount as the difference between the cost of construction paid by Huggins and the amount it would have cost Huggins to perform this work, if the Berger Company had not delayed and disorganized it. The only evidence offered on the amount of these damages was given on behalf of Huggins, and would have supported a much larger credit allowance to him. The appellant invokes the rule that damages will not be apportioned between parties in mutual fault, but the finding that there was no delay by Huggins renders the rule inapplicable.

[1, 2] The master and the trial court allowed two items of damages against the Berger Company for the expense of reconstructing floors, the roof, and other portions of the building, which the Berger Company had undertaken to construct. The joists of these floors were spaced at a distance between centers that the Berger Company claimed was in compliance with plans which it had submitted to the architect and he had approved before the work was begun. After the joists were placed the contractor had a test made, and found a deflection that he reported to the architect. The architect disapproved of the proposed construction and required a reinforcement of the joists. The Berger Company was notified of this decision, but failed to supply the additional members, and the contractor, following the architect's direction, incurred the expense mentioned. There were a number of provisions in the contract of the Berger Company subjecting the work to the approval of the architects. Among them was the following:

"In case any of said work done or materials provided by the said party of the second part shall be unsatisfactory to the architects, then the said party

of the second part will, on being notified thereof by the architects, or general contractor, immediately remove such unsatisfactory work or materials, and supply the place thereof with other work and materials satisfactory to the architects or general contractor."

"If any question should arise during the progress of the work or in the settlement of accounts, it is to be referred to the architects, whose decision shall be binding upon both parties; but there is reserved the right of final decision in all such questions by two disinterested parties, one chosen by each party to this agreement, at his own expense, and in the event of the parties so chosen failing to agree, they are to have the power to choose a third at the joint expense of both parties hereto; and the decision of two of the referees so chosen shall be binding on both parties."

In the original specifications there was a certain test provided for the concrete floors then contemplated, to be made after the floors had been in place for 45 days, and the Berger Company contends that this test was the limit of the architect's authority. The provisions quoted from the contract refute this contention. The preliminary approval of the Berger Company plans was not the only permissible use of the architect's discretion, for the contract allowed the condemnation of "work done or materials provided." Neither was the judgment of the architect required to be based on any particular tests. The amount of deflection of the floor joists when the test load was applied to them, and the probable effect of that deflection upon the terazzo floors to be laid upon them, when such floors should be put to the strain of use, justified the architect in condemning them and in avoiding the delay that would ensue if the floors were finished before a test was made. Some criticism is made of the method employed in making a test of the roof material, but the architect's decision does not depend upon the results of this test. As the parties committed their work to the satisfaction of an arbiter, his judgment, when reached in the exercise of good faith is conclusive. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; United States v. Hurley, 182 Fed. 776, 105 C. C. A. 208; Frisco Lumber Co. v. Hodge, 218 Fed. 778, 134 C. C. A. 456. The amount allowed because of these deficiencies was not the subject of an exception by the Berger Company.

[3] The court affirmed an allowance of a credit to Huggins for the failure of the Berger Company to furnish some gas pipe railings and thresholds. The complaint made of this allowance is based on the fact that the Berger Company sublet the manufacture of some parts of the metal, including these articles, to another contractor, who should have delivered the articles, and finally did so, but too late. There is no merit in this complaint, as the Berger Company could not excuse the nonperformance of its contract by the default of its chosen agency.

There were some negotiations between the architect and the Berger Company looking to an alteration of the plans for the stairway; but in its written contract the Berger Company agreed to build the stairs according to the original plans. After they were constructed, they were condemned and ordered removed by the architect, under the authority given him by the contract, and Huggins, after removing them, had them replaced by stairs to conform to the plans. For

this there were credits allowed by the master and approved by the court. A weak attempt is made to claim that there was a contract between the parties authorizing the stairs to be built as attempted by the Berger Company; but there is no evidence of any alteration of the written contract, and these credits, unchallenged otherwise, must be allowed.

In the contract each party agreed that, in case of the violation of the terms of the agreement, he would pay all costs, expenses, and reasonable attorney's fees incurred by the other party on account of such violation, or in enforcing its obligations, and that these expenses and fees might be included in the judgment in any suit on the contract. An allowance was made to Huggins for the value of attorney's services in advising him on questions arising under the contract and in enforcing his claim against the Berger Company. The only objection made to this allowance in the specification of errors is because appellant should not have been found to be in any default; but as this objection has been held ill-founded, no further consideration of the objection is required.

[4] The Berger Company filed its claim of lien on February 10, 1912, and within 90 days thereafter brought this suit. In the counterclaim of the defendant Huggins was an averment that the college trustees had withheld from him a balance of about $10,000 after the date of notice of the Berger Company's lien on the building, and a prayer that he be allowed a judgment against appellant for an amount equivalent to 6 per cent. annual interest on the amount so withheld. The trial court included in its decree an amount to that date in accordance with this prayer, and decreed that the Berger Company should pay a further sum equal to 6 per cent. on the principal sum until this decree should be satisfied. Soon thereafter the college trustees paid into the registry of the court the money it had previously retained. In support of this allowance is cited the statute of Missouri (section 8233, Rev. Stats. Mo. 1909), which allows the owner of the property to withhold from the contractor the amount of money for which such lien shall be filed. It is said that Huggins has lost the use of this amount of money during the pendency since the lien was filed, and as appellant was not entitled to a lien, Huggins should have compensation for this loss. There is no agreement in the contract to pay the contractor for the use of money withheld by the owner, nor is there any provision in the statute that requires such compensation, if the claim of lien is not sustained. There is neither pleading nor proof that the Berger Company acted maliciously and without probable cause in filing its lien claim or in prosecuting this suit. No case has been cited that sustains a recovery against the claimant because of the filing of a claim of mechanic's lien.

The fact that the contractor was deprived of the use of this money withheld by the owner because of these proceedings is not decisive of the question. In the United States courts the damages sustained by one enjoined, where no bond is given, cannot be recovered from the party obtaining the injunction, unless the defendant can make out a case of malicious prosecution. Meyers v. Block, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642; Scheck v. Kelly (C. C.) 95 Fed. 941; In

re Williams (D. C.) 120 Fed. 34; United States v. Lewis Pub. Co. (C. C.) 160 Fed. 989. See also Rieger & Co. v. Knight, 128 Md. 189, 97 Atl. 358, L. R. A. 1916 E, 1277–1282.

The seizure of a defendant's goods in an action of bankruptcy does not subject the plaintiff, who obtains such seizure to an action for damages, if his suit is brought in good faith. Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116. In the last case cited it was said:

"The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the Circuit Court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding."

Statutes usually protect defendants against damages by requiring the giving of bonds in such special remedies as attachment, replevin, injunction, receivership, and arrest and bail. In the absence of any statutory provision on the subject, the plaintiff was not subject to any other penalty for instituting this suit, in good faith, than the ordinary burden of such decree for costs in the case might require. The statutory right to file its claim of lien, and the right of the owner to defer payment to him pending determination of the validity and amount of the lien, were facts that the contractor was bound to know, and to take into consideration, when he made his agreement with the owner for the construction of the building. The portion of the decree which allows damages to the contractor for the loss of the use of the money withheld by the owner because of the filing of this claim of lien and prosecution of this suit must be held to be erroneous.

There are other questions which have been presented, and each has been considered; but the conclusions already announced dispose of all questions properly before the court. The decree of the lower court is modified in accordance with this opinion, by reducing the amount of judgment in favor of the defendant Huggins against the plaintiff from $2,638.86 to the sum of $634.50, and the eleventh paragraph of the decree, providing for the recovery from the plaintiff by the defendant Huggins, of a sum equal to 6 per cent. on the amount withheld by the college trustees from the date of the decree until the decree shall be satisfied, is vacated and set aside, and the decree, as thus modified, is affirmed. The costs in this court will be divided, each party to pay one-half.

HERMAN et al. v. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 211.

1. SHIPPING ⟸137—DAMAGE TO CARGO—HARTER ACT.
In the absence of affirmative evidence of the exercise of diligence to make a vessel seaworthy at the beginning of the voyage, the owner cannot invoke the provisions of Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1916, § 8031), as a protection against liability for cargo damage.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492.]

2. SHIPPING ⟸141(3)—DAMAGE TO CARGO—EXCEPTIONS IN BILLS OF LADING.
An exception in bills of lading of liability for damage from perils of the sea does not protect the ship or owner from liability for damage to cargo from sea water, in the absence of evidence to show what caused the entry of the water; the burden resting upon the carrier to bring the case within the exception.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498.]

3. SHIPPING ⟸141(3)—DAMAGE TO CARGO—LIABILITY OF SHIP.
The presence in one hold of a steamship of several tons of sea water, by which cargo was damaged, raises a presumption of unseaworthiness or of negligence, and, in the absence of an explanation of how the water entered, the ship is not protected from liability, even by a specific exception against wetting by sea water in the bills of lading.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498.]

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

Suit in admiralty by Max Herman and others against the Compagnie Générale Transatlantique. Decree for libelants, and respondent appeals. Affirmed.

The action is in personam against the owners of the steamship Caroline, upon which vessel as a common carrier libelants (or their consignors) shipped certain goods at Havre, France, for transportation to New York. The goods in question consisted of 23 cases of millinery, 131 bales of rags, and 30 cases of woolen goods. On arrival at New York 7 cases of millinery, 53 bales of rags, and 17 cases of woolens were damaged by sea water. By uncontradicted evidence each bale of rags weighed about 500 pounds when shipped; on arrival the injured bales had soaked up and retained an average of about 150 pounds of water apiece, i. e., there was positive proof that the rags alone had absorbed almost four tons of sea water. The 7 cases of millinery were described as "entirely wet," and the balance of the consignment "more or less damaged"; but the quantity of water affecting these goods did not more specifically appear. The condition of the woolens was not further proved than to show that they were wet, with resulting "very big damages." All the injured goods were in the same hold.

There was no evidence of any inspection or survey of the Caroline immediately or very soon before the voyage upon which this damage occurred. The master testified that his vessel was "brand new" and a very solid ship; that he had had bad weather on the voyage, but could not "recollect the details." While the master thought that the weather would "be sufficient source for damaged cargo," he admitted that he had "frequently encountered such weather without having cargo damaged." The bill of lading under which libelants' goods were shipped contained an exception against losses "resulting from * * * occurrences of seas, rivers or navigation," and a further

specific exception against "wetting by fresh water or by sea water." The answer pleaded the Harter Act, and relied upon the hereinabove specified exceptions of the bill.

Nolan Bros., of New York City (Joseph P. Nolan, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, on the brief), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] How or why the sea water immediately causing this damage entered the hold remains unknown. To this case the Harter Act has no application, because there is no affirmative evidence showing that the Caroline was seaworthy at the beginning of the voyage, or even at a time approximately near its beginning. Such proof cannot be supplied by inferences or presumption. Bradley v. Lehigh Valley R. R. Co., 153 Fed. at 352, 82 C. C. A. 426; The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794.[1]

[2] The phrase "occurrences of seas, rivers or navigation" is a translation from the French bill of lading. We take it as equivalent to the familiar exception against "peril of the seas." So far as the defense based upon this clause is concerned, there is "a failure of proof to determine whether the presence of the sea water was occasioned by an accident of the sea, by negligence or by any other cause." Therefore, as the burden of showing that "the damage arose from an excepted cause is upon the carrier," and no such showing has been made, the defense fails, under The Folmina, 212 U. S. at 363, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748.

[3] There remains the specific exception against wetting by sea water. It was admitted that, when cargo received in good condition is delivered in bad order, a presumption of negligence arises, casting upon the carrier the burden of showing that the injury arose from an excepted cause; if the carrier does this, the shipper must take up the burden and prove negligence in order to overcome the lawful exception of the bill. This appellant's case is thought to rest upon our decisions in The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578, The St. Quentin, 162 Fed. 883, 89 C. C. A. 573, and The Baralong, 172 Fed. 220, 97 C. C. A. 24. See, also, The Dolbadarn Castle, 222 Fed. 838, 138 C. C. A. 264. The citations relate to exceptions against leakage, breakage, heat, and sweat, and substantially hold that, where the injury is within a good exception, it does not constitute proof of the carrier's negligence to show (or rather argue) that the damage was of such an extraordinary and unusual nature that it could not have occurred without negligence.

[1] Appellants' brief contains a document said to have been inadvertently omitted from the apostles, which is submitted as proving due diligence. It is the Caroline's license, and contains specifications of her engines, etc. We may presume that inspection preceded license, but that does not make the document itself evidence of either due diligence or seaworthiness. It is evidence only of what it purports to show, viz. that the ship was lawfully entitled to sail under the French flag.

From these rulings we are not disposed to depart; but to this case they bear a remote relation.

Ships are especially designed to exclude sea water. It cannot ordinarily gain access to cargo unless the vessel is leaky in good weather, or becomes so (even temporarily) by stress of weather. The presence of sea water in cargo space may be of itself enough to destroy the presumption of seaworthiness which flows from the implied warranty in respect thereof imputed to every ship acting as a common carrier. The question (like so many others) is one of degree, for the warranty of seaworthiness goes as far as to require fitness for the particular business or businesses in which the ship engages; she may be seaworthy as to one sort of cargo and unseaworthy as to another. The Southwark, 191 U. S. 11, 24 Sup. Ct. 1, 48 L. Ed. 65.

Inasmuch, therefore, as an exception against peril of the seas does not relieve the carrier of the burden of showing where sea water in cargo came from and why it got into the hold (The Folmina, supra), and leaves the presumption of unseaworthiness caused by its presence undisturbed, it must follow that, even as against a specific exception covering any wetting by sea water (as here), the appearance of tons of such water in a single hold is quite sufficient to show negligence. The ship that will not keep out the sea stands in a very different category from one on which the cargo sweats, leaks, breaks, or melts. On such ships the visible and immediate cause of injury bears no necessary or obvious relation to the structure or seaworthiness of the vessel. As against breakage, heat, etc., the shipper has no right to rely upon such a warranty as that of seaworthiness, which rests on and arises from the reason for constructing all sea-going vessels, in the shape and manner long universal.

We therefore hold that a specific exception against wetting by sea water does not furnish a protection to the ship under the circumstances here shown: (1) Because the unexplained presence of sea water in such large quantities makes out a prima facie case of unseaworthiness, sufficient to put upon the carrier a burden of explanation which has not been met; and (2) because there is an inherent difference between the duty of a shipowner to avoid breakage (or the like) of cargo, and the duty to keep his hold free of sea water, which difference makes it proper to treat the mere presence of large quantities of salt water in the hold as proof of a negligence that is not shown by the existence (e. g.) of unusual heat in the same hold.

It was said in The Konigin Luise, supra, that The Folmina would not have been sent by certificate from this to the Supreme Court, had there been such an exception as is here presented, because the damage would have been specifically within it. That remark has been misunderstood. The exception put a duty of explanation on the shipper. No other inference should be drawn from the words of Lacombe, J., and we so hold. The question now is whether the evidence recited fulfills the shipper's duty; we hold it does.

A construction less stringent than the foregoing would be opposed to a long course of decision. Every exception in a bill of lading must receive a construction not "nullifying and destroying the implied obli-

gation of the shipowner to provide a ship proper for the performance of the duty undertaken." The Carib Prince, 170 U. S. at 659, 18 Sup. Ct. 753, 42 L. Ed. 1181, citing Steel v. State Line S. S. Co., L. R. 3 App. Cas. 72. Taken literally, this exception against any wetting by sea water would be good against the flooding of a hold by the breakdown of any one of a score of structural pieces, and would amount to abnegation of the carrier's duty to furnish a seaworthy vessel and use due diligence to keep her so. An instance of such injury is shown in The Citta di Palermo, 226 Fed. 529, 141 C. C. A. 285. That case went off on another point, but the facts are instructive.

There may be instances of infrequent sea water damage, to which this exception might reasonably apply. Cf. The Ontario, 115 Fed. 769, 53 C. C. A. 199, where a ballast tank leaked. Whether it could ever attach where the common exception against peril of the seas would not be equally available may be doubted, but is not decided. All that is now held is that this exception cannot be construed to relieve respondent, without at the same time relieving from the consequences of unseaworthiness, and refusing to credit plain and persuasive evidence of negligence.

The decree below is affirmed, with interest and costs.

NEW YORK, N. H. & H. R. CO. et al. v. BALLOU & WRIGHT.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1917.)

No. 2853.

1. COMMERCE ⇐95—FINDINGS OF INTERSTATE COMMERCE COMMISSION—CARRIAGE OF GOODS—OVERCHARGES.

Under Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (Comp. St. 1916, § 8563), providing that charges for the transportation of persons or property shall be reasonable and just; section 8 (Comp. St. 1916, § 8572), declaring, in case any common carrier subject to the provisions of the act shall do, cause to be done, or permit any matter or thing prohibited or declared to be unlawful, it shall be liable to the person or persons injured; and section 16 (Comp. St. 1916, § 8584), relating to findings by the Interstate Commerce Commission on the reasonableness of rates, and declaring that the findings and orders of the Commission shall be prima facie evidence of the facts therein stated—a finding by the Commission that the rate charged petitioner was unreasonable, and that petitioner was damaged to an amount stated, is prima facie correct.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145.]

2. CARRIERS ⇐202—CARRIAGE OF GOODS—RATES—DISCRIMINATION.

Where a railroad company exacted unreasonable freight rates, which were paid by petitioner, to whom merchandise was consigned, petitioner's recovery of damages on account of the unjust charges cannot be denied, because petitioner, in disposing of the merchandise, sold it for a price in excess of the factory list price, so as to cover the discrimination in charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915.]

3. CARRIERS ⟸202—CARRIAGE OF GOODS—UNREASONABLE RATES.
The proper measure of damages suffered by one on account of the exaction of unreasonable freight charges is the difference between the unreasonable charges and reasonable charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915.]

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Petition by Ballou & Wright, a corporation, against the New York, New Haven & Hartford Railroad Company, a corporation, and others. There was a judgment for petitioner, and defendants bring error. Affirmed.

Action to recover damages sustained by reason of the exaction and collection of excessive freight rates upon certain carload shipments of motorcycles from Armory, Mass., to defendant in error, at Portland, Or. Judgment for petitioner. Respondents allege error.

H. A. Scandrett, of Chicago, Ill., and W. W. Cotton, Charles E. Cochran, and Arthur C. Spencer, all of Portland, Or., for plaintiffs in error.

Will H. Bard, of Portland, Or., and James E. Fenton, of San Francisco, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. 1. This is an action brought by the petitioner, a corporation, under section 16 of the act to regulate commerce, approved February 4, 1887 (24 Stat. 379), as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859, Act June 29, 1906, c. 3591, § 5, 34 Stat. 590, and Act June 18, 1910, c. 309, § 13, 36 Stat. 554 (Comp. St. 1916, § 8584), to recover from the respondents, as common carriers engaged in interstate commerce, damages awarded to the petitioner by the Interstate Commerce Commission on account of unjust and unreasonable rates charged and collected from the petitioner for the transportation of certain specified quantities of motorcycles in carload lots from Armory, Mass., to Portland, Or.

It is alleged by the petitioner, in substance, that upon a hearing before the Interstate Commerce Commission it was found that the commodity rate charged and collected by the respondents from the petitioner for services rendered in the transportation of certain shipments of motorcycles was unjust, unreasonable, and excessive to the extent that it exceeded the first-class rate in effect at the time the shipments were made, and that the petitioner was damaged to the extent of the difference between the commodity rate charged and collected and the first-class rate in effect at that time, and that the petitioner was entitled to an award of reparation for such difference; that thereafter the Interstate Commerce Commission made an award to the petitioner in reparation of such damages in several specified sums, amounting in the aggregate to $828.13, with interest from January 1, 1913, and apportioned the same between the respondents over whose lines the said respective shipments were carried, and directed that the said several

sums, with interest, as apportioned, be paid to the petitioner by the respondents on or before the 1st day of October, 1914; that, the respondents having refused to pay the award, petitioner brought this suit to recover the damages sustained by it in consequence of the violation of the provisions of the act to regulate commerce, together with interest and reasonable attorney's fees, costs, and disbursements.

The petitioner set forth in its complaint in detail the amounts of the various overcharges, alleging, in substance, that the commodity rate of $4 per 100 pounds charged and collected by the respondents was unjust, unreasonable, and excessive, and that the first-class rate in effect at the time the shipments were made should have been applied to motorcycles in carload lots, and that by reason of the said unjust, unreasonable, and excessive rate charged and collected for the service rendered the petitioner had suffered and sustained damages to the extent of the difference between the commodity rate charged and collected and the reasonable amount which petitioner would have paid on carload lots, based upon the first-class rate in effect at that time.

The respondents answered the complaint, and, in substance, denied that the commodity rate charged and collected was unjust, unreasonable, or excessive, and denied that the first-class rate in effect at the time the shipments were made was just and reasonable, or that the same should have been applied to motorcycles in carload lots; and, for a further and separate answer and defense, the respondents alleged, in an amended answer, in substance, that the petitioner in the management of its business sold each motorcycle to the trade at a retail price of $15 in excess of the factory list price, which said sum was added to cover and did cover the difference in freight charges sought to be recovered as damages by the petitioner.

The petitioner interposed a demurrer to this further and separate answer and defense; but the court suspended a ruling on this demurrer until after the testimony had been taken. Thereupon the petitioner filed a reply, denying the matters and things contained in the further and separate answer; and, a jury being waived, the proceedings before the Interstate Commerce Commission, including the report of the Commission and the award authorizing the reparation, were offered in evidence, and the petitioner offered evidence as to what should be a reasonable attorney's fee in the event it should prevail in the action. It was thereupon stipulated between the parties that the only question for the determination of the court was the reasonableness or unreasonableness of the rate charged and collected, and the measure of damages, if any, sustained by the petitioner. The court sustained the demurrer of the petitioner to the further and separate answer and defense of the respondents, and made findings of fact and conclusions of law, and entered a judgment in favor of the petitioner and against the respondents in accordance with the order of reparation of the Interstate Commerce Commission, together with attorney's fees and costs.

[1] The law provides that:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Section 1, Act Feb. 4, 1887 (24 Stat. 379).

It is also provided:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, * * * such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Section 8, Act Feb. 4, 1887 (24 Stat. 382).

The Interstate Commerce Commission has found as a fact, on testimony before it, that the rate charged the petitioner was unreasonable, and that the petitioner had been damaged thereby. It also found the amount of reparation due thereon, on the basis of the Commission's decision, and the Commission thereupon ordered and required that, as reparation on account of the unreasonable rate charged, the respondents should pay to the petitioner the specific sums amounting in the aggregate to $828.13. The report of the Commission containing these findings of fact and orders is prima facie evidence of the matters therein stated. Section 16, Act Feb. 4, 1887 (24 Stat. 384).

The court below also found as a fact that the petitioner had been damaged in an amount equal to the difference between the amounts charged and collected on the several shipments made by the petitioner and the amounts it would have paid at the first-class rate contemporaneously in effect, amounting in the aggregate to $828.13. In the case of Southern Pacific Co. v. Goldfield Consolidated Milling & Transportation Co., 220 Fed. 14, 18, 135 C. C. A. 590, 594, this court had before it this identical question, and Judge Ross, rendering the opinion of the court, said:

"The fact that the defendant in error was damaged in the particulars specified, as well as the extent of such damage, was therefore expressly found by the Commission in the present case; and that finding of facts, like all other facts found by it, is, by the Interstate Commerce Act of February 4, 1887, as amended by the acts of March 2, 1889, and June 29, 1906 (24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591 [Comp. St. 1913, § 8584]), expressly made prima facie evidence. Being introduced by the plaintiff on the trial in the court below, and there being nothing in any of the other evidence given on the trial in conflict therewith, it must be here taken that the plaintiff in the case was damaged by the unlawful act of the defendants below, plaintiffs in error here, to the extent and in the amounts for which the court gave judgment."

[2] 2. But in the present case the respondents set up in their amended answer, as a further and separate defense, that the petitioner sold each motorcycle to the trade at a retail price of $15 in excess of the factory list price; that said sum was added to cover, and did cover, the difference in freight charges sought to be recovered as damages by the petitioner. To this further and separate defense the petitioner demurred, and the court sustained the demurrer. Upon the trial the court also refused to permit testimony in support of this separate defense. This brings us to the question, as one of law, which may be concretely stated in this form: Can petitioner be deprived of the reparation provided by law because in the petitioner's business the freight paid was

entered as an element of cost and was passed along to the ultimate purchaser in the selling price?

In Burgess v. Transcontinental Freight Bureau, 13 Interst. Com. Com'n, 668, 680, decided in 1908, the Interstate Commerce Commission had before it this identical question, which the Commission disposed of in the following language:

"These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount, because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

In Nicola, Stone & Myers Co. v. L. & N. R. R. Co., 14 Interst. Com. Com'n, 199, 207, the claims against the carriers involved reparation on shipments of lumber between points of origin and destination, and opposition to the claims of the shippers of such lumber on the ground that in the general course of the lumber business the lumber is ordinarily sold by the manufacturer or millman f. o. b. cars at the mill at prices taking into account the amount of the freight which must be paid for transportation from that point to destination; that the purchaser to whom it is consigned protects himself against the injury caused by the excess amount of the rate by adding to the price of the lumber, thus imposing the burden or injury upon the consumer; and that if any one of the parties is entitled to a refund it was the latter. This claim was rejected; Commissioner Clements, speaking for the Commission, giving this reason:

"The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences, and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between the vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation."

In Kindelon v. Southern Pacific Company, 17 Interst. Com. Com'n, 251, 254, the Commission again considered this question, saying:

"The defendants further contend that the complainants herein have not shown that they were damaged. It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. The shipper who has been charged an unlawful rate, and who is the owner of goods transported, is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight, who has been required to pay an unreasonable rate, is entitled, upon proper complaint and showing, to reparation, irrespective of the profits accruing from his business."

The case of Ballou & Wright v. N. Y., N. H. & H. R. R. Co., 34 Interst. Com. Com'n, 120, 121, was between the same parties, and the same questions were involved as in the present case. In that case the Commission said:

"The case is similar to Ballou & Wright v. N. Y., N. H. & H. R. R. Co., Docket No. 5616 [the present case], in which the rates applied on similar shipments were found unreasonable, and reparation was awarded. A copy of the transcript of testimony in that case was introduced in evidence in this proceeding, with certain additional evidence adduced to establish the fact of the shipments here involved. The single question contested is complainant's right to reparation, defendants showing that complainant added an arbitrary sum of $15 to the sale price of each motorcycle to cover freight and local drayage charges, from which they argue that complainant suffered no damage and therefore is not entitled to reparation. * * * Carriers cannot be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee, from whom the same has been collected, has on that account secured a higher price for the commodity from his purchaser."

[3] 3. In the case of Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412, 428, 35 Sup. Ct. 328, 335 (59 L. Ed. 644, Ann. Cas. 1916B, 691), the Supreme Court of the United States, discussing the force and effect to be given the reports and orders of the Interstate Commerce Commission upon a question of this character arising upon a claim against the carrier for unreasonable rates and unjust discrimination, said:

"But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation,' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company Meeker & Co. were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid, had they been dealt with on the same basis as was the Coal Company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Co. were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by section 8 of the act to regulate commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania Railroad v. International Coal Mining Co., 230

U. S. 184 [33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315], is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, said (230 U. S. 203, 33 Sup. Ct. page 898, 57 L. Ed. 1446, Ann. Cas. 1915A, 315): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

The Interstate Commerce Commission in that case had found that, by reason of being charged an excessive and unreasonable rate, the shipper had been damaged to the extent of the difference between what it actually paid and what it would have paid, had it been given the rate which the Commission found would have been reasonable. Against this report, the carrier contended that the shipper had failed to prove by competent evidence that it had sustained damage, and that the measure of damages, if any, should have been the loss to the shipper as the result of the discrimination or unreasonable rate. But the Supreme Court could find nothing in the report of the Commission in that case pointing to the application of an erroneous or inadmissible measure of damages in favor of the shipper, and neither can we find in this case anything pointing to an erroneous or inadmissible measure of damages in favor of the shipper.

The judgment of the lower court is affirmed, with attorney's fee in favor of the defendant in error allowed at $150, to be taxed as part of its costs upon this writ of error.

MAH SHEE v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. June 25, 1917.)

No. 2946.

1. HABEAS CORPUS ⟸6—GRANT OF WRIT—DISCRETION.

On an application for a writ of habeas corpus by a Chinese woman, seeking admission to the country as the wife of a native-born citizen, there was no merit in the claim that the evidence was so conclusive that the District Court abused its discretion in refusing to grant the writ, where there were serious discrepancies between the testimony of the alleged husband and his statements when he applied for a return certificate before making a trip to China.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 6.]

2. ALIENS ⟸32(13)—DEPORTATION OF CHINESE—APPEALS.

Though the fact that the immigration inspector, conducting the examination on an application of a Chinese woman to enter the country as the wife of a citizen, believed that she was the wife of the alleged husband, was entitled to consideration, it did not affect the right of the Commis-

sioner of Immigration and Secretary of Labor to decide an appeal on the merits.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95.]

3. ALIENS ⟸32(4)—DEPORTATION OF CHINESE—IMPRISONMENT—COMMUNICATION BETWEEN ALIEN AND OTHERS.

There was no injustice in denying communication between a Chinese woman, seeking admission to the country as the wife of a citizen, and her alleged husband, pending the determination of the matter by the immigration authorities.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93, 94.]

4. ALIENS ⟸32(4)—DEPORTATION OF CHINESE—IMPRISONMENT—COMMUNICATION BETWEEN ALIEN AND OTHERS.

The rules of the Bureau of Immigration governing the admission of Chinese provide that, after notice of appeal has been filed, the applicant's counsel shall be permitted to examine the record; that within 10 days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record shall be forwarded to the Secretary of Labor; and that if, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report. *Held* that, as the rules contemplate the possibility of the submission of evidence in addition to that brought out at the hearing, the refusal to permit the applicant's counsel to communicate with her pending an appeal deprived her of a fair hearing, as the right to submit additional or further evidence could not be availed of, unless she could communicate with her counsel, who had examined the record and read the testimony.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93, 94.]

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

Habeas corpus by Mah Shee, by Chung Leong, against Edward White, as Commissioner of Immigration at the Port of San Francisco, Cal. From an order denying the writ, the petitioner appeals. Order set aside, and cause remanded, with directions.

George A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Mah Shee, a Chinese woman, appellant herein, applied to enter the United States at San Francisco. She claimed to be the wife of Chung Leong, a Chinaman, native citizen of the United States returning from a visit to China in August, 1916. Mah Shee came with him, and her application to enter the United States as the wife of a citizen thereof was heard before an immigration inspector under orders of the Commissioner of Immigration. After examination of the witnesses, the inspector found that the woman was the wife of Chung Leong, a native-born citizen of the United States, and he recommended that she be admitted, but this recommendation was not followed by the commissioner, who denied admission upon the ground that the statements of the applicant and her alleged husband were "wholly false."

On September 4, 1916, counsel for the applicant asked a reopening of the case. With this application to reopen were presented several affidavits, including one by Chung Leong, wherein he stated substantially that at his examination before the inspector certain mistakes through misunderstanding had been made by him. He set forth the particular parts which he desired to set straight in his testimony. The commissioner at San Francisco granted application to reopen the case, but wrote that the reopening would be—

"for the introducing of a supplementary report by the examining inspector as to the demeanor of the witnesses, and for a statement as to whether or not said witnesses had been previously discredited before this office. In so doing, such supplementary report, together with the affidavits which accompanied your letter first above mentioned will be considered by this office, and a new decision rendered."

The inspector made a supplementary report, stating that none of the witnesses had been discredited by the immigration office to his knowledge; that the demeanor of the applicant was good, as she answered all questions without hesitation; and that the demeanor of the alleged husband was not as good. The inspector added, "The applicant has to my mind every appearance of respectability." No new oral hearing was had, but the commissioner stated that, "after full hearing and careful consideration of all the evidence submitted and adduced," the existence of the relationship claimed by Mah Shee to Chung Leong was not established to his satisfaction, and the application was denied. Notice of appeal was given September 15, 1916, and copy of the testimony was furnished counsel for Mah Shee. Counsel in communication to the commissioner at San Francisco requested opportunity to read the report of the law officer which had been made the basis of the first excluding decision. This request, however, was denied on September 19th. On September 20th counsel for the applicant acknowledged the receipt of the letter of the commissioner at San Francisco denying their application to have the review of the law section opened to their inspection, and wrote:

"We now request an interview with this applicant with her husband as a basis for the introduction of further evidence in support of her appeal."

On September 25th the acting commissioner answered this letter in this way:

"* * * You are advised that the request contained therein that you as counsel and the applicant's alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal must be denied as there is no authority in either the law or regulations for such a procedure."

Two days afterwards counsel for Mah Shee again wrote to the commissioner asking permission for Chung Leong, as husband of Mah Shee, to see, talk to, and confer with and comfort his wife who had been held "incommunicado" and away from her husband since her arrival. On September 27th, this request was denied on the ground that the case was still pending before the department. In time appeal to the Secretary of Labor was perfected. Counsel appearing in Washington were notified that the case was "ready for inspection" and briefs

could be filed. Counsel filed brief and made oral argument, but the appellant was ordered deported.

Chung Leong, as husband, on his own behalf and on behalf of Mah Shee, alleged to be his wife, applied for writ of habeas corpus, and the immigration record of Mah Shee was filed with the District Court upon the hearing of the demurrer. The District Court sustained the demurrer and this appeal issued.

Mah Shee, through her counsel, urges these points: First, that the evidence presented was so conclusive in its character that it was an abuse of discretion to refuse to be guided by it; second, that the hearing was not fair, in that the right of counsel was so curtailed as to negative its value to the alien, and thus she was deprived of the right to submit evidence and properly to defend herself.

[1, 2] We find it unnecessary to quote the testimony taken. But the point that the evidence was of such a conclusive character that the District Court abused its discretion in refusing to grant the writ is answered by the fact that there were serious discrepancies between the testimony given by Chung Leong, December 9, 1914, when he applied for a native's return certificate, and that given by him in the present matter. For example, prior to his departure for China on December 9, 1914, he said that he married in 1894, and that his wife was then living in China; but a day afterwards, in a letter filed with the immigration officers, and which he asked to have made a part of his case, he said that she had died in November or December, 1913, and upon this hearing he said that she had died in "7th month of CR 2," or December, 1913. There were other inconsistencies, but those mentioned are sufficient to refute the contention that the evidence to support the application of Mah Shee was of such indisputable character that but one fair conclusion could be gathered from it. In weighing the evidence the immigration officer may well have believed that a man who made such radically different statements concerning his wife was not credible in his statement that he had married the woman he says he married in Hong Kong. The fact that the inspector who heard the testimony believed that the man was married to Mah Shee is worthy of every consideration. But the right of the commissioner and Secretary to decide an appeal on its merits is not to be questioned. Tang Tun v. Edsell, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606.

[3] Nor can we hold that, because applicant was kept apart from Chung Leong and was not allowed to communicate with him, the proceeding was manifestly unfair. The sole question to be decided was whether there existed the relationship of husband and wife, and we think that until the administrative authorities could finally answer that question there was no injustice in denying communication between those directly involved in order to prevent opportunities for preparation of harmonizing statements.

[4] But the more important point is: Was the applicant deprived of the right to submit evidence and to defend herself? Rule 5 of the Rules of the Department of Labor, Bureau of Immigration, governing the admission of Chinese, after providing that notice shall be given to a Chinese applicant, adjudged to be inadmissible, of his right to appeal, reads as follows:

"(b) Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein. If there is a consular officer of China at the port where examination is held, he also shall be notified in writing that the said Chinese applicant has been refused a landing, and shall be permitted to examine the record. The word 'record' as used in this paragraph shall not be construed to include memoranda of comment or letters of transmittal unless they contain evidence additional to that in the record proper.

"(c) The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor; and, within ten days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report."

Section (c) of this rule contemplates the possibility of the submission of evidence in addition to that which has been brought out at the hearing. The procedure would seem to be this: After the notice of appeal has been filed in behalf of the applicant, then counsel for the applicant must be permitted to inspect the record as defined, and to read the testimony which has been taken. If new evidence has been discovered favorable to the applicant, or if evidence in addition to that which has been brought out at the hearing is in her possession, or in the possession of her counsel, she may present or submit the same for consideration to the Secretary of Labor. Now, it being her right to submit such additional or further evidence, the applicant is in no position to avail herself of its benefit, unless she can communicate with her counsel, who have read the testimony contained in the record of exclusion, to the end that by affidavit or supplementary statement she may set forth the new or additional evidence upon which she may rely. To hold that a Chinese woman should herself make the showing would be absurd, and, moreover, every rule of fair procedure would indicate that the presentation of such new evidence to be considered on appeal, may be by the applicant's counsel. We therefore think that, when counsel for Mah Shee requested an interview with the applicant as a basis for the introduction of further evidence in support of her appeal, they but asked for an opportunity whereby she might be able to avail herself of a right recognized by the regulations as belonging to her, and that denial of the request so made deprived her of a fair, though summary, hearing according to the law and the regulations of the department.

We will add that, if the refusal of the immigration officers had been limited only to that part of the request which contemplated the presence of Chung Leong at the interview asked for, we do not see that injustice would have been done.

The order of the District Court is set aside, and the cause is remanded, with directions to overrule the demurrer.

WILLIAMSON v. ELECTRIC SERVICE SUPPLIES CO.

(Circuit Court of Appeals, Third Circuit. June 20, 1917.)

No. 2235.

APPEAL AND ERROR ⟸239, 719(10)—RESERVATION OF GROUNDS OF REVIEW—ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals will not consider a question as to the costs which may be charged by the clerk of the District Court for certifying a record on appeal, where no costs were taxed in the District Court, there was no request to tax them, and no motion or decision is disclosed, and there is no assignment of error raising the question, which is presented only by an informal oral complaint at the bar.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2979, 2982, 3490.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by James E. Williamson against the Electric Service Supplies Company. From a decree (236 Fed. 353) dismissing the bill, plaintiff appeals. Affirmed.

J. F. Shrader, of Philadelphia, Pa. (John H. Roney, of Pittsburgh, Pa., of counsel), for appellant.

Charles N. Butler, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. We adopt as the opinion of this court what Judge Thompson has so well said in dismissing the bill. 236 Fed. 353.

The appellant seeks to raise a separate question to this effect: What costs may be charged by the clerk of a District Court for certifying a record on appeal that has been printed, not by himself, but by the appellant? On this subject a difference of opinion exists between the Eastern and the Western districts. In the Eastern district, 15 cents per folio is regarded as proper (Sarfert Co. v. Chipman [D. C.] 205 Fed. 937); while in the Western district a total charge of 50 cents only is allowed, as will appear by the unreported opinion (quoted in the margin)[1] delivered in January, 1915.

[1] Solomon v. American, etc., Ins. Ass'n, No. 433, November Term, 1911.

"Thomson, District Judge. From the judgment entered on the verdict against the defendant in the above-entitled case, the defendant appealed to the Circuit Court of Appeals. The company then presented its petition to this court, setting forth that the clerk of the United States District Court for this district had presented to petitioner a bill for services in connection with the record on the appeal amounting to $86.90. The petitioner averred that there is no provision in the law authorizing the charges in said bill and praying the court's ruling thereon. Respondent answered that each of the charges in said bill was properly made under section 828 of the Revised Statutes of the United States (U. S. Comp. St. 1916, § 1383); that the first charge of $86.40 was the clerk's services for examining, comparing, and certifying 576 pages of the printed record in said case, on the removal thereof to the Circuit Court of Appeals; that the second charge of 30 cents was for services in certifying to the said 576 pages as being a true and correct copy of said record, pursuant

Uniformity of practice on this subject is no doubt to be desired, but for the present we do not see our way to assist in reaching this result. On the record now before us the question has nowhere been raised, either in the District Court or here. Indeed, there is not a word in

to paragraph 8 of section 828 of the Revised Statutes; and that the third item of 20 cents was for attaching the seal of the court to the record.

"Prior to the passage of the act of Congress of February 13, 1911 (36 Stat. 901, c. 47 [Comp. St. 1916, §§ 1656, 1657]), the charges to which the clerk of a Circuit or District Court was entitled was a matter upon which the courts differed. That portion of section 828 of the Revised Statutes, relating to the fees in question, is as follows: 'For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents.' 'For a copy of any entry or record, or of any paper on file, for each folio, ten cents.' 'For affixing the seal of the court to any instrument, when required, twenty cents.' In Cavender v. Cavender (C. C.) 10 Fed. 828, the judge held that the transcript of the record on appeal, or writ of error, was only a copy, and that the clerk was only entitled to receive 10 cents a folio. In McIlwaine v. Ellington, (C. C.) 99 Fed. 133 it was held that the copy of the record of the trial court to be used in the Circuit Court of Appeals is a record for which the clerk is entitled to receive 15 cents a folio. In Mohrstadt v. Mutual Life Ins. Co. (C. C.) 145 Fed. 751, it was held that the making of the transcript was a 'return' within the meaning of the statutes; while Judge Archbald, in Hoysradt v. Del., L. & W. R. R. Co. (C. C.) 182 Fed. 880, held the making and certifying of the transcript required was making a record within the meaning of the statute, entitling the clerk to 15 cents a folio.

"The question to be determined here is as to the effect of the act of Congress of February 13, 1911, assuming that under the former act the clerk was entitled to 10 or 15 cents per folio for making and certifying a transcript of a record on appeal. Bearing strongly on this question is the case of Rainey v. Grace & Co., 231 U. S. 703, 34 Sup. Ct. 242, 58 L. Ed. 445, which was decided on January 5, 1914. The court was there called upon to determine what fees the clerk of the Circuit Court of Appeals was entitled to on an appeal from the District Court since the passage of the act of 1911. In construing that act the court considered the prior statutes on the subject. On February 19, 1897, Congress passed an act (Act Feb. 19, 1897, c. 263, 29 Stat. 536 [Comp. St. 1916, § 1376]) amending the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 826, c. 517, § 2), in substance, that the costs and fees in the Circuit Court of Appeals should be fixed by that court in a table of fees, provided that the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court; that the table of fees so fixed by the several Circuit Courts of Appeals should be transmitted to the Chief Justice of the United States, and that the Supreme Court should revise the same, making the same so far as possible uniform throughout the United States; and that such revised table of fees shall thereupon be in force in each circuit. On February 28, 1898, the Supreme Court by order (169 U. S. 740) fixed a table of fees and costs in the Circuit Courts of Appeals, one paragraph thereof providing as follows: 'Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, $0.25.'

"The court states that before the passage of the act of 1911 the clerk of the District Court or Circuit Court charged for a transcript of the record in preparing the case for review in the Circuit Court of Appeals, which was generally written or typewritten, the fee for such service being fixed by section 828 of the Revised Statutes, and that the printing was done under the supervision of the clerk of the Circuit Court of Appeals, after the allowance of the appeal or writ of error; that the act of 1911, entitled 'An act to diminish the expense of proceedings on appeal, or writ of error, or certiorari,' had for its main purpose the reduction of the expense of records upon which cases may be taken to, and considered by, the Circuit Court of Appeals and the Supreme Court; that this was to be accomplished by dispensing with a written or type-

either court that refers to it, even remotely. No costs were taxed in the District Court, there was no request to tax them, and no motion or decision is disclosed. There is no assignment of error raising the question we are now asked to decide, and of course the matter does not primarily concern the practice in the office of our own clerk. We have nothing but an informal oral complaint at bar that error was commit-

written transcript of the record of the lower court and substituting therefor a certified copy of the printed record, other copies of which should be available for use in the further consideration of the case in the appellate courts; that to effect this purpose the appellant, or plaintiff in error, shall cause to be printed, and shall file in the office of the clerk of the Circuit Court of Appeals, 25 printed copies of the records, the form in which the transcript shall be printed to be prescribed by the Supreme Court, which was accordingly done by order of that court on March 13, 1911 (see rule 31, 222 U. S. Appendix, page 36, 32 Sup. Ct. xiii). The court held that the evident purpose of the act, among other things, was to save expenses incurred under the former system in printing records, the clerk's fees for supervising, etc., and that, when the court below had by rule provided for the printing and indexing of the record and the filing of the printed transcript in the Circuit Court of Appeals, no fee for like services could be charged by the clerk of that court; that while there was no express repeal of the act of 1897, and that while repeals by implication are not favored, in this case such clear inconsistency exists that it cannot stand consistently with the act of February 13, 1911. The court therefore held that the latter act repeals the table of fees fixed by the Supreme Court as to the fees of the clerk of the Circuit Court of Appeals, in connection with the transcript of the record sent up on an appeal.

"In the later case of Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 235 U. S. 383, 35 Sup. Ct. 132, 59 L. Ed. 282, in an opinion filed December 14, 1914, the Supreme Court held, in harmony with the above opinion, that when a printed transcript of the record was filed with the clerk of the Circuit Court of Appeals in compliance with the act of 1911, no supervision fee could be charged by such clerk; and they held, reversing the Circuit Court of Appeals, that an appeal, taken from an interlocutory decree entered by the court below was within the intendment of the statute, a final decree, and that the clerk was not entitled to a supervision fee therefor. In that case the Supreme Court adopted the reasoning of the learned judge in the case of Smith v. Farbenfabriken, 197 Fed. 894, 117 C. C. A. 133.

"From the reasoning of the court in the foregoing cases, I feel constrained to hold that the clerk of the District Court is not entitled to the fee of 15 cents per folio, for examining, comparing, and certifying 576 pages of the printed record as charged, amounting to the sum of $86.40. Whatever may have been the correct interpretation of section 828 of the Revised Statutes for the services of the clerk in preparing and certifying a transcript of the record, it seems quite clear that he is not entitled to the same fees under the act of 1911. The purpose of the act is to diminish the expenses on appeals. and this is largely effected by requiring the appellant, or plaintiff in error, to file printed copies of the record. Before this act was passed, the District Court clerk had to prepare the case for review, making a written or typewritten transcript of the records; the printing being done under the supervision of the clerk of the Circuit Court of Appeals. The full transcript of the record is printed and filed by the appellant, and the clerk simply certifies or attaches his certificate to one of such printed transcripts. For this certificate he is entitled to be paid the usual fee, and also the fee prescribed for attaching thereto the seal of the court. But the certificate does not include that to which it is attached. United States v. Julian, 162 U. S. 324, 16 Sup. Ct. 801, 40 L. Ed. 984. When fees are claimed by a public officer, he must be able to point to the provision of the statute under which they are allowed; otherwise, they are not recoverable.

"I therefore conclude that the charge of $86.40, as made by the clerk in this case, is not legally collectible."

ted below, while the record does not show that anything whatever was done. In effect, therefore, we are asked to give an opinion on a question that not only does not appear to have been raised, but has not been brought before us according to any rule. The appellant has not even filed a motion in the Circuit Court of Appeals, and we do not know what order we are asked to make, except as we may gather it from the appellant's brief. As is well known, this court is not disposed to be rigorous in matters of practice, but the situation now in hand makes too large a demand on our leniency. We have, however, gone so far as to inquire from the district clerk what was done in his office, and we learn that the appellant did no more than make an oral offer to pay 50 cents for the certificate, and that this was declined by the clerk, after which nothing further was done either by him or by the District Court. Some attention at least must be paid to regularity of procedure, and as matters stand we feel justified in refusing to answer the question that has been propounded. This is a court of appeal, and not a court of first instance.

The decree is affirmed, at the costs of the appellant.

UNITED STATES v. BEAMAN et al.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1917.)

No. 4280.

1. PUBLIC LANDS ⟸120—PATENTS—MINERAL LANDS—AVOIDANCE.

While, under Rev. St. §§ 2302, 2318, 2319, 2347, 2351 (Comp. St. 1916, §§ 4591, 4613, 4614, 4659, 4663), lands known at the time of their purchase from the United States to be valuable for minerals are not subject to acquisition under the Homestead Law (Act May 20, 1862, c. 75, 12 Stat. 392), a patent under the Homestead Law for land as agricultural may not be avoided by a suit in equity on the ground that the land was mineral land, unless the conditions were such at the time of the entry and purchase as to then make plain to the entryman and others familiar with the land that it contained mineral deposits of such quality and value and in such quantity as to render the extraction profitable, for the subsequent discovery of minerals on the land will not warrant avoidance of the patent.

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

2. PUBLIC LANDS ⟸114(6)—PATENTS—CONSTRUCTION.

A patent of the United States is an adjudication by the Land Department, a quasi judicial tribunal, and raises a presumption of right and regularity in all the proceedings antedating it, and of perfect title in the grantee.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 322.]

3. PUBLIC LANDS ⟸114(1)—PATENTS—CONSTRUCTION.

Where, under the Homestead Law, land is patented as agricultural, such patent is an adjudication of the Land Department that the land is not then known to contain minerals in paying quantities, and of every other fact essential to the validity of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314, 316.]

4. PUBLIC LANDS ⟸117—PATENTS—COLLATERAL ATTACK.
A patent to land, being a decision of the Land Department, is impervious to collateral attack, and raises a strong presumption that the decision is right.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324.]

5. PUBLIC LANDS ⟸120—PATENTS—VACATION.
While the government may avoid a patent by a suit in equity for false and deceitful representations, the burden is on the government to establish the fraud by evidence producing a conviction.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335.]

6. PUBLIC LANDS ⟸120—PATENTS—CONSTRUCTION.
Where, in a suit to set aside a patent to lands on which coal was discovered, on the ground that the patent issued under the Homestead Law was obtained through fraud, the decree must be for the defendant, where the evidence was only sufficient to raise an uncertainty as to whether persons familiar with the land knew at the time it was patented that it was valuable for coal.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335.]

7. EVIDENCE ⟸96(1)—BURDEN OF PROOF.
Where complainant established a matter as to which defendant had the burden of proof, defendant is relieved of establishing such fact.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119, 121.]

8. VENDOR AND PURCHASER ⟸220—BONA FIDE PURCHASERS—WHO ARE.
No one is bound to assume, and hunt for wrong in the acts of those who have dealt in the title to land he is buying, when that title is fair on its face, in order to secure himself the rights of a bona fide purchaser.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461–465, 720.]

9. VENDOR AND PURCHASER ⟸229(3)—BONA FIDE PURCHASERS—EVIDENCE.
Defendant, which purchased land valuable for coal deposits, which had been patented some years under the Homestead Law, as agricultural land, *held* a bona fide purchaser.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 481.]

10. PUBLIC LANDS ⟸120—BONA FIDE PURCHASERS—PATENTS.
Where lands containing valuable minerals were patented under the Homestead Law as agricultural, a subsequent purchaser from the grantee of the patentee, who took in good faith without notice of any possible fraud on the part of the patentee in obtaining the patent, has an equity superior to that of the government, and the patent cannot be vacated.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335.]

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

Bill by the United States against D. C. Beaman and another. From a decree for defendants, complainant appeals. Affirmed.

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

Cass E. Herrington, of Denver, Colo. (R. H. Hart, of Denver, Colo., on the brief), for appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

SANBORN, Circuit Judge. This is a suit commenced August 13, 1909, to set aside a patent to 160 acres of land in Colorado issued to

Joseph Miskiel on September 8, 1904, and all the conveyances succeeding the patent, on the ground that Miskiel fraudulently entered it as agricultural land under the homestead law (sections 2289, 2291, Revised Statutes [Comp. St. 1916, §§ 4530, 4532]), and acquired it by commutation under section 2301, Revised Statutes (Comp. St. 1916, § 4589), when it was known at the time he purchased it to be valuable for its coal. The defense was a denial that the land was known to be valuable for its coal when Miskiel entered it and bought it, a denial of any fraud or misrepresentation by Miskiel at the time of his entry and purchase and an assertion that the Colorado Fuel & Iron Company, for whom the defendants Beaman and the Colorado Realty Holding Company took and hold the title to it, was on July 8, 1907, a bona fide purchaser of the land from remote grantees of Miskiel, without notice of any fraud or defect in the title. The case went to final hearing, and at the close of the plaintiff's evidence the court below of its own motion, after hearing argument, dismissed the suit on the ground that, assuming, without deciding, that the land was known by Miskiel to be valuable for its coal when he purchased it, the proof was conclusive that the Coal Company purchased and paid in good faith, in July, 1907, $20,000 for the title under the patent without any notice or knowledge, either by itself or by Beaman, who then took the title in trust for it, that there was any fraud in the entry or purchase of the land, or any other defect in the title.

[1] Lands known at the time af their purchase from the United States to be valuable for mineral, and coal is mineral, were not subject to acquisition under the homestead law. Revised Statutes, §§ 2302, 2318, 2319, 2347, 2351. A patent under the homestead law for land as agricultural may not be avoided by a suit in equity on the ground that it was mineral land, unless the conditions were such at the time of the entry and purchase of it as to make the fact plain at that time, to the entryman and others familiar with the land and its condition, that it contained mineral deposits of such quality and value and in such quantity as to render the necessary expenditures to develop, extract and sell them profitable. If at that time the land was not known to be valuable in that way for its mineral deposits, subsequent discoveries, developments, explorations, or mining in that land, or in land in its vicinity, will not sustain an avoidance of the patent. Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. 95, 29 L. Ed. 423; Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 328, 8 Sup. Ct. 131, 31 L. Ed. 182; United States v. Iron Silver Mining Co., 128 U. S. 673, 683, 9 Sup. Ct. 195, 32 L. Ed. 571; Davis's Adm'r v. Weibbold, 139 U. S. 507, 519, 11 Sup. Ct. 628, 35 L. Ed. 238; Dower v. Richards, 151 U. S. 658, 663, 14 Sup. Ct. 452, 38 L. Ed. 305; Shaw v. Kellogg, 170 U. S. 312, 332, 18 Sup. Ct. 662, 42 L. Ed. 1050; United States v. Plowman, 216 U. S. 372, 374, 30 Sup. Ct. 299, 54 L. Ed. 523; Diamond Coal Co. v. United States, 233 U. S. 236, 240, 34 Sup. Ct. 507, 58 L. Ed. 936.

[2-5] Miskiel entered this land under the homestead law on October 20, 1902, and on December 18, 1903, he proved up his case before the officers of the Land Department, commuted his entry, paid cash

for the land and received his final receipt therefor, which entitled him to his patent under section 2301, Revised Statutes. His patent was issued on September 8, 1904, and this suit was brought August 13, 1909, almost six years after he completed his purchase of the land. The United States charges that Miskiel obtained this patent by falsely representing to the officers of the land office, when he proved his case and obtained his final receipt, that the land was not then known to be valuable for its mineral deposits, when the fact was otherwise. A patent of the United States is an adjudication by the quasi judicial tribunal, the Land Department, to which the government has intrusted the determination of the claims of applicants for titles to the public lands, and a conveyance of the title to the lands which the patent describes to the patentee. It raises the presumption of right and regularity in all the proceedings antedating it and of perfect title in the grantee. In the case at bar it was an adjudication of the Land Department that the land it patented was not mineral land, and this and every other adjudication it made that was essential to the validity of the patent was impervious to collateral attack and presented a strong presumption that its decision was right (Roberts v. Southern Pacific Co. [C. C.] 186 Fed. 934, 946; Southern Development Co. v. Endersen [D. C.] 200 Fed. 272, 274, 275; United States v. Winona & St. Peter R. Co., 67 Fed. 948, 957, 15 C. C. A. 96, 105), and while the government may avoid this patent by a suit in equity for false and deceitful representations of material facts which induced its issue, the burden is upon the plaintiff in such a case to prove the facts which establish the fraud it charges, not only by a mere preponderance of conflicting evidence, but by "that class of evidence which commands respect and that amount of it which produces conviction" (Diamond Coal Co. v. United States, 233 U. S. 236, 239, 34 Sup. Ct. 507, 58 L. Ed. 936; Maxwell Land Grant Case, 121 U. S. 325, 379–381, 7 Sup. Ct. 1015, 30 L. Ed. 949; United States v. Iron Silver Mining Co., 128 U. S. 673, 676, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. Stinson, 197 U. S. 200, 204–205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Clarke, 200 U. S. 601, 608, 26 Sup. Ct. 340, 50 L. Ed. 613; Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 670, 696, 703, 34 Sup. Ct. 907, 58 L. Ed. 1527).

[6] The first question in this case, therefore is: Did the United States present at the hearing below that class of evidence which commands respect and that amount of it which produces conviction, that in 1902 and 1903, when the entry and purchase of this land by Miskiel were made, the conditions were such as to make the fact plain to Miskiel and to others familiar with the land and the surrounding circumstances, that it contained mineral deposits of such quality and value and in such quantity as to make their extraction profitable? The evidence on this subject is voluminous and conflicting. It has been carefully digested, studied and considered. Viewed in the light most favorable to the government, it goes no further than to raise an uncertainty, a doubt in the mind, whether or not any one with all the knowledge those familiar with the land, with the lands in the vicinity, and with the conditions and circumstances surrounding these lands

then had, would have known that the land here under consideration was valuable for its deposits of coal.

[7-10] This conclusion necessarily results in an affirmance of the decree below; but, even if the proof would permit a different answer to the question which has been considered, there is another reason why that affirmance must be adjudged, and that is that the court below found that the Coal Company was a bona fide purchaser of the land without notice of any fraud of Miskiel in procuring the title to it, or of any defect in that title, and the evidence fails to convince that there was any mistake in that finding. The patent was issued on July 8, 1904. On December 21, 1905, Miskiel conveyed the land, by warranty deed which recited a consideration of $8,000, to Farr and McGuire. On July 8, 1907, Farr and McGuire conveyed this land to D. C. Beaman, who took the title to it in trust for the Coal Company. At the hearing below the United States called Mr. Welborn and examined him as its witness. , He testified that he was the president of the Coal Company, that he became such in March, 1907, that D. C. Beaman, to whom the land was conveyed, was the general counsel of the company, that he (Welborn) had charge of the negotiations in behalf of the company for the purchase of this land, that the company owned the land on the south and east of it at the time he purchased it, that at that time an abstract of title of this land was procured and he asked Mr. Herrington, the attorney of the company, to look up the title, that Herrington did so and declared it good, that an abstract of title which the government introduced in evidence below was the abstract on which the purchase was made, that he did not consult D. C. Beaman at all about this purchase, that he ordered the title placed in Beaman, that the company paid $20,000 for the land at this time by check and voucher in the usual way, that previous to the commencement of this suit he had no knowledge how the title to the land was obtained from the government, that he did not know Miskiel, that from the time he was elected president until the lands were purchased no one but himself had any authority to make any deals or negotiations as to these lands, and that at the time he purchased them for the company he had never heard or been informed that the lands had been fraudulently obtained from the government.

Counsel for the United States argue that the finding that the Coal Company was a bona fide purchaser should be reversed because the burden was on the defendants to prove it, and they have not done so. But the plaintiff proved it and thereby relieved the defendants of that burden. They contend that the company had constructive notice of Miskiel's alleged fraud because it knew before its purchase that the land was coal land, that opposite the notation of the patent on the abstract, under the word "remarks," the words "Cash Entry No. 8894, made at the Federal Land Office" appeared, and that this notation was notice to the counsel for the company that this coal land was procured under a non-coal form of entry. Conceding that in 1907 the land was known by the company to be valuable for coal, the notation on the abstract was neither sufficient to charge the company or its attorney with notice, or with a suspicion, that the land was procured under the homestead law, or that it was obtained by a fraud upon the govern-

ment in the face of the patent which had been issued and recorded more than two years before and which the government had never assailed. Even if the company had been notified that the land had been procured in 1902 and 1903 under the homestead law, that knowledge would not have imposed upon it any duty to hunt up the patentee, the conditions surrounding the land and the knowledge concerning its value for coal deposits in the years 1902 and 1903 when Miskiel bought it. The patent evidenced the adjudication of the Land Department in 1903 that the land was not then known to be valuable for coal. That decision was impervious to collateral attack. The legal presumption was that all the proceedings leading up to the patent were regular and valid, and that all who had dealt with the property had done so honestly and rightfully. No one is bound to assume and hunt for fraud and wrong in the acts of those who have dealt in the title to land he is buying, when that title is fair on its face, in order to secure himself the rights of a bona fide purchaser. United States v. Detroit Timber & Lbr. Co., 200 U. S. 321, 332, 26 Sup. Ct. 282, 50 L. Ed. 499; United States v. Clark, 200 U. S. 601, 609, 26 Sup. Ct. 340, 50 L. Ed. 613. There was persuasive evidence that the Coal Company purchased and paid $20,000 for this property in reliance upon the patent, without notice of any fraud in its procurement, and there was no substantial evidence to the contrary. The equity of the Coal Company is far superior to that of the United States, and the decree below must be affirmed. United States v. Detroit Timber & Lbr. Co., 131 Fed. 668, 674, 675, 677, 678, 67 C. C. A. 1, 6, 7, 8, 9, and the cases there cited.

It is so ordered.

HOUCK et ux. v. BANK OF BRINKLEY.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1917.)

No. 4540.

1. COURTS ⟸322(1) — FEDERAL COURTS — JURISDICTION — ALLEGATIONS OF PLEADINGS.

Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1916, § 991) provides that no District Court shall have cognizance of any suit on any promissory note or other chose in action in favor of any assignee or subsequent holder, if the instrument be payable to bearer, unless such suit might have been prosecuted in such court if no assignment had been made. A petition in an action by an Arkansas corporation against citizens of Missouri alleged that defendants made their note to the order of themselves, a copy of which note was attached, and showed that the note was payable at the office of a trust company at St. Louis, Mo., and that they afterwards indorsed it in blank and delivered it to such trust company, which afterwards and before maturity sold it in the usual course of business to plaintiff. *Held*, that as the trust company was apparently a Missouri corporation or association, and as there was no averment that it could have brought suit in the federal court, the petition failed to show that the federal court had jurisdiction, since, under Rev. St. Mo. 1909, §§ 10001, 10002, 10004, the note was not an obligation of the makers until delivered to the trust company, and was then payable to bearer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876, 877, 879.]

2. COURTS ⟸280—FEDERAL COURT—JURISDICTION—DISMISSAL ON COURT'S OWN MOTION.

As the petition failed to show that the federal court had jurisdiction, the suit should have been dismissed by the District Court upon its own motion for want of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818.]

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

Action by the Bank of Brinkley against Louis Houck and wife. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

Oscar A. Knehans, of Cape Girardeau, Mo., for plaintiffs in error.

Allen Laws Oliver, of Cape Girardeau, Mo. (Robert Burett Oliver and Robert Burett Oliver, Jr., both of Cape Girardeau, Mo., on the brief), for defendant in error.

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

REED, District Judge. This action was commenced originally in the United States District Court for the Eastern District of Missouri by the Bank of Brinkley, an Arkansas corporation, which will be called the plaintiff, against the defendants Louis Houck and Mary H. G. Houck, his wife, citizens and residents of Missouri, upon a promissory note which reads in this way:

"$5,000.00. St. Louis, Missouri, May 1st, 1914.

"Six months after date, for value received, I, we, or either of us, promise to pay to the order of ourselves five thousand and no/100 dollars at the office of Bankers' Trust Company of St. Louis, at St. Louis, Mo., with interest from date at the rate of 8 per cent. per annum until paid. Interest payable annually. Defaulting interest to bear same rate of interest as principal. The makers, sureties, indorsers and guarantors of this note hereby severally waive demand, presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit against any party thereto, and consent that the time of payment may be extended without notice thereof, and further agree that, in case payment of this note shall not be made at maturity and the same is placed in the hands of an attorney for collection, they will pay the costs of collecting this note, including an attorney's fee of 10 per cent. of the principal and interest thereof remaining unpaid.

"Louis Houck.
"Mary H. G. Houck."

Indorsed on the back of the note is the following: "Louis Houck. M. H. G. Houck."

The note was not paid at maturity, and shortly thereafter the bank had some negotiations with the makers looking to the payment of a part thereof, and an extension of time upon the balance, which were not consummated. The note was then placed in the hands of an attorney for collection, who on March 9, 1915, commenced suit against the defendants to recover the amount of such note and an attorney's fee of 10 per cent. on the amount thereof. One of the plaintiff's attorneys testified upon the trial that:

"The note herein sued upon was sent to us for collection. Before filing suit, we took up the matter of collecting this note with Mr. Houck, one of the defendants, and requested that it be paid. Mr. Houck did not pay it, and he was notified that, unless it was paid, suit would be instituted. Mr. Houck offered to make arrangements to pay a part of the note, and offered to secure the balance, but would not pay the 10 per cent. attorney fee. He never made a legal tender of the money for the principal sum of this note, or any part of it, nor for the principal sum and the attorney's commission of 10 per cent. for collection. The firm of Oliver & Oliver had a conference with Mr. Giboney Houck, son of the defendants, in our office, before the institution of this suit. I finally concluded that the defendants would not pay the note, and this suit was instituted. The note was not paid at maturity, and the law firm of Oliver & Oliver had considerable correspondence with the defendants with reference to the said note. In all we spent several days' time in attempting to collect this note before bringing suit."

This is all of the testimony in the record. Thereupon, a jury having been waived, the court entered judgment in favor of the Bank of Brinkley against defendants for the principal sum of the note and interest, amounting to $5,347.77, and for 10 per cent. attorney's fees, amounting to $534.77, making a total of $5,882.84, to which judgment the defendants excepted, and prosecute this writ of error to reverse the same.

The only controversy between the parties is as to the attorney's fee. The defendants maintain that the stipulation in the note to pay 10 per cent. attorney's fee is in the nature of a penalty, only to cover the reasonable cost of an attorney's fee for the collection of the note, of which cost there is no evidence, and therefore the judgment for the attorney's fee is unauthorized, and cite Mechanics' American National Bank v. Coleman, 204 Fed. 24, 122 C. C. A. 338, in support of their contention. In that case this court held, upon full consideration and citation of authorities, that under the Missouri statute:

"A provision in a note, that if it is not paid when due, and is placed in the hands of an attorney for collection, the maker will pay the holder 10 per cent. additional on the principal and interest due as an attorney's fee, is in the nature of a penalty and will not be enforced, except to provide indemnity to the holder," and "in general, no allowance will be made for attorney's fees in an action on a note" containing a provision for such fees, "in the absence of evidence as to the value of the attorney's services."

Whether or not that rule should be followed in this case we need not now determine, for, aside from this, there is an insuperable obstacle to sustaining this judgment. The action, as before stated, was originally brought in the court below by the Bank of Brinkley, an Arkansas banking corporation, upon this note. That note is one payable to bearer upon its indorsement by the payees as makers, and negotiated by them, and the title thereto passed by delivery to the Bank of Brinkley as shown at page 5 of the record.

The Negotiable Instruments Law is in force in Missouri. Revised Statutes of Missouri 1909, c. 86. Section 10001 provides:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

Section 10002:

"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

Section 10004:

"An indorsement may be either special or in blank; and may also be either restrictive or qualified, or conditional. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

The note in suit is made by the defendants Houck to the order of themselves. Upon the back thereof they have written their names, which is an indorsement in blank, and is payable to bearer upon its negotiation by the makers.

Section 24 of the Judicial Code, defining the original jurisdiction of the District Courts of the United States, provides:

"The District Courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * (b) is between citizens of different states. * * * No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. * * *"

The note in suit would therefore be payable to bearer under the commercial law, or the law merchant, and is so payable under the Negotiable Instrument Law in force in Missouri.

The plaintiff alleges in the petition that by their promissory note, dated St. Louis, Mo., May 1, 1914, defendants promised and agreed for value received, to pay themselves, six months after the date of said note the sum of $5,000, a copy of which note is attached and marked Exhibit A. Plaintiff further states that afterwards defendants Louis Houck and Mary H. G. Houck severally indorsed said note in blank, by signing their names on the back thereof, and delivered the same to the Bankers' Trust Company, which afterwards and before maturity sold and delivered the same for value and in the usual course of business to plaintiff.

In Kolze v. Hoadley, 200 U. S. 76, 82, 26 Sup. Ct. 220, 222, 50 L. Ed. 377, the Supreme Court, in construing this clause of section 24 of the Judicial Code above set out, said:

"The decisions of this court have settled the following propositions: (1) That a suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. * * * (3) That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made."

[1, 2] The note in question is payable to the order of the makers thereof, and is not a liability of such makers until it is negotiated or transferred by them. The petition alleges that it was first indorsed by the defendants in blank, and delivered to the Bankers' Trust Company, which afterwards and before maturity sold and delivered the same in the usual course of business to the plaintiff. The instrument in suit is made payable upon its face at the office of the Bankers' Trust Company at St. Louis, Mo. From this it appears to be a corporation or association of Missouri, which could not maintain an action thereon in the federal court against the defendants as makers who are citizens of Missouri. The instrument, therefore, only became an obligation of the makers when it was indorsed by them and put in circulation, and in this manner, under the allegations of the petition, came to the plaintiff, Bank of Brinkley, and as there is no averment in the petition that the Bankers' Trust Company of St. Louis could have brought suit thereon in the federal court, the petition fails to show that the United States District Court for the Eastern District of Missouri had any jurisdiction of this controversy. It follows that the suit should have been dismissed by the District Court upon its own motion for want of jurisdiction. Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; Morris v. Gilmer, 129 U. S. 315, 325, 9 Sup. Ct. 289, 32 L. Ed. 690; Crehore v. Ohio, etc., Ry. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Swift v. Hoover, 242 U. S. 107, 37 Sup. Ct. 57, 61 L. Ed. 175.

In New Orleans v. Quinlan, 173 U. S. 191, 193, 19 Sup. Ct. 329, 43 L. Ed. 664, the certificates sued upon were made by the defendant city, a corporation, and the Circuit Court therefore had jurisdiction because of that fact.

The judgment of the District Court is reversed, at the cost of the defendant in error, Bank of Brinkley, and the cause remanded to that court, with directions to dismiss the suit without prejudice and at plaintiff's costs of that court, for want of jurisdiction. Ordered accordingly.

NORWOOD v. WATSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1917.)

No. 1498.

BANKRUPTCY ⟸400(3)—EXEMPTIONS—SALE OF PROPERTY.

Under Const. S. C. 1868, art. 2, § 32, as amended (see 17 St. at Large S. C. p. 320), and Civ. Code S. C. 1912, § 3711, providing for a homestead exemption not exceeding $1,000 in value, and Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1916, § 9654), providing that the trustee shall be vested with the title of the bankrupt, except to property which is exempt, where bankrupts claimed their homestead exemptions in their schedules, the trustee had no title to such exemption, and a sale by him under an order authorizing the sale of all right, title, and interest of the bankrupts' estate in certain land did not disturb the homesteads therein, but passed to the purchaser only such interest in the property as the trustee had, and the bankrupts were not, therefore, entitled to

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

the allowance of their homestead exemptions from the proceeds of the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 673, 675.]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy; Henry A. Middleton Smith, Judge.

In the matter of J. A. Watson and another, bankrupts. On petition by S. W. Norwood, trustee, to superintend and revise an order in favor of the bankrupts. Reversed.

M. C. Woods, of Marion, S. C., for petitioner.

H. S. McCandlish, of Marion, S. C. (L. D. Lide, of Marion, S. C., on the brief), for respondents.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge. This is a petition to superintend and revise in matter of law proceedings of the District Court of the United States for the Eastern District of South Carolina in the case of S. W. Norwood, trustee in bankruptcy of the estates of J. A. Watson and J. C. Watson, trading as J. C. Watson & Son, petitioner, against J. A. and J. C. Watson, respondents.

It appears that respondents were adjudged bankrupts by voluntary petition on the 1st day of March, 1915. It further appears that a trustee was duly elected; that the greater portion of the estate of the bankrupts consisted of lands, and these lands were sold by the trustee on the first Monday in February, 1916, under order of the referee, which provided that the trustee should sell "all the right, title, and interest of the bankrupts' estate" in the lands in question. It was further stipulated in the order that "it being the intention of this order only to sell such interest in said lands as the bankrupts' estate have." It further appears that in pursuance of the Bankruptcy Act the respondents claim their homestead exemption of $1,000 in lands as provided by the laws of South Carolina in their schedule filed with the petition, that each one is the head of a family, and that the titles for the lands stood in the name of one partner or the other as an individual. It also appears that the trustee failed to set aside any homestead; i. e., by the allotment of a certain portion of the land in accordance with the provisions of the state law. He advertised and sold "all the right, title, and interest of the bankrupts' estate," while at the time of the filing of the petition it appears, as we have said, that the bankrupts claimed their homestead exemptions. It does not appear that they did or said anything further about the matter until after the sale of the property, at which time they claimed their homesteads out of the proceeds of such sale. The referee sustained their claim, and on a petition to review the District Judge sustained the referee by affirming the report that he had made.

It is insisted by counsel for trustee, on behalf of the creditors, that the homestead exemptions of respondents were not in any wise dis-

turbed by the sale of the property, which only purported to sell "all the right, title, and interest of the bankrupts' estate," and that this order limited the power of the trustee in that it only authorized him to sell the title and interest of the bankrupts' estate. In the case of Calder v. Maxwell, 99 S. C. 115, 82 S. E. 997, the Supreme Court of that state held that:

"An officer making a judicial sale has no power beyond that conferred by the order of the court, which must be strictly followed."

Of course, if the trustee had offered to sell the right, title, and interests of the bankrupts, then, in that event, they would have been entitled to have had allotted to them the value of the homestead exemptions arising from the proceeds of such sale. In view of the facts of this case it is insisted that inasmuch as the homestead exemptions were not allotted in advance, and could not have been allotted because the sale of the same was not contemplated by the trustee, that the title to the proceeds of such sale was vested in the creditors, and that the court below erred in decreeing that respondents were entitled to the same.

It is further insisted that in no event could the trustee have sold the homestead exemptions of respondents because of the limitations contained in section 70 (a) of the Bankruptcy Act, which are in the following language:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment or qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

Undoubtedly that portion of the property of the bankrupts contemplated by the homestead provision of the South Carolina statute is exempt from sale. This is expressly made so by the provisions of the Constitution of South Carolina. Article 2, section 32, of the Constitution of 1868, as amended (see 17 St. at Large S. C. p. 320), is in the following language:

"The General Assembly shall enact such laws as will exempt from attachment and sale under any mesne or final process issued from any court to the head of any family residing in this state a homestead in lands, whether held in fee or any lesser estate, not to exceed in value one thousand dollars, with the yearly products thereof; and to every head of a family residing in this state, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars. * * *"

The provisions for enforcing the foregoing are contained in section 3711 of the Code of South Carolina; that portion of which is material being as follows:

"A homestead in lands, whether held in fee or any lesser estate, to the value of one thousand dollars, or so much thereof as the property is worth if its value is less than one thousand dollars, with the yearly products thereof, shall be exempt to the head of every family residing in this state from attachment, levy or sale, in mesne or final process issued from any court, upon any judgment obtained upon any right of action arising subsequent to the ratification of the Constitution of the state of South Carolina in 1868. And it shall be the duty of the sheriff or other officer before selling the real estate of any head of a family resident in this state to cause a homestead as above stated to be set off to said person. * * *"

This question was passed upon by the Circuit Court of Appeals for Sixth Circuit in the case of In re Muhlhauser et al., 121 Fed. 669, 57 C. C. A. 423; the first syllabus in that case being as follows:

"Unless there is some special direction in an order for the sale of real estate of a bankrupt, the trustee sells only the interest of the bankrupt therein, and one claiming an interest adverse to the bankrupt, and who is a stranger to the proceedings, is not affected by the sale, and has no interest in the proceeds; nor has the court of bankruptcy, after the property has been sold and conveyed, jurisdiction to adjudicate the rights of such claimant therein."

In the case of Gibbes v. Hunter, 99 S. C. 410, 83 S. E. 606, the Supreme Court of that state in discussing this phase of the question, among other things, said:

"If a claimant had a title in land not exceeding $1,000 in value, was a resident of the state, and the head of a family (and such was Wilson Gibbs' plight in 1898), then a judgment against him would have no lien on that title. The Constitution and statutes so declare. The right of exemption would be a hollow thing if the sheriff could alienate the title before it could be settled down on a particular parcel of ground or the proceeds of it. By parity of reasoning a highwayman might justify his act in taking a traveler, before the traveler could draw in self-defense, and because the traveler had not drawn his weapon. Gibbs' title was not so segregated as to be marked 'exempted'; but it was so immune from liability as to stay the sheriff's hand from meddling with it. The sheriff, however, in June, 1898, did undertake to sell the undivided title in remainder against the needless protest of Gibbs, the claimant; it was purchased by the judgment creditor, the Bank of Columbia, for $50; and the sheriff executed to the bank a deed therefor. The circuit court rightly held that such sale was unlawful and did not operate to alienate the title of Gibbs."

By virtue of the statute of South Carolina the bankrupts were entitled to an exemption, and therefore, in the absence of a waiver on their part, the trustee had no title to such exemption, and, of course, could not convey property which he was not authorized in the first instance to sell. The order to sell restricted him to "all the right, title, and interest of the bankrupts' estate," and it was so stated in the advertisement. Such being the case, it necessarily follows that the purchaser acquired only such interest in this property as the trustee had title thereto. The homesteads remain undisturbed, and the title of the bankrupts as such is as perfect as it would have been, had there been no sale of the property.

For the reasons stated, the decree of the lower court is reversed.

TOXAWAY TANNING CO. v. SULZBERGER & SONS CO. et al. HANS REES' SONS v. SAME. J. H. LADEW CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. June 6, 1917.)

Nos. 249–251.

1. SHIPPING ⊂⊃143—INJURY TO GOODS—PARTIES LIABLE.

Where the charterer of a steamship, not needing the whole of the space, arranged with a steamship line to operate the steamer as one of its own line and get freight for the open spaces, the steamship line was the charterer's general agent, and its negligence in unloading green salted

hides on a pier on which dry aniline powder had been spilled was imputable to the charterer, and made the charterer liable to the shippers for the resulting damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 489.]

2. INDEMNITY ⟸13(1)—LIABILITY OF ONE PRIMARILY LIABLE.
The steamship line was liable to indemnify the charterer.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29, 30, 33, 34.]

3. SHIPPING ⟸126—INJURY TO GOODS—UNLOADING ON PIER.
Where a steamship line ought to have appreciated the danger of unloading green salted hides on a pier on which dry aniline powder had been spilled, and a proper and liberal use of dunnage would have prevented or greatly reduced the damage, they were at fault for not taking these precautions.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 461–464.]

4. WHARVES ⟸20(1)—INJURIES TO GOODS—DUTIES OF WHARFINGER.
A wharfinger, which, in addition to payment by the day for the time vessels were at its pier and until the cargo was removed, was paid $25 for cleaning up the pier and removing the sweepings, was not required to resurface its pier with asphalt, in order to make the surface perfectly free of aniline powder, which had been spilled thereon, and which could not otherwise be entirely removed.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 35.]

5. WHARVES ⟸20(1)—INJURIES TO GOODS—DUTIES OF WHARFINGER.
Where the wharfinger's representatives had nothing to do with the unloading of green salted hides on such pier, did not know that there were any such hides on board the steamer from which they were unloaded, and were not present, it was not lacking in ordinary care and diligence, and was not liable for damages to the hides from such aniline powder, as it could have done nothing more than to suggest the use of dunnage.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 35.]

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

Three libels, by the Toxaway Tanning Company, Hans Rees' Sons, and the J. H. Ladew Company against Sulzberger & Sons Company and others. From decrees for libelants, defendants Barber & Co., Incorporated, and another appeal. Modified and affirmed.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, of New York City, of counsel), for appellant Barber & Co., Inc.

Haight, Sandford & Smith, of New York City (Edward Sanford and John W. Griffin, both of New York City, of counsel), for appellant Hamburg-American Line.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellees Toxaway Tanning Co. and J. H. Ladew Co.

Cravath & Henderson, of New York City (Hoyt A. Moore and Stuart McNamara, both of New York City, of counsel), for appellee Sulzberger & Sons Co.

L. H. Porter, of New York City, for appellee Hans Rees' Sons.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Sulzberger & Sons Company, a corporation of the state of New York, exclusively engaged in the packing business, found itself in need of refrigerating space on a steamer to bring a large quantity of fresh beef from Buenos Aires to New York. To accomplish this it took a refrigerating steamer named the Suriname on time charter for a period of 60 days. As the company needed only the refrigerating space northbound, and had no cargo southbound and knew nothing about the shipping business, it arranged with Barber & Co. to get freight both ways for the open spaces and to operate the steamer as if it were one of their own line. This Barber & Co. did, Sulzberger & Sons Company taking absolutely no part in the transaction.

Barber & Co. had a standing arrangement with the Hamburg-American Line for berths for its steamers on the south side of that company's pier at the foot of Thirty-Third street, Brooklyn. The charge was $75 a day while the vessel was at the pier, $60 a day from the time she left until the cargo was removed, and $25 for cleaning up the pier and removing the sweepings before discharge began.

There are four berths on the south side of the pier, numbered 1 to 4, beginning at the river end. Between March 24 and 27, 1915, the steamer George E. Warren, also operated by Barber & Co., discharged a quantity of aniline dye stuffs in kegs, much of which, in the form of a powder, got scattered over the pier, owing to the insufficiency of the kegs. The Suriname arrived April 1st at 6:30 p. m. and left April 5th at 8:45 a. m., occupying berth No. 3, just west of the berth at which the Warren had laid.

The Hamburg-American Line flushed the surface of the pier at these berths with hose and swept it with brooms before the Suriname began to discharge, which both the Hamburg-American Line and Barber & Co. thought a sufficient washing down to clean the pier. The steamer laid bow in to the eastward, and three large consignments of green salted hides, which are more or less wet, were discharged from hold No. 2, beginning the night of April 2d, which was Good Friday, and ending at 7 a. m. Saturday, April 3d. The representatives of the Hamburg-American Line were not at the pier on Friday, and did not return until after the hides had been landed. They were laid in piles four feet high, flesh side down, on the asphalt surface of the pier, without any dunnage whatever. It was afterwards discovered that many of them were badly damaged by coming in contact with the dry aniline powder. The three shippers filed libels to recover for this damage, the respondents being Sulzberger & Sons Company, the Hamburg-American Line, and Barber & Co.

The District Judge found that Sulzberger & Sons Company was a common carrier, and liable at least as warehousemen to the shippers for the damage in question; that the Hamburg-American Line was liable as wharfinger for lack of ordinary care in not cleaning away all the aniline powder and that Barber & Co. were liable to Sulzberger & Company for lack of ordinary care in discharging the hides on the pier before all the aniline powder had been removed. He found that, although the Hamburg-American Line and Barber & Co. believed that the pier was entirely clean, they ought by the exercise of due diligence

to have known that the cleaning given was insufficient to remove all the aniline powder and that wet goods like the green salted hides coming in contact with it would be damaged. Accordingly he entered decrees in favor of the libelants, one-half to be paid in the first instance by the Hamburg-American Line and Barber & Co. respectively, any deficiency to be paid by Sulzberger & Sons Company.

[1-3] We agree with him that both the Hamburg-American Line and Barber & Co. ought to have appreciated the danger to which the hides were exposed, and also that the negligence of Barber & Co., the general agents of Sulzberger & Sons Company, is imputable to the latter. Accordingly the Sulzberger & Sons Company was rightly held liable to the shippers, and Barber & Co. liable to indemnify the company. He was furthermore of opinion that the question of dunnage was immaterial, but we think that a proper and liberal use of dunnage by Barber & Co. would have prevented or greatly reduced the damage. They were at fault for not taking this precaution.

[4, 5] So far as the Hamburg-American Line is concerned, the evidence is that the only way it could have made the surface perfectly free of the aniline powder would have been by resurfacing it with asphalt. We think such a service could not have been intended to be covered by a payment of $25 for cleaning the pier and removing the sweepings, and that the Hamburg-American Line performed its contract by the cleaning that it did give the pier. Therefore, if it is to be held, it must be for the breach of its implied obligation as wharfinger to supply a pier proper for the cargo. No other goods were damaged, and there is nothing to show that the representatives of the Hamburg-American Line knew that there were any green salted hides on board the Suriname, and none of them was present when the hides were being discharged on the night of April 2d-3d. They had nothing whatever to do with the discharge, which was entirely in the hands of Barber & Co., and, if they had been present, could have done nothing more than suggest the use of dunnage. Under these circumstances we do not think the Line was lacking in ordinary care and diligence.

The libel should have been dismissed as to it, and, so modified, the decree is affirmed, with interest, and costs of this court to the Hamburg-American Line against Barber & Co., Inc., with costs to Sulzberger & Sons Company against Barber & Co., Inc., and to the Toxaway Tanning Company against Barber & Co., Inc., and Sulzberger & Sons Company, to be paid primarily by Barber & Co., Inc.

HALE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 10, 1917.)

No. 4780.

1. CRIMINAL LAW ⊜901—ERROR—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

A contention that the evidence was insufficient to support the conviction cannot be disposed of on writ of error, where, after motion for directed verdict at the close of the evidence, the case was reopened, and

defendant allowed to introduce additional testimony, and no subsequent motion was made.

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

2. CRIMINAL LAW ⟸1159(2)—APPEAL—REVIEW—EVIDENCE.
Where there was substantial evidence to sustain the conviction, the appellate court cannot pass upon its weight and sufficiency to sustain the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

3. CRIMINAL LAW ⟸586, 1151—CONTINUANCE—APPLICATION.
An application for a continuance is addressed to the sound discretion of the trial court, whose determination will not be disturbed, unless clearly erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045–3049.]

4. CRIMINAL LAW ⟸596(3)—CONTINUANCE—DENIAL.
Accused and another were jointly indicted for the offense of having possession of counterfeit national bank notes, with knowledge of their spurious character and with intent to pass the same. When the case came on for trial, the government dismissed as to accused's codefendant. Thereafter a jury was impaneled, the indictment read, and defendant's plea stated to the jury, when the cause was adjourned until the following day. On the following day, accused applied for a continuance to investigate the character of his codefendant, who testified for the prosecution. *Held*, that there was no abuse of discretion in denying the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330.]

5. CRIMINAL LAW ⟸596(3)—TRIAL—CONTINUANCE.
The granting of a continuance, to enable accused to investigate the credibility of a witness, rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330.]

6. CRIMINAL LAW ⟸596(3)—TRIAL—CONTINUANCE.
Where accused's counsel frankly admitted that he was by no means sure of discovering anything against the credibility of a government witness, the denial of accused's application for a continuance, to investigate such witness' credibility, was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330.]

7. CRIMINAL LAW ⟸1119(4)—APPEAL—TRANSCRIPT.
The impropriety of remarks made by the district attorney cannot be reviewed on appeal, where they were not preserved in the transcript.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2929.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Earl Hale was convicted of having a counterfeit national bank note in possession, with knowledge of its spurious character and with intent to pass the same, and he brings error. Affirmed.

Victor A. Sniggs, of Oklahoma City, Okl. (McQuire & Devereux, of Tulsa, Okl., and Moman Pruiett, of Oklahoma City, Okl., on the brief), for plaintiff in error.

Herbert M. Peck, Asst. U. S. Atty., of Oklahoma City, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

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

STONE, Circuit Judge. Error from conviction for having counterfeit national bank note in possession, with knowledge of its spurious character and with intent to pass the same.

The indictment was drawn against this plaintiff in error and one John Doe (Robert E. Winters). It contained other counts not involved in this writ. The assignments of error may be grouped as follows: Insufficiency of evidence to sustain the verdict and judgment; refusal to grant continuance when, at the opening of the case, there was dismissal as to the codefendant, Winters; case not delayed overnight to permit investigation of credibility of witness Hammond, introduced in rebuttal by the government; improper conduct of counsel in stating before jury during the testimony that he would show that the defendant, when arrested, had in his possession a leaden dollar, and in stating during the argument that the assessment of the penalty was for the judge.

[1, 2] The error mainly insisted upon in brief and argument was the insufficiency of the evidence. This insistence cannot prevail for two reasons: First, it cannot be considered by the court, because not properly raised by a motion for directed verdict after all the evidence. It is true that such a motion was made at the close of the evidence, just before argument; but during the argument the case was reopened, and plaintiff in error permitted to introduce the testimony of a new witness. Thereafter the motion was not renewed. Simpson v. U. S., 184 Fed. 817, 107 C. C. A. 89 (8th Circuit). Second, it is not the province of this court to pass upon the weight or sufficiency of the evidence, but solely upon the presence of any substantial evidence to sustain the verdict. A careful reading of the entire evidence shows substantial evidence upon which to base the verdict. Therefore, irrespective of the proper preservation of this point, it could not be allowed.

[3, 4] Objection is made that the court should have granted a continuance when the government dismissed as to the other defendant, Winters, who afterwards testified as a witness for the United States. It is said that plaintiff in error might have obtained testimony to affect his credibility or might have ascertained a defense to his testimony. This case came on for trial May 2d. At once the government dismissed as to John Doe (R. E. Winters). Thereafter a jury was impaneled, the indictment read, and defendant's plea stated to the jury, counsel for each side stated his case to the jury, and, the hour of adjournment having arrived, the court recessed until the next day. Upon resumption of the case next day, the application for continuance was presented and denied. Waiving any question of the delay in presenting this application, there was no error in refusing it. Applications for continuances address themselves to the sound judicial discretion of the trial court. The appellate court can never have mirrored to it the exact situation in the trial court. It is therefore cautious in substituting its own discretion, and will not do so unless it appears clearly that the trial court has erred. No such abuse of discretion is found here.

[5, 6] Error is claimed because in rebuttal the government placed on the stand a witness, Hammond, and the court refused to hold the

case until the following morning to permit investigation of this witness. Counsel for plaintiff in error frankly stated:

"I do think that your honor ought to give me until to-morrow morning. I may not find a thing on earth that can do this court or jury any good."

At the evening session, during the argument by the government, the case was reopened to enable plaintiff in error to put on a witness in an endeavor to impeach Hammond. What has just been said regarding the discretion of the trial court applies to this objection. We find no error in refusing the delay.

[7] Error is urged in the conduct of counsel for the government in statements made during the testimony that possession of a leaden dollar by plaintiff in error at the time of his arrest would be shown. During the examination by the government of the witness Mulkey, a deputy United States marshal who aided in the arrest, occurred the following:

"Q. What did you find in that search of the defendant? A. Oh, I don't remember what all I did find. I found some money—I found a piece of money on him that I have in my possession.

"Defendant objects: This is six months after the alleged offense in this case; irrelevant, incompetent, immaterial, too remote, and has no bearing on this transaction.

"By the Court: The question will be stricken out, and given no attention by the jury, or any remarks made about it."

This is the entire content of the record. The last portion of the quoted ruling makes it evident that remarks were made by the district attorney regarding this matter. But no such remarks are preserved in the bill of exceptions. This court can act only upon the transcript brought here. This also applies to the suggested error concerning alleged prejudicial statements in course of argument, no part of which is preserved in the transcript.

The judgment is affirmed.

SMITH v. DOUGLAS COUNTY, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1917.)

No. 4786.

1. COURTS ⟸371(6)—FEDERAL COURTS—JURISDICTION.

A state statute, providing that the amount of any tax paid erroneously shall be refunded, entitles a taxpayer to maintain an action at law therefor in the federal courts, if the elements of federal jurisdiction, such as diverse citizenship, be present.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 976.]

2. TAXATION ⟸905(1)—INHERITANCE TAX—INJUNCTION—ADEQUATE REMEDY AT LAW.

Inheritance Tax Law Neb. § 10 (Rev. St. 1913, § 6631), under which a tax was assessed and levied, declares that, when the amount of the tax shall have been paid erroneously to the state treasurer, it shall be lawful for him, on satisfactory proof, to refund and pay to the executor, administrator, or trustee, or person who has paid such tax, the amount thereof, provided that all applications for repayment shall be made within two years after the date of payment. Plaintiff filed suit in federal

courts to enjoin collection of such taxes. *Held*, that as plaintiff had a complete and adequate remedy at law, which was available in the federal courts, equity would afford no relief.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1728, 1729.]

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Bill by George Warren Smith against the County of Douglas in the State of Nebraska and others. From the decree, plaintiff appeals. Reversed and remanded, with instructions to dismiss the bill.

Francis A. Brogan, of Omaha, Neb. (Anan Raymond, of Omaha, Neb., on the brief), for appellant.

George E. Bertrand and John H. Grossman, both of Omaha, Neb. (George A. Magney, of Omaha, Neb., on the brief), for appellees.

Before CARLAND and STONE, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. The appellant brought this action to restrain the collection of an inheritance tax assessed upon the property of one Francis Smith. The objection was made in the court below, and is renewed here, that the trial court had no jurisdiction of the controversy as a court of equity, for the reason that the appellant had a complete and adequate remedy at law.

Section 10 of the Inheritance Tax Law, under which the tax complained of was assessed and levied, reads as follows:

"When any amount of said tax shall have been paid erroneously to the state treasurer it shall be lawful for him, on satisfactory proof rendered to him by said county treasurer of said erroneous payments, to refund and pay to the executor, administrator or trustee, person or persons who have paid any such tax in error, the amount of such tax so paid, provided that all applications for the repayment of said tax shall be made within two years of the date of said payment." Rev. St. Neb. 1913, § 6631.

Section 6491 of the Revised Statutes of Nebraska, being section 203 of the Revenue Law, reads as follows:

"In every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, may proceed in the following manner, viz.:

"First. If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon. If such taxes are paid to the proper authority, other than the county treasurer, such persons so receiving them shall, within ten days thereafter, deliver such taxes, or such part thereof as are paid under protest, to the county treasurer, together with a copy of the receipts given for the same, and the county treasurer shall retain the money so paid under the protest until otherwise directed by order of the county board. Within thirty days after paying such taxes the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter, they shall inquire into the matter, and

if they shall find, either that the property upon which taxes were levied was not liable for taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county treasurer to refund the taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of the money in the same manner, as though it had not been paid under protest. Appeals may be taken from such decisions in the same manner and within the time as appeals are now taken from the action of the county board in allowance or disallowance of claims against the county; and if such an appeal be taken the county treasurer shall retain such taxes until the case is finally determined: Provided, he shall in all cases retain said money until the time for an appeal shall have elapsed. If an appeal from the decision of the county board be taken, and upon the final determination thereof their decision be affirmed, the treasurer shall at once carry the order of the board into effect; but if their decision be reversed, they shall issue a new order to the treasurer conforming to the decree of the court finally determining the case. In all cases where the treasurer shall refund such taxes he shall write opposite such taxes in the tax list the words, 'Erroneously taxed—refunded.'"

[1, 2] In Singer Sewing Machine Company v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, Mr. Justice Van Devanter in delivering the opinion of the court said:

"In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares (Rev. Stat. § 723 [Comp. St. 1916, § 1244]), and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte, and in other cases it is treated as waived, if not presented by the defendant in limine. Raynes v. Dumont, 130 U. S. 354, 395 [9 Sup. Ct. 486, 32 L. Ed. 934]; Allen v. Pullman's Palace Car Co., 139 U. S. 658 [11 Sup. Ct. 682, 35 L. Ed. 303]. There was no waiver here. The objection was made by the demurrer, and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. Boise Artesian Water Co. v. Boise City, 213 U. S. 276 [29 Sup. Ct. 426, 53 L. Ed. 796]."

It was decided in this same case that a statute of Colorado, which provided that any tax found to be erroneous or illegal should be refunded to the taxpayer, gave a right of action which could be enforced by an action at law in the Circuit Courts no less than in the state courts, if the elements of federal jurisdiction, such as diverse citizenship, were present. Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624; United States Mining Company v. Lawson, 134 Fed. 769, 67 C. C. A. 587.

Section 723 of the Revised Statutes is now section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. 1916, § 1244]), which reads as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In New York Guaranty Company v. Memphis Water Company, 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, the Supreme Court, in referring to the law just quoted, said: "This enactment certainly means something." The following cases also decide that statutes like those of Nebraska hereinbefore quoted provide an adequate remedy at law: Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452,

47 L. Ed. 651; Union Pacific Railroad Co. v. Commissioners of Weld County, 217 Fed. 540, 133 C. C. A. 487 (8th Cir.); A., T. & S. F. Ry. Co. v. Commissioners of Douglas County, 225 Fed. 978, 141 C. C. A. 100 (8th Cir.); Singer Sewing Machine Co. v. Benedict, 179 Fed. 628, 103 C. C. A. 186 (8th Cir.); Pittsburg Railway Co. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; McLaughlin v. St. Louis Southwestern Ry. Co., 232 Fed. 579, 146 C. C. A. 537 (8th Cir.).

We do not decide whether the general revenue law would apply to the case of appellant, as that question has not been fully argued; but section 10 of the Inheritance Tax Law certainly would apply, and under decisions which are binding upon us it affords an adequate remedy at law. We therefore are of the opinion that the decree rendered by the trial court should be reversed, and the case remanded, with instructions to dismiss the bill for reasons herein stated; and it is so ordered.

GRETSCH v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 28, 1917.)

No. 2240.

1. CRIMINAL LAW ⟸1159(2)—APPEAL—CONCLUSIVENESS OF VERDICT.
A verdict, finding one member of a bankrupt firm guilty of conspiring with the other member to conceal their assets, cannot be disturbed, when supported by submissible evidence.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

2. CRIMINAL LAW ⟸510—TESTIMONY OF ACCOMPLICE—NECESSITY OF CORROBORATION.
The uncorroborated testimony of an accomplice will sustain a conviction, if believed by the jury.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126.]

3. CRIMINAL LAW ⟸274—PLEA OF GUILTY—WITHDRAWAL.
Where B., jointly indicted with defendant, pleaded guilty, and on defendant's appeal the court pointed out that the judgment against B., as well as that against defendant, was a nullity for want of jurisdiction, and on defendant's subsequent trial under a new indictment objection was made to B.'s competency as a witness, on the ground that he was a convicted felon, it was not error for the court to allow him to withdraw his plea of guilty, and substitute a plea of not guilty, as this was merely a form, and was either superfluous or a proper amendment of the record.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633.]

4. CONSPIRACY ⟸27—CRIMINAL LAW ⟸113—OVERT ACT—JURISDICTION OF PROSECUTION.
The filing of a petition in bankruptcy was a sufficient overt act to support a conviction for conspiracy by the bankrupt to conceal his property from the trustee, and gave jurisdiction to the District Court for the district in which the petition was filed, though the concealment took place in a different district.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Criminal Law, Cent. Dig. §§ 190, 232.]

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Mark J. Gretsch was convicted of conspiracy, and he brings error. Affirmed.

S. G. Nissenson, of New York City, for plaintiff in error.

Charles F. Lynch, U. S. Atty., of Newark, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In September, 1914, the defendant below, Mark J. Gretsch, and his partner, A. Birnbaum, filed a voluntary petition in bankruptcy in the District Court of New Jersey. Soon afterward they were indicted for concealing property from their trustee, and Gretsch was convicted; Birnbaum entering a plea of guilty. Early in March, 1916, we were obliged to set aside the conviction (Gretsch v. U. S., 231 Fed. 57, 145 C. C. A. 245) because the concealment had not taken place in the district, and within a few weeks thereafter another indictment was found charging the same defendants with conspiring to conceal the same property. In October Gretsch was separately tried and convicted for conspiracy, but in December the District Court set the verdict aside. In the following January he was convicted again, and the present writ of error attacks the conduct of the second trial.

[1] It may be noted, therefore, that the plaintiff in error has already had three trials for practically the same offense, and has been convicted by three juries, so that he can hardly complain with success that the facts relating to his conduct have not been carefully considered. In this proceeding we are of course confined to the inquiry whether legal error was committed during the second trial of the conspiracy case; if the indictment was supported by submissible evidence, the verdict is beyond our power. Tapack v. U. S. (C. C. A. 3) 220 Fed. 448, 137 C. C. A. 39.

[2] 1. The first question is whether the record contains such evidence, and to this subject the plaintiff in error has devoted many pages of his brief. We shall not review the evidence: It has been examined, and we need only say that the testimony of Birnbaum alone was sufficient, even if it had been unsupported. If believed by a jury, the testimony of an accomplice will sustain a conviction although no corroboration may appear. Caminetti v. U. S., 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. ——; Knoell v. U. S. (C. C. A. 3) 239 Fed. 16, —— C. C. A. ——.

[3] 2. Complaint is also made that Birnbaum should not have been allowed to testify because he was "a convicted felon"; the objection relying on the fact that, when the present trial began, his plea of guilty to the indictment for concealing was still on the record. Assuming, but not deciding, that the plea would have disqualified him, if nothing further had been done, it remains to be said that before he was allowed to testify the court permitted him to substitute a plea of not guilty. In this course we see no error. The plea of guilty was addressed to the indictment for concealing (considered by this court in the

case referred to—Gretsch v. U. S., 231 Fed. 57, 60, 145 C. C. A. 245), and in disposing of that indictment, we said:

"While Birnbaum pleaded guilty, and Gretsch upon trial was found guilty, of the crime charged, the constitutional right of each was alike invaded by indictment in a district in which the crime was not committed. Although the judgment entered upon Birnbaum's plea of guilty is not before us, we venture to suggest to the district court that a suspension of Birnbaum's sentence and a disposition of the indictment against him, in harmony with the views expressed in this opinion, would tend to uniformity in the administration of justice."

It was in complying with this suggestion that the court allowed the plea of guilty to be withdrawn, and we see no impropriety in so doing. As we decided in the former case, the District Court had no jurisdiction of the offense there charged, and in effect the whole proceeding was without authority. Permitting the plea to be withdrawn was merely a form, and was either superfluous or a proper amendment of the record.

3. Another matter complained of is the alleged unfairness of the District Court in the conduct of the trial, and to this we need only reply that we discover nothing that calls for reversal. Undoubtedly the notes of trial show occasional friction between the court and the defendant's counsel, but we are unable to say that the defendant was prejudiced thereby. Some allowance must be made both for court and counsel under the strain of a long and earnest controversy, and we are satisfied that on the whole the rights of the defendant were carefully and impartially protected, and that the District Judge did not go too far in what he said or did.

[4] 4. It is also contended that the court erred in receiving the petition in bankruptcy as sufficient proof of an overt act committed in New Jersey. No authority is cited to support this position, and in principle no reason appears for excluding the evidence. The offense charged was conspiring to conceal property from a trustee in bankruptcy, and this necessarily implied that a bankruptcy proceeding was contemplated as part of the scheme. In this proceeding Gretsch took part, and the filing of the petition was an indispensable step toward making the conspiracy effective. If no petition had been filed, no trustee could have been appointed, and therefore the filing of the petition was an overt act in furtherance of the crime. A proceeding lawful in itself when considered separately can become a step in carrying out a plan that is an unlawful conspiracy when taken as a whole, and in such a connection we see no reason why the proceeding should not be regarded as a part of the illegal scheme. As the act in question was done in New Jersey, this was sufficient to give the district court jurisdiction of the present indictment.

Some other objections are argued in the two briefs of the plaintiff in error, but none of them seems to require particular attention. No reversible error appears in the record, and the judgment is therefore affirmed.

DICKINSON et al. v. SCRUGGS.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2973.

1. TRIAL ⊂⊃178—MOTION FOR DIRECTED VERDICT—EVIDENCE.
On a motion to direct a verdict, the testimony must be viewed in the aspect most favorable to the party against whom the direction is asked.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403.]

2. CARRIERS ⊂⊃283(3)—ASSAULT BY CARRIER'S EMPLOYÉ—DEFENSES.
If plaintiff consented to a carrier's employé ravishing her because of fear, there was not only an actionable wrong, but an actual rape.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1123, 1124.]

3. CARRIERS ⊂⊃320(4)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
In an action against a railroad company, whose porter was claimed to have ravished plaintiff, testimony that plaintiff told the witness that the porter agreed to give her $10 and her breakfast if she would submit to him, that he gave her neither, and that she would make the company pay for it, made a question for the jury as to whether plaintiff yielded voluntarily to the porter's advances.

4. TRIAL ⊂⊃178—MOTION FOR DIRECTED VERDICT—EVIDENCE.
On a motion to direct a verdict for plaintiff, the controlling question was not whether the testimony as a whole could be reconciled with her claim, but whether it was inconsistent with any other conclusion than that claimed by her.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403.]

5. TRIAL ⊂⊃140(1)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.
Questions of credibility of the witnesses are peculiarly for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334.]

6. EVIDENCE ⊂⊃87—FAILURE TO CALL WITNESS—CONCLUSIVENESS.
While, in an action against a carrier for an assault by one of its employés, its failure to call such employé as a witness supported an inference that, if called, he would have testified against defendant, it did not amount to a legally conclusive confession thereof by defendant.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109.]

7. APPEAL AND ERROR ⊂⊃856(3)—GROUNDS OF DECISION—SUSTAINING JUDGMENT ON DIFFERENT GROUNDS.
In an action against a railroad company, whose porter was claimed to have ravished plaintiff, where the court directed a verdict for plaintiff, and submitted the question of damages on the theory that plaintiff was actually ravished, the direction of the verdict could not be upheld on the theory that the porter's improper advances were enough to create liability, as damages were presumably assessed for an actual rape.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3417.]

8. CARRIERS ⊂⊃283(4)—ACTS OF EMPLOYÉS—INSULTING LANGUAGE.
Lascivious proposals of a railway porter to a female passenger, if later voluntarily accepted, will not create liability on the part of the railroad.

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

Action by Cora Scruggs against Jacob M. Dickinson and others, receivers of the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

Wright, Miles, Waring & Walker, of Memphis, Tenn., for plaintiffs in error.

Anderson & Crabtree, of Memphis Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error (plaintiff below) sued to recover damages for an alleged assault upon her while a passenger on defendant's railroad train. Her testimony, in substance sufficient for purposes of this opinion, is this:

The train upon which plaintiff was a passenger from Memphis, Tenn., to Oklahoma City, Okl., left Memphis about midnight. At several times during the night, when she was the only passenger in the women's compartment of the colored coach, the porter made indecent proposals to her, offering her money and attempting familiarity with her person. His advances were repelled. On the next morning, just before reaching Booneville, while plaintiff was about to leave the lavatory (she being then the sole passenger in the car), the porter pushed her back into the lavatory, and, in spite of her active resistance, succeeded in forcibly ravishing her. Her back was badly injured. When the train reached Booneville, the porter in question left the train. Plaintiff complained to the successor porter of the treatment to which she had been subjected. About two weeks later, on the return trip to Memphis, the porter who had made the assault came on the car at Booneville, but, seeing plaintiff, immediately backed out. To the porter on this run to Memphis plaintiff made complaint of her treatment on the previous trip.

Neither the porter who is alleged to have made the assault nor the porter who succeeded him at Booneville were produced as witnesses. The porter on the return trip from Booneville to Memphis was produced by defendants. The substantial defense, so far as it went, seems to have been that the plaintiff yielded for a consideration. At the conclusion of the testimony, the trial judge, regarding plaintiff's testimony essentially uncontradicted, directed verdict in her favor, leaving to the jury the question of assessment of damages. There was verdict for $1,800, on which judgment was rendered.

The sole question argued relates to the propriety of the direction of verdict, this propriety being challenged upon two grounds: First, that plaintiff's testimony is too improbable and self-contradictory to be accepted; and, second, that her testimony is otherwise contradicted in material respects.

We are not impressed with the first of these objections. Were there nothing in the case but plaintiff's testimony, we should not disturb the direction of verdict. Her testimony is not, in our opinion, inherently improbable, and not only would it, standing alone, amply sustain the verdict, but the same is true of the testimony in the case taken together. The trial judge, as indicated by his opinion on motion for new trial, apparently, and we assume properly, believed plaintiff's testimony. The assignment that the verdict is excessive in amount is without merit.

[1] But the question whether there was other testimony tending to contradict plaintiff's testimony is a more serious one. This question must be considered in the light of the rule that, on a motion to direct verdict, the testimony must be viewed in the aspect most favorable to the party against whom the direction is asked. Milwaukee, etc., Ins. Co. v. Rhea (C. C. A. 6) 123 Fed. 9, 60 C. C. A. 103; Erie R. R. Co. v. Rooney (C. C. A. 6) 186 Fed. 16, 19, 108 C. C. A. 118.

[2-5] The porter on the return trip testified that plaintiff, in her conversation with him, in reply to his question whether the porter had succeeded in effecting the alleged relation, said:

"Well, he seemed to carry the intention out so until I was afraid and I give over to him."

If this were the only item of asserted contradiction, we should hesitate to disturb the direction; for, if plaintiff's consent was compelled by fear, there was not only an actionable wrong, but an actual rape. Don Moran v. The People, 25 Mich. 356, 358, 12 Am. Rep. 283. But the witness gave further testimony to the general effect that in the course of his conversation with plaintiff she said that the porter agreed to give her $10 and her breakfast at Booneville if she would submit to him, that he gave her neither the $10 nor the breakfast, and that she "would make the company pay for it." Although plaintiff denied this statement, we are constrained to hold that the existence of this testimony so far tended to contradict the plaintiff's testimony as to make it a question for the jury whether or not she yielded voluntarily to the porter's advances; for, upon this motion to direct verdict, the controlling question was not merely whether the testimony, taken as a whole, could be reconciled with plaintiff's claim, but whether it was inconsistent with any other conclusion than that claimed by her, and questions of credibility are peculiarly for the jury. Rochford v. Pennsylvania Co. (C. C. A. 6) 174 Fed. 81, 83, 98 C. C. A. 105.

[6] In directing verdict, the trial judge apparently gave weight to the defendant's failure to call its accused porter, and to a presumption that, if called, he would have testified against defendants. But, while such failure supports an inference of such fact, it does not amount to a legally conclusive confession thereof by defendants.

[7, 8] The District Judge, in denying a motion for a new trial, suggested that proof that the porter made improper advances to plaintiff while she was a passenger in defendant's car was of itself enough to create liability; but this consideration, standing alone, is not enough to sustain the direction of verdict: First, because the case was submitted on the theory that plaintiff was actually ravished, and damages were presumably assessed on that basis; and, second, lascivious proposals, if later voluntarily accepted, would not create liability upon defendant's part.

The judgment must be reversed, and the case remanded, with directions to award a new trial.

WAY v. MORTENSON.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1917.)

No. 3997.

COURTS ⇐366(7)—FEDERAL COURTS—DECISIONS OF STATE COURTS AS AUTHORITY.

Where an insolvent corporation was under administration in a state court, and in a suit against a former stockholder to enforce his double liability under the Constitution and statutes of the state the state court held that extensions of the indebtedness after he transferred his stock with knowledge of the transfer and without his consent released him from liability, such holding would be followed by a federal court in a suit against another former stockholder.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by Charles M. Way, as receiver of the Winslow Furniture & Carpet Company, against Alfred Mortenson. Judgment for defendant, and plaintiff brings error. Affirmed.

James E. Trask, of St. Paul, Minn (John M. Bradford, of St. Paul, Minn., and Davis & Lyon, of Sioux Falls, S. D., on the brief), for plaintiff in error.

Bishop H. Schriber, of St. Paul, Minn. (Aikens & Judge, of Sioux Falls, S. D., on the brief), for defendant in error.

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

AMIDON, District Judge. The Winslow Furniture & Carpet Company is an insolvent Minnesota corporation. Defendant was the owner of 32½ shares of its capital stock from April 19, 1905, to February 24, 1906. At the latter date he sold and transferred his stock. The company was then a solvent, going concern. It continued in business until October, 1908, when it was adjudged a bankrupt under the federal Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). The creditors received about 23 cents on the dollar. After bankruptcy proceedings were closed a sequestration suit was commenced by creditors under the statutes of Minnesota, to impound any estate owned by the corporation, and to enforce the stockholders' double liability fixed by the Constitution and statutes of the state. In that suit plaintiff was appointed receiver, and judgment was entered assessing the stock 100 per cent. The petition for the assessment alleged that the defendant was a stockholder to the extent of 32½ shares, and prayed that an assessment of 100 per cent. be imposed for the benefit of creditors. The petition further set forth that, of the claims of creditors allowed by the court, $25,000 accrued prior to defendant's becoming a stockholder. The decree allowing claims expressly fixed the amount of each claim and the date when the indebtedness represented thereby arose. Notice of each step in the proceeding was given to stockholders by publication, and also by mailing, and the proof shows the mailing of

such notices to defendant. The decree in this parent suit does not attempt to fix the amount of the liability of the several stockholders except in general terms. Its language is as follows:

"That each and every person or party liable as such stockholder of said defendant, or on account of any of the capital stock of said defendant, pay to said Charles M. Way, as receiver of said defendant, at his office in the city of Minneapolis, Hennepin county, Minnesota, within thirty days after the date of this order, the sum of one hundred dollars ($100) for and on account of each and every share of said stock for or upon which said persons or parties are liable as past or present stockholders of said defendant, under the terms of this order, and hold the amounts thus collected until the further order of this court herein."

After the decree had been entered in the parent suit, as above set forth, the present suit was brought against defendant in the United States District Court of South Dakota to enforce the payment of his liability as a stockholder. The bill sets out the proceedings in full. The answer admits ownership of the stock at the dates named. It also alleges:

"That all the indebtedness of the said the Winslow & Ruff Furniture & Carpet Company, existing at the time defendant sold and delivered his stock in said company, as aforesaid, has since been paid or renewed and extended, and that the creditors so renewing and extending said indebtedness had at the time thereof notice of the sale of defendant's stock in said company, and that he had severed his connection therewith."

A jury was waived. The court made a general finding "of all the issues in said action in favor of the defendant," and dismissed the complaint upon the merits, with costs. Plaintiff brings error.

While defendant was a stockholder the corporation was indebted to the St. Paul National Bank upon promissory notes aggregating the sum of $20,000. These notes became due a short time after defendant transferred his stock. With knowledge of the transfer the bank renewed the notes, surrendering the old notes, taking new ones for a short period. Afterwards that bank was consolidated with the Capital National Bank, and the notes passed to it as a part of the consolidation. They were repeatedly renewed with knowledge that the plaintiff had transferred his stock. The trial court was of the opinion that defendant, after the transfer, occupied the position of a surety, and that these repeated extensions of the indebtedness, without his consent, had the effect to release him from his liability as a stockholder. That was one of the grounds upon which the court acted in dismissing the suit. If that ruling is sound, the judgment should be affirmed.

While the present case has been pending in this court, a case involving identically the same question between the plaintiff and another stockholder by the name of Mooers has been pending in the Supreme Court of Minnesota. Since the case was argued and submitted, the Supreme Court of the state has handed down its opinion. Way, Receiver, v. Mooers (Minn.) 160 N. W. 1014. This decision is in harmony with previous rulings of the court, so that plaintiff cannot claim any vested right that will be disturbed. The case turns upon an interpretation of the state law and Constitution. The corporation is under administration in the state court. For these reasons, our "duty to lean to

an agreement with the state court" (Kuhn v. Fairmount Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 54 L. Ed. 228) is unusually strong.

Upon the authority of the state decision, therefore the judgment below is affirmed.

PABLO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 25, 1917.)

No. 2873.

1. WITNESSES ⟸78—CONVICTION OF FELONY—PARDON—EVIDENCE.

Where, on objection to the competency of a witness on the ground that he had been convicted of a felony, the United States attorney presented to the judge a telegram, which he stated pardoned the witness and restored him to citizenship, whereupon defendant's counsel stated that they could not question the telegram, but objected to its receipt as evidence until the pardon itself was produced, defendant's rights were not violated by the court's ruling that the witness was competent to testify; the telegram having contained matter which was accepted by the court as notice that the witness was pardoned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195–200.]

2. CRIMINAL LAW ⟸400(11)—BEST AND SECONDARY EVIDENCE—LABELS.

On a trial for introducing liquor into an Indian reservation, a reservation policeman, who had followed the movements of a party, of which defendant was one, testified that he picked up parts of bottles and could tell that there were labels on them. Defendant objected, on the ground that the witness could not testify to the labels. The objection was overruled, and the witness testified that the bottle was a flask, and had a label on it which had not been broken off; that he did not notice what make it was, but that it was a whisky bottle, and that "whisky" was written on the label. *Held*, that there was no error, as this testimony was a part of the general description of the bottles and pieces found, especially where another witness testified without objection as to the labels on the pieces of broken bottles.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879–886.]

3. CRIMINAL LAW ⟸1170½(1)—WITNESSES ⟸388(10)—IMPEACHMENT—LAYING FOUNDATION—CERTAINTY—PREJUDICE.

Where a witness testified that he saw defendant about the 5th or 6th of September, or somewhere along there, the admission of his testimony as to his conversation with defendant, over the objection that it was not proper impeachment, was within the discretion of the trial court, and not erroneous, in the absence of prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Witnesses, Cent. Dig. § 1242.]

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Joseph Pablo was convicted of introducing liquor into an Indian reservation, and he appeals. Affirmed.

Albert Besancon, of Missoula, Mont., and John P. Swee, of Ronan, Mont., for plaintiff in error.

B. K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and James H. Baldwin, Asst. U. S. Atty., of Butte, Mont.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Joseph Pablo, plaintiff in error, was indicted in three counts for having at different times introduced liquor into the Flathead Indian reservation in Montana. He was tried and acquitted under two counts, but convicted under the third, and by writ of error asks review in this court.

The first point made is that the court erred in allowing a witness to testify over the objection of defendant's counsel, who stated that Hunter was incompetent to testify, having been convicted and sentenced for a felony, which was not specified in the objection. It does not appear that any record of conviction accompanied the objection. Nevertheless, immediately after objection, the United States attorney stated to the court that he had "a telegram pardoning the witness and restoring him to citizenship." The contents of the telegram are not incorporated in the record, but it is shown that the telegram was produced and read by the judge. Counsel for defendant stated that they could not question the telegram, but they did object to its being received as evidence "until the pardon itself was produced." The court held that the telegram was a satisfactory showing of executive action and pardon, and added that if there was any mistake it would be cause for setting aside verdict or judgment should such be rendered against defendant. It might be said that, because of the failure on defendant's part to produce and incorporate in the record proof of conviction of the witness for felony, he is not in a position to rely upon the point.

[1] But, passing that, we think that when counsel did not question the telegram, yet objected to its receipt as evidence until the "pardon itself" was produced, they assumed the position that, although the telegram constituted an official announcement of pardon, still such form of announcement was not the best evidence to prove the executive act. But, as the telegram contained matter which was accepted by the court as notice that the witness was pardoned by executive act, we fail to see how defendant's rights were violated by the ruling that the witness was competent to testify.

[2] A reservation policeman testified that he had followed the movements of the party of which defendant was one, and later picked up parts of bottles and could tell there were labels on them. Defendant's counsel objected, on the ground that the witness could not testify to the labels on the bottles or parts which were picked up. The court overruled the objection, and the witness said that the bottle he saw was a big bottle, a flask, and it had a label on it, that the label had never been broken off the bottle, that he did not notice what make it was, that it was a whisky bottle, and that "whisky" was written on the label. This testimony was given as a part of the general description of bottles and pieces found, and we think there was no error in allowing the witness to describe the things as he found them. Furthermore, another witness, without objection on defendant's part, testified in detail as to the labels on the pieces of broken bottles.

[3] Upon rebuttal a witness testified that he had seen the defendant, about the 5th or 6th of September, or "somewhere along there," and that he did not have any conversation with him at that time "to amount to anything." Counsel for the government then asked, "What did you do, or what did he say to you, if anything?" Counsel for the de-

fendant objected, on the ground that it was not a proper impeaching question, and it is said that the court erred in overruling the objection. The admission of the evidence was a matter of discretion, and, no prejudice being shown, we find no error.

It is contended that the court erred in refusing to give an instruction submitting the question whether or not one Pritchett was an accomplice, and also in refusing to charge that the evidence of accomplices "must be received with great caution." The court, however, in referring to the evidence of one Hunter, did tell the jury that they should view the testimony of an accomplice with caution, but advised the jury that, so far as the witness Pritchett was concerned, he was not an accomplice. We will not recite the evidence, but are of opinion that the court was not in error in holding that it failed to prove that Pritchett was criminally implicated.

Other errors assigned are of less importance, and without substantial merit.

The judgment is affirmed.

MILLER et al. v. UNITED STATES.

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

No. 2231.

1. CRIMINAL LAW ⟸97(3)—JURISDICTION OF PROSECUTIONS—OFFENSES ON THE HIGH SEAS.

Under Judicial Code Act March 3, 1911, c. 231, § 41, 36 Stat. 1100 (Comp. St. 1916, § 1023), providing that the trial of all offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district shall be in the district where the offender is found or into which he is first brought, where defendants were taken into custody on the high seas for taking fish from a pound off the coast of New Jersey, and were immediately brought ashore within that state, the District Court for that state was the proper tribunal to try the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 183–188.]

2. LARCENY ⟸5—PROPERTY SUBJECT OF LARCENY—FISH.

Fish in a pound used in catching fish, and from which the fish rarely escaped, were so far reduced to the possession of the company erecting the pound as to be the subject of larceny, though fish could escape from the pound, and in occasional instances probably did escape.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11–17.]

3. CRIMINAL LAW ⟸97(3)—JURISDICTION OF PROSECUTIONS—OFFENSES ON THE HIGH SEAS.

The stealing of fish from a pound on the high seas off the coast of New Jersey, which fish have been reduced to the possession of the American citizens erecting the pound, is an offense punishable under the laws of the United States, as the character of the act is not changed by the fact that the theft is committed on the high seas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 183–188.]

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Harry Miller and others were convicted of an offense, and they bring error. Affirmed.

George F. Deiser, of Philadelphia, Pa., for plaintiffs in error.

Charles F. Lynch, U. S. Atty., of Newark, N. J., and Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiffs in error were indicted, convicted, and fined for the larceny of fish taken from a pound on the high seas off the coast of New Jersey. The indictment is drawn under sections 272 and 287 of the Criminal Code.[1] The facts are as follows:

[1] On May 13, 1916, the accused were taken into custody while fishing with hook and line from a boat moored to the pound, and were immediately brought ashore within the state. Under section 41 of the Judicial Code, which provides that:

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought"

—the District Court of New Jersey was the proper tribunal to try whatever offense had been committed. 1 U. S. Comp. Stat. Annot. p. 1092, and notes. The pound belonged to the Hilton & Hilton Fish Company, of Anglesea, N. J., and was in the Atlantic Ocean more than 3 miles from shore. It was built and maintained in the manner required by the Secretary of War, who issued a permit or license that need not be further referred to, as no weight was laid upon it either below or on the argument of this writ. A pound such as this is erected by combining piles and nets. Piles 80 or 90 feet long, whose diameter is a foot or more at the base and from 3 to 5 inches at the top, are driven into the bed of the ocean about 12 feet, and are also anchored in place. They are 20 or 30 feet apart, and these spaces are closed by nets broad enough to reach nearly, if not quite, from the top of the piles to the bottom. The structure runs at a right angle to the shore, so that the fish, obeying their natural tendency to swim away from the land, are gradually led to the outer section of the pound. A single line of piles, called the lead, runs from the starting point to a circle called the "forebay," beyond which and at the outer extremity is a similar circle called the "pocket." This contains a net in which there is an opening 7 feet wide and 8 feet high, facing the shore. This opening is never closed until the pocket is about to be emptied, when the net is hauled up toward the surface and is turned over to prevent the fish from escaping while they are being scooped out and transferred to the boats.

At the time in question, the net had not been hauled and the opening had not been closed. The accused went to the pocket in their boat, dropped their hooks into it, and were seen to catch several fish. On the facts no defense was offered, the accused relying on the legal proposition that their conduct was not indictable. The accused and the company are citizens of the United States. The District Court instructed the jury in substance as follows:

Fish in the Atlantic Ocean belong to nobody until they have been reduced to possession. After this has been done, the individual that has acquired the possession gains a qualified right of property that may be the subject of larceny. They are reduced to possession when the indi-

[1] Comp. St. 1916, §§ 10445, 10460.

vidual so confines them within his immediate power that they cannot escape and resume their natural liberty. If the accused caught the fish in question out of the pound, and if the fish had been reduced to possession so that the company had acquired a property right, the defendants are guilty. On the other hand, if beyond a reasonable doubt they did not take the fish from the pound, or if the fish had not been reduced to possession in the sense defined, the defendants must be acquitted.

[2] The verdict, therefore, establishes the fact that the fish had been reduced to possession by confining them within the company's power, so that they could not escape and resume their natural liberty. The only error assigned is the court's refusal to direct an acquittal, and the objection is based (1) on the lack of evidence that possession of the fish had been acquired, or (2) on the fact that the felonious taking was upon the high seas. In our opinion neither ground is sufficient. Certainly the natural liberty of the fish was so much restrained that they were unlikely to swim away, although in occasional instances they no doubt could escape, and probably did escape. This, however, was exceptional, and we think the company had taken all reasonable steps to assert dominion over the fish, and to keep them safe until they could be taken out of the water. Even if they had been in a boat or strung on a line, they would still have been able to escape sometimes, and we see no reason to apply a standard so severe as complete security. There was evidence tending to prove that fish rarely escape from a pound, and the verdict establishes the fact against the present contention.

[3] Unquestionably the taking was upon the high seas, but it was nevertheless a felonious taking, and we do not appreciate the force of the argument on this point. Theft is theft, wherever committed, and the fact that the thief steals on the high seas, instead of on the land, does not change the character of his act. If the fish had become the qualified property of an individual, the law of some jurisdiction—in this case, the law of the United States—protected them in a pound, just as it would have protected them in a boat or on a line. The vital question was whether the fish had been sufficiently reduced to possession, so as to become the qualified property of the company, and, if this was true, the accused were guilty. A similar decision in a closely analogous situation on Lake Erie is Ohio v. Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481, where an exhaustive note on the whole subject may be found.

The judgment is affirmed.

CONRON v. CAUCHOIS et al.

(Circuit Court of Appeals, Second Circuit. June 11, 1917.)

No. 268.

1. HUSBAND AND WIFE ⇐129(3)—TITLE TO PROPERTY—ESTOPPEL.
Where a wife conveyed land to her husband on his agreement to hold it for her use and benefit, she was not estopped from claiming it, as against the husband's creditors, by the fact that he included it in a list of his assets in a letter to a person from whom he got a loan, as her title

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

could not be prejudiced by his representation, to which she was not a party.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 470.]

2. FRAUDULENT CONVEYANCES ⟸57(5)—HUSBAND AND WIFE ⟸121—TRANSACTIONS BETWEEN HUSBAND AND WIFE—OWNERSHIP OF PROPERTY.

Where money inherited by a wife was turned over to her husband and used in his business, and subsequently, at a time when he was solvent, she took title to land, which was paid for by his checks, she acquired good title thereto, whether the premises were purchased by her husband for her with her own funds, or whether he, being then solvent, gave them to her.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 155–157; Husband and Wife, Cent. Dig. §§ 432, 435–441.]

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

Suit by John E. Conron, as trustee in bankruptcy of Frederic A. Cauchois, bankrupt, against Frederic A. Cauchois, individually and as executor of Lillian Cauchois, deceased, and others. From a decree for complainant, defendants appeal. Reversed.

James F. McNaboe, of New York City (Edwin Vandewater, of New York City, of counsel), for appellants Frederic A. and Corinne Cauchois.

Louis W. Severy, of New York City, guardian ad litem for minor appellants.

John E. Roeser, of New York City, for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The bankrupt, Cauchois, married in 1887; his wife inheriting shortly before and shortly after the marriage some $6,000 from various relations, which she handed over to him and he used in his business, no formal account being kept between them. Cauchois from that time down to 1910, or thereabout, was solvent and increasingly prosperous. January 30, 1895, Mrs. Cauchois took title to premises at Watermill, Long Island, costing $1,000, on which she caused to be erected a house, stable, and windmill, at a cost of $3,100; all being subject to a mortgage of $2,000. The payments were made by her husband's checks. In February, 1896, she being in a delicate condition and there being a dispute with a neighbor about an encroachment on his property, Mrs. Cauchois conveyed the premises to her husband. From that time the place remained the family summer home; title standing in Mr. Cauchois until September, 1911, when he reconveyed to her. This was at a time when he was insolvent, and within four months of the filing of the petition against him upon which he was adjudicated a bankrupt January 16, 1912. Mrs. Cauchois died June 4, 1913, leaving a will dated January 26, 1891, and codicil dated February 18, 1894, giving all her property to her husband. Four children were born after the date of the codicil, as to whom, under the law of New York, Mrs. Cauchois died intestate. Decedent Estate Law (Consol. Laws, c. 13) § 26.

The premises not being in the custody of the bankruptcy court, the trustee was vested, under section 47a (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [Comp. St. 1916, § 9631]), with the rights of a judgment creditor holding an execution returned unsatisfied; i. e., he had a right to establish a lien in equity if he could. October 15, 1912, he filed a bill for this purpose against Cauchois and his wife, after whose death Cauchois, as executor, and the four children born subsequent to the date of the codicil, were brought in as defendants. The relief prayed was that the conveyance be declared null and void, because made without consideration and to hinder and delay creditors. At the trial counsel for the trustee abandoned this ground, and placed his right to recover on the ground that the conveyance was a preference, under section 60b of the Bankruptcy Act (Comp. St. 1916, § 9644), because it was made within four months of the filing of the petition as a payment on account of the bankrupt's original indebtedness to his wife, with intent to prefer her; she having reasonable cause to believe that the transfer would effect a preference.

We discover no evidence whatever to sustain this charge. If the trustee has any ground of recovery, it is because the conveyance was made to hinder, delay, and defraud the creditors, within section 67e of the Bankruptcy Act (Comp. St. 1916, § 9651). Mrs. Cauchois being dead at the time of the trial, there was no evidence but Mr. Cauchois' testimony and the documents. The District Judge found as matter of fact that Mrs. Cauchois did not convey the property to her husband as a gift; that the consideration of the conveyance was his promise to hold for her use and benefit; that he reconveyed it to her, not for the purpose of putting the property out of the reach of his creditors, but because he considered that it was hers. We concur in these findings, and conclude as matter of law that, between him and his wife, it was the bankrupt's moral and legal duty to reconvey to her.

[1] The District Judge held that because Mrs. Cauchois put the title in her husband's name, and he was shown to have included the premises in a list of his assets in a letter dated January 31, 1911, to a friend from whom he got a loan, she was estopped from claiming the premises to be hers as against his creditors. But he has found Cauchois to be trustee for his wife, in which finding we concur. No representation by him as to his ownership could prejudice her title, if she were not a party to it. In the cases cited the question determined was simply whether the proof offered sustained the wife's claim to ownership. No question of estoppel like this suggested in the court below was raised. Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51; Seitz v. Mitchell, 94 U. S. 582, 24 L. Ed. 179; Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218; Owens v. Daniel, 230 Fed. 101, 144 C. C. A. 399.

[2] It is quite plain that Mrs. Cauchois got good title to the premises in question in 1895, whether they were purchased by her husband for her with her own funds, or whether he, being then solvent, gave them to her. The conduct of both spouses down to the time of the reconveyance is entirely consistent with the mutual confidence and affection that should exist between them. The rendering of formal accounts and the making of express promises by the husband to pay whenever he re-

ceives money from his wife, or a receipt by the wife on every occasion he pays money on her account, are not to be expected. The title of Mrs. Cauchois should not be forfeited, unless she intentionally did something to mislead creditors, and there is not a scintilla of evidence of any such conduct on her part.

The decree is reversed, but, under the circumstances, without costs.

MALDONADO et al. v. ESTERÁS (two cases).

(Circuit Court of Appeals, First Circuit. June 7, 1917.)

Nos. 1257, 1258.

1. STATUTES ⟸181(1)—CONSTRUCTION—INTENTION OF LEGISLATURE.
Rev. Civ. Code Porto Rico 1902, § 187, authorizing a child born in adultery, but acknowledged by its father, to inherit from him, does not apply to children born before its enactment, unless the Legislature so intended.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259.]

2. COURTS ⟸366(22)—CONSTRUCTION OF STATUTES BY TERRITORIAL COURTS—REVIEW.
The holding of the Supreme Court of Porto Rico that Rev. Civ. Code Porto Rico 1902, § 187, under which a child born in adultery, but acknowledged by its father, may inherit from him, does not apply to children born before its enactment, will not be disturbed, where it followed a prior decision of that court, and was in harmony with prior decisions of the Supreme Courts of Spain and Porto Rico construing prior Codes, as this conclusion, adhered to through a series of years, was a matter of local law and not clearly erroneous.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 960.]

In Error to and Appeal from the Supreme Court of Porto Rico.

Action by José Marcelino Esterás, by his mother, Claudina Morales, against José Esterás Maldonado and others, by their mother, Paula Maldonado. Judgment for complainant, and defendants appeal and bring error. Affirmed.

José A. Poventud, of Ponce, Porto Rico (Malcolm Donald, of Boston, Mass., on the brief), for plaintiffs in error and appellants.

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

BINGHAM, Circuit Judge. No. 1257 is a writ of error and No. 1258 is an appeal from a judgment of the Supreme Court of Porto Rico in favor of the complainant, appellee, in an action, brought under section 1559 of the Revised Statutes and Codes of Porto Rico, seeking the annulment of a judicial declaration of heirship entered in the district court of Humacao, January 10, 1911, in favor of José I. Esterás y Arroyo.

The facts in the case are not in dispute. The complainant, Claudina Morales, is the mother of José Marcelino Esterás y Morales, a minor child and the acknowledged natural son of José I. Esterás y Rivera. The respondents, appellants, are José, Clara Marina and Gabriel Es-

terás y Maldonado, the lawful children of José I. Esterás y Arroyo and Paula Maldonado. José I. Esterás y Arroyo was the adulterous son of José I. Esterás y Rivera. He was born in 1885, and was acknowledged by Esterás y Rivera as his son in 1904. Esterás y Rivera died intestate January 23, 1908, and Esterás y Arroyo, having died, his widow, Paula Maldonado, acting in behalf of their minor children, under section 1558 of the Revised Statutes and Codes of Porto Rico, obtained a judgment in the district court of Humacao declaring Esterás y Arroyo sole and universal intestate heir of Esterás y Rivera, as his acknowledged illegitimate child.

Under the Revised Civil Code of Porto Rico, which went into effect July 1, 1902, and, so far as intestate estates are concerned, was an operative law down to March 9, 1911, a child conceived and born in adultery could be acknowledged by its father (section 187), and having been acknowledged was entitled to use his surname and be supported by him; he also had the same rights of inheritance as a lawful child, in case the father died intestate (sections 191, 905, 913). But under the law existing prior to the adoption of the Revised Civil Code, and operative when Esterás y Arroyo was born in 1885, an adulterous child could not lawfully be acknowledged by his father. He was entitled to support, but not to the use of the surname of his father, and could not inherit from him.

In the district court and in the Supreme Court, on the authority of Lucero et al. v. Heirs of Vila, 17 P. R. R. 141, decided by the Supreme Court of Porto Rico February 11, 1911, it was held that the law governing the acknowledgment of illegitimate children, as embodied in the Revised Civil Code, was not applicable, if the illegitimate child was born prior to the enactment of the Code, and that the declaration of heirship in favor of Esterás y Arroyo was null and void.

The contention is made by counsel for the respondents that the court erred in declining to hold that both the right of acknowledgment and of inheritance were governed by the Revised Civil Code, which was in force in 1908, when Esterás y Rivera died, on the ground that laws governing the disposition of estates are those in force at the time of the decedent's death. It is true that the heirs or succession of Esterás y Rivera are to be determined as of the time of his death, but it does not follow from this that the provisions regulating the acknowledgment of illegitimate children as found in the Revised Code are applicable in the case of an illegitimate child born prior to the enactment of the Code.

[1, 2] If the Legislature, in the enactment of the Revised Civil Code, did not intend that its provisions relating to the acknowledgment of illegitimate children should be applicable to such a child born prior to its enactment, the contention is without merit. Morgan v. Perry, 51 N. H. 559. In Lucero et al. v. Heirs of Vila, supra, this precise question was decided in considering the rights of the plaintiffs, Carmen and Lucia, to acknowledgment. They were adulterous children, born prior to the Revised Civil Code, whose father, José Villa y Soler, died August 5, 1908, having acknowledged them as his children after the enactment of the Code. It was held that the provisions of the Code

were not applicable, and that the legality of their acknowledgment would have to be tested by the law in force at the time of their conception and birth. The question was considered at great length and with much care, and the decision discloses that similar provisions of prior Codes relating to the same question had been previously construed in the same way, both by the Supreme Court of Porto Rico and the Supreme Court of Spain. As the conclusion there reached has been adhered to through a series of years, is a matter of local law, and does not appear to be clearly erroneous, we think the decision of the court below should be sustained. Cardona v. Quinones, 240 U. S. 83, 36 Sup. Ct. 346, 60 L. Ed. 538.

As the complainant failed to appear when the case was called and filed no brief, no costs will be awarded in this court.

The judgment of the Supreme Court of Porto Rico is affirmed, without costs of appeal.

BALTIMORE & O. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 252.

TELEGRAPHS AND TELEPHONES ⇐32—REGULATION—FREE MESSAGES—CONTRACT WITH RAILROAD.

In 1887 a railroad company and a telegraph company entered into a contract, whereby the railroad company should transport men and material and furnish labor to the telegraph company without limit for the erection and maintenance of a telegraph system on the railroad company's property, the telegraph company in turn agreeing to transmit orders and intelligence along the railroad company's property without limit, so far as the maintenance and traffic management of the railroad was concerned; each company agreeing further to serve the other with regard to that other's business in respect to matters not directly connected with the line of railroad along which the telegraph lines were extended. The two kinds of work were known as "on line business" and "off line business"; there being stated periods for accounting for the off line business, at which time balances were discharged at a rate of settlement or exchange fixed at one-half of the ordinary rate of each party. Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 18, 1910, c. 309, § 7, 36 Stat. 546, so as to apply to telegraph companies, declares that nothing shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services. *Held* that, in the absence of fraud, the agreement was not objectionable under the Interstate Commerce Act; each company having the right to fix the value of the services of each to the other.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 18.]

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

Suit by the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company. From a decree for complainant (241 Fed. 162), defendant appeals. Affirmed.

Rush Taggart, of New York City, for appellant.

Joseph W. Folk, of Washington, D. C., amicus curiæ.

J. Du Pratt White, of New York City (George F. Brownell, of New York City, amicus curiæ), for appellee.

Before WARD, ROGERS and HOUGH, Circuit Judges.

PER CURIAM. The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other, and the sole question presented in argument or by assignment of error is whether, under the act to regulate commerce, as amended June 18, 1910, it is lawful for railway and telegraph companies to observe the terms of a contract made between them (and lawful when made) long before passage of the statute referred to. We express no opinion on any other point.

The District Court (Mayer, J.) has written an ample and correct statement of facts taken from the pleadings—the hearing below having been on bill and answer. With the premises and conclusions of the trial judge we agree. The railroad and the telegraph became instrumentalities of commerce at substantially the same time. They advanced hand in hand, and agreements by which each agreed to serve the other for the common benefit have been known and observed for more than two generations. Indeed, they long ago became but parts of one system, so far as the public was concerned.

The parties hereto made a written agreement in 1887, which is still unattacked except in one point, which may be summarized as follows: The Railroad Company transports men and material and furnishes labor to the Telegraph Company, without limit, so far as the erection and maintenance of the telegraph system on the railroad company's property is concerned. The Telegraph Company in turn transmits orders and intelligence along the Railroad Company's property, also without limit, so far as the maintenance and traffic management of the railroad is concerned; and each company further serves the other with regard to that other's business in respect of business matters not directly connected with the line of railroad along which the telegraph lines extend. These two kinds of work are commonly known, the former as "on line" business, the latter as "off line" business. At stated periods the amount of "off line" business transacted by each for the other is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half of the ordinary rates of each party to the agreement. The right to do this is the only question in this case.

Not until the amendment of 1910 were telegraph companies subject to the Commerce Acts and the jurisdiction of the Commission. By a proviso in that statute (section 7) it was declared that:

"Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method, or amount of exchange. The agreement being to exchange the carriage of goods against the trans-

mission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course. If it were shown that this contract, or any other agreement, were being used as a cover for injuring one party or the public, other rules would apply.

Nothing of the kind being suggested, the decree is affirmed.

LINKOUS v. VIRGINIAN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. June 2, 1917.)

No. 1522.

APPEAL AND ERROR ⊂⇒1099(8)—LAW OF THE CASE—QUESTIONS FOR JURY.

Where an action was tried the second time upon the same evidence as that of a former trial, the holding on a former appeal that verdict for defendant should have been directed is the law of the case, and the court will not disturb its former judgment.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Daisy M. Linkous, administratrix of J. M. Linkous, deceased, against the Virginian Railway Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

See, also, 235 Fed. 49; 230 Fed. 88.

W. L. Welborn, of Roanoke, Va. (S. H. Hoge and Welborn & Jamison, all of Roanoke, Va., on the brief), for plaintiff in error.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va. (Hall & Apperson, of Roanoke, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case was brought here by writ of error at the November term, 1915; the lower court having rendered judgment based on a verdict of the jury in favor of the plaintiff below. This court reversed the judgment, holding that the lower court, upon the whole evidence, should have directed the jury to return a verdict in favor of the defendant. A new trial was granted, and the case was remanded to the court below for further proceedings. The case was heard upon the same evidence as that of the former trial. The learned judge directed a verdict in favor of the defendant in pursuance of the rule announced by this court.

Counsel for plaintiff below insist:

"That the former judgment of this court should be reviewed, reversed, and annulled, and that the judgment in favor of this plaintiff in error in the District Court on first trial for the sum of $8,541 should be affirmed, with interest and costs."

This question has been decided adversely to the contention of plaintiff in error in numerous cases. In the case of Roberts v. Cooper, 20

How. 467, 15 L. Ed. 969, the Supreme Court, in referring to this point, said:

"* * * We cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. * * * We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial."

Also, in the case of Woodruff v. Yazoo & M. V. R. Co., 222 Fed. 29, 137 C. C. A. 567, the Circuit Court of Appeals for the Fifth Circuit, in referring to a ruling of that court when a case was there on a former hearing, said:

"The foregoing ruling of the court must stand as the law of the case upon the present hearing, since it is well settled 'that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit.' Clark v. Keith, 106 U. S. 465, 1 Sup. Ct. 568, 27 L. Ed. 302; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Bell v. Arledge, 219 Fed. (C. C. A. 5th Cir.) 675, 135 C. C. A. 347, citing numerous authorities."

The following cases are to the same effect: Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97; Browder v. McArthur, 7 Wheat. 58, 5 L. Ed. 397; Chaires v. United States, 3 How. 611, 11 L. Ed. 749; Corning v. Troy Iron and Nail Factory, 15 How. 451, 14 L. Ed. 768; Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044; Granite Brick Co. v. Titus, 226 Fed. 557, 141 C. C. A. 313; Thompson v. Maxwell Land Grant & R. Co., 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

Our decision when the case was here before became the law of the case, and, there being no additional facts adduced at the last trial, this court declines to disturb its former judgment.

The only other question presented in the brief relates to the admissibility of the evidence that plaintiff below had married since the former trial. Under the circumstances, this question is not now material.

For the reasons stated in the opinion filed at the former hearing (Virginian Ry. Co. v. Linkous, 235 Fed. 49, 148 C. C. A. 543), the judgment of the lower court is affirmed.

WOODS, Circuit Judge. While I adhere to the views expressed in the dissenting opinion when this case was here before, I concur in the view that the judgment rendered by the District Court on the second hearing must be affirmed on the authority of the judgment rendered by this court.

THE PRINCESS VICTORIA. *

(Circuit Court of Appeals, Ninth Circuit. May 14, 1917.)

No. 2850.

ADMIRALTY ⟸54—AGREEMENT BY STIPULATION—CONCLUSIVENESS.

Where an insurer, which was a damage claimant in a proceeding for limitation of liability for collision, entered into a stipulation fixing the amount of its claim, in which the question of its right to interest from the time it paid the insured was reserved, it cannot afterward claim interest from the time of the collision.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 443–447.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Proceeding in admiralty by the Canadian Pacific Railway Company, as owner of the steamship Princess Victoria, for limitation of liability. From a portion of decree the Fireman's Fund Insurance Company, damage claimant, appeals. Affirmed.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, Cal., and Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for appellant.

W. H. Bogle, Carroll B. Graves, F. T. Merritt and Lawrence Bogle, all of Seattle, Wash., for appellee Canadian Pac. R. Co.

B. S. Grosscup and W. C. Morrow, both of Tacoma, Wash., for appellees Alaska Pac. S. S. Co. and Pacific Alaska Nav. Co.

R. S. Jones and C. F. Riddell, both of Seattle, Wash., for appellee Pacific Alaska Nav. Co.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appeal in this case is from that portion of the decree of the court below disallowing interest upon the principal amount awarded the claimant there (appellant here) prior to a certain fixed date.

The record shows that on August 26, 1914, a collision occurred in the waters of Puget Sound between the steamship Princess Victoria, owned by the Canadian Pacific Railway Company, and the steamship Admiral Sampson, owned by the Alaska Pacific Steamship Company, and of which the Pacific Alaska Navigation Company was charterer; such collision resulting in the loss of the Admiral Sampson and her entire cargo. The owners of the latter ship thereupon libeled the Princess Victoria, claiming damages in the sum of $670,000, and the owner of the Princess Victoria, being one of the appellees here, thereupon filed a petition in the court below for a limitation of its liability. The appellant, Fireman's Fund Insurance Company, as insurer of cargo aboard the Admiral Sampson at the time of her sinking, filed its claim in the limitation proceeding for the sum of $31,407.

Thereafter, and on the 26th day of August, 1915, a stipulation was entered into on behalf of the owner of the Princess Victoria, and on

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

*Rehearing denied October 8, 1917.

behalf of both the owner and charterer of the Admiral Sampson, and on behalf of the owners of the lost cargo, including the appellant, by which it was agreed that, in so far as concerned the claims of the appellant and other insurers of the cargo, the collision occurred by reason of the mutual fault of the two vessels, and, further, that the said cargo claimants should be paid in full before any portion of the claims of any of the other parties interested were paid, and that unless the amount of the cargo claims were agreed upon such amount should be established by competent proof.

On the 5th day of November following an interlocutory decree was entered limiting the liability of the owner of the Princess Victoria to $286,225.10. Thereafter, and on June 12, 1916, a further stipulation was entered into, between the same parties making the first stipulation, by which the amounts of the respective claims of the cargo claimants were fixed, that of the appellant Fireman's Fund Insurance Company being fixed at $31,392.04; the latter stipulation further reciting the agreed fact that the appellant and the other cargo claimants "contend that they are entitled to recover, in addition to the principal amount of their respective claims as aforesaid, interest thereon at the rate of 6 per cent. from the several dates of payment of the items constituting such respective claims, and fourth parties (the cargo owners) further contend that they are also entitled to recover their taxable costs," which contention the other parties to the stipulation denied. The court below gave the appellant judgment for the amount of its claim as fixed by the stipulation, with interest on the amount of the claim so fixed from the date of the stipulation—June 12, 1916.

The sole ground of the present appeal is that the court should also have allowed the appellant interest on its claim from the date of the collision of the ships. One sufficient answer to the position is, in our opinion, that the appellant made no such contention in the court below, but, on the contrary, as is expressly recited as an agreed fact in the stipulation of June 12, 1916, all of the cargo claimants, including the appellant, there only claimed to be entitled to recover, in addition to the principal amount of their respective claims, "interest thereon at the rate of 6 per cent. from the several dates of payment of the items constituting such respective claims." When the appellant paid its insured the amount for which it was liable and thus became subrogated to the rights of the insured, is nowhere made to appear in the record; but surely it could not have been prior to the time when its insured's loss was ascertained and fixed, which was June 12, 1916.

Without considering other objections to the now asserted right of the appellant to interest extending back to the date of the collision of the ships, it is enough to say that it not only made no such contention in the court below, but there affirmatively stipulated to the contrary. Benedict on Admiralty (4th Ed.) § 566.

The portion of the decree appealed from is affirmed.

GUARANTY TRUST CO. OF NEW YORK v. INTERNATIONAL STEAM PUMP CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 221.

APPEAL AND ERROR ⊂=1096(3)—SUBSEQUENT APPEALS—MATTERS THAT MIGHT HAVE BEEN LITIGATED ON FORMER APPEAL.

In a suit to foreclose a mortgage, the decree provided that no disbursements should be imposed upon a receiver, but that, if an appeal was taken, then, in the event of affirmance, costs of the trial would be taxed against him. An appeal was taken, but error was not assigned on this part of the decree, and the decree was affirmed. Subsequently the District Court taxed disbursements against the receiver. *Held*, that whether this was error or an abuse of discretion could not be determined on appeal from such order, as the error, if any, was in the decree of foreclosure, and the objections thereto should have been urged on the former appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4355.]

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

Suit by the Guaranty Trust Company of New York, as trustee, against the International Steam Pump Company, in which William I. Lewis, as receiver of the International Steam Pump Company, intervened. From an order fixing and allowing the complainant's disbursements, the intervener appeals. Appeal dismissed.

See, also, 237 Fed. 286.

Plaintiff brought suit to foreclose a mortgage made by the International Steam Pump Company. Cotemporaneously a creditor's suit to conserve and distribute assets was instituted against said corporation defendant. The cases were consolidated. A receiver was appointed for the Pump Company in New Jersey (the state of its incorporation). Such receiver intervened in the consolidated action and answered, setting up as a defense certain matters sufficiently appearing in the previous appeal herein. 231 Fed. 594, 145 C. C. A. 480. The decree of foreclosure, from which appeal was considered in the case just referred to, contained the following: "Ordered, that no costs [by which is meant disbursements] be imposed upon the [intervener]. If, however, an appeal is taken, then in the event of an affirmance costs of this trial in this court will be taxed against the said [intervener]." The intervener did appeal, the decree was affirmed ut supra, the disposition of costs and disbursements declared in and by the decree appealed from was not assigned for error, nor then formally sought to be reviewed in any way, although adverted to in the briefs of counsel. The cause having been affirmed and remanded, the District Court entered an order, fixing and allowing the disbursements. The amount and propriety (per se) of the items charged against the intervener is not questioned. On this appeal the assignments of error challenge the authority of the trial court to enter any such order at any time, asserting its action to be an abuse of discretion.

Harry Lane, of Jersey City, N. J. (W. Bourke Cockran, of New York City, of counsel), for appellant.

Allen Wardwell and Stetson, Jennings & Russell, all of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). We do not find it necessary, nor even possible, now to consider the alleged

lack of power in the trial court to award costs and disbursements or either, contingent upon the fate of an appeal on the merits. The case being in equity and costs within discretion, that discretion was exercised in a manner plainly expressed in the decree of foreclosure from which this intervener appealed. If discretion was abused, if the action of the court was erroneous for any reason, it was just as wrong and as plainly wrong the moment foreclosure decree was entered as it is now. The only difference between the present situation and that existing when the case was here before is that we are now informed of the amounts awarded as costs, instead of knowing merely that some amounts would be awarded. The principle has not changed; the details (i. e., the exact figures) are not and never have been complained of.

Under such circumstances we hold it plain, upon mere statement, that the act of the lower court now alleged as error had been committed and was expressed in a formal decree from which an appeal was taken and lost, by the present appellant, more than a year ago. It was possible for and incumbent upon the intervener to urge his objections, if any, on the previous appeal; for every question which might have been then raised in opposition to the decision then appealed from must now be held res adjudicata between the parties. Burns v. Cooper, 153 Fed. at 151, 82 C. C. A. 300, per Van Devanter, J. The principle of the rule as to conclusiveness of appellate decisions upon all matters which might have been litigated upon a given appeal is the same as that often announced in this court as to the conclusiveness of judgments of other competent tribunals. Landon v. Bulkley, 95 Fed. 344, 37 C. C. A. 96; Straus v. American, etc., Ass'n, 201 Fed. 306, 119 C. C. A. 544; Old Dominion, etc., Co. v. Lewisohn, 202 Fed. 178, 120 C. C. A. 392.

The question here sought to be raised having (as between these parties) passed in rem judicatam, the appeal is dismissed, with costs.

THE VOLUNTEER.

THE EUREKA.

(Circuit Court of Appeals, Second Circuit. April 26, 1917.)

Nos. 192, 193.

COLLISION ⇐95(2)—MEETING TOWS—FAULT.

A collision between the tows of two meeting tugs in East River *held* due solely to the fault of the upbound tug in attempting to pass through the narrow space between two descending tugs, instead of passing on the port side of both.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

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

Suit in admiralty for collision by the Staples Transportation Company, owner of the steam tug Eureka, against the steam tug Volunteer, the Phœnix Sand & Gravel Company, claimant, and cross-libel against the Eureka. Decree against the Volunteer, and her claimant appeals. Affirmed.

The following is the opinion of Hough, District Judge, on the hearing in the court below:

On the afternoon of May 14th, in fair weather and with slack tide, the ocean tug Eureka came down the East River with four light barges, "bunched," three in a tier, and one tailed on behind, upon a hawser of about 50 fathoms. When approaching Brooklyn Bridge a car float was seen coming out from alongside Pier 26, Manhattan, in charge of D., L. & W. tug Newark, and also bound downstream. The Eureka blew two whistles, intending to overtake and pass the Newark and her float on the latter's port side. This plan was agreed to.

Outside the Newark and also going downstream was the tug Stone, and the Eureka intended to pass between the Stone and the Newark. The latter tug was gathering way, and was not as matter of fact overtaken. The Stone has furnished no witnesses in this case. I have no doubt her crew has been sought out and questioned, and from their absence I infer that the Stone was still a little downstream of the scene of the collision productive of litigation.

With matters in the condition above stated, the Volunteer, a tug with two loaded scows in tow tandem on a hawser of about 15 fathoms, was at least 1,000 feet and probably much more downstream of the Newark, and bound up. There was an exchange of whistle signals between Newark and Volunteer, and then between the latter tug and Eureka. Thus it was agreed all round that Newark and Eureka were to go downstream side by side (the Newark nearest Manhattan) and the Volunteer to pass to port of both. This maneuver was attempted, and during the endeavor Eureka's tow collided with Volunteer's. The consequences were serious to both, and each accuses the other of faults.

The contest between the vessels is as to which crowded the other, and in my judgment that question is solved by asking another, viz.: How wide was the passage or channel way between the courses of the Newark and Stone, when and after the Eureka and Volunteer agreed to pass port to port? This question is crucial, because there is no doubt at all that the Eureka and her tow were passing as near to the Newark and her car float as prudence permitted; i. e. 75 feet or less.

If it be true, as sworn to by those on Eureka, that the Stone was no more than 80 or 100 feet to port, then the Volunteer attempted to pass through so narrow an opening at her own risk, unless it was necessary so to do. Such was not the case according to Eureka's claim, for the substance of her complaint is that the Volunteer should have passed to port of the Stone.

If the evidence of the Volunteer's master be considered, the facts are stated quite differently, but not to the benefit of his tug. That captain was asked: "Q. What distance did you say there was between the Stone and the Eureka? A. About 500 feet, I should judge." Why the Volunteer could not keep out of Eureka's way in such a channel, when the Newark was close off the latter's starboard, is sought to be explained by a rank sheer of Eureka's tow. That no such sheer occurred is the plain weight of evidence.

So far as I can judge, the testimony from the Newark is wholly unprejudiced and disinterested. It is also strongly confirmatory of the proximity of Eureka, and the narrow waters between that tug and the Stone. It is not wholly consonant with the Eureka's assertion that all the vessels named were on the Manhattan side of the river. This last point I do not think controlling. Whether the Stone was nearer New York or Brooklyn is a matter wholly subordinate to the inquiry whether it was necessary for Volunteer to try going between Stone and Eureka. It was not; she should have passed the Stone also port to port. This statement is made because on the whole I believe the Eureka's story.

It is also held that there was no rank sheer on the part of either tow, although both tows probably drifted a little, as before collision both tugs stopped their engines, and took all tension off the hawsers. The fault was in bringing about a situation that required stopping, and that fault was the Volunteer's.

Decrees, with costs, may be entered as above indicated.

T. C. Jones, of New York City, for the Eureka.
J. A. Martin, of New York City, for the Volunteer.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

THOMAS A. EDISON, Inc., v. KIDD.

(Circuit Court of Appeals, Second Circuit. May 8, 1917.)

No. 263.

1. MASTER AND SERVANT ⟸80(6)—WAGES—PRESUMPTIONS.
That a singer employed by a phonograph company to give entertainments in connection with its phonograph was to be paid only for such weeks as she was booked with its dealers is improbable, and the presumptions are overwhelmingly against the contract of employment having been made on such terms.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 115.]

2. APPEAL AND ERROR ⟸999(1)—CONCLUSIVENESS OF VERDICT.
When a question of fact as to whether or not a contract of employment was made was properly sent to the jury, their verdict should not be disturbed by the appellate court.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3915, 3917–3921.]

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

Action by Mary Carson Kidd against Thomas A. Edison, Incorporated. Judgment for plaintiff (239 Fed. 405), and defendant brings error. Affirmed.

This is a writ of error by the defendant below to review a judgment entered upon the verdict of a jury in favor of the plaintiff for $6,885.45. The parties will be referred to hereafter as they appeared in the District Court, viz., as plaintiff and defendant.

White & Case, of New York City (James J. Porter and Joseph M. Hartfield, both of New York City, of counsel), for plaintiff.

Everett, Clarke & Benedict, of New York City (Herman S. Hertwig and George M. Clarke, both of New York City, of counsel), for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. It appears from the testimony that the defendant in order to sell its machines and records conceived the idea of engaging some of the most popular singers to give entertainments in connection with the Edison phonograph. The artist would first sing and immediately thereafter the same song would be reproduced by the phonograph, giving the audience an opportunity to compare the voice of the phonograph with the voice of the singer. The plaintiff was employed by Verdi E. B. Fuller acting for the Edison Company. He

had acted in the same capacity before and, prior to the engagement of the plaintiff, he was known as general supervisor of the musical division of the Edison Company.

[1] The principal question, as pointed out by Judge Learned Hand, relates to the contract of employment and is one of fact. It is admitted that a contract was made but the dispute is as to the terms thereof. The plaintiff insists that the contract was that the Edison Company should employ her at the rate of $300 per week from October 15th to April 1st and that this amount was to be paid, whether the Edison Company booked her or not. The defendant insists that it agreed to pay her only for those weeks during which she was booked with the dealers. The jury found a verdict for the plaintiff in the full amount demanded, viz., $6,885.45. We think the verdict was fully justified by the proof. It seems highly improbable that a popular singer like the plaintiff would make an agreement which bound her to the defendant for nearly six months with the understanding that she receive nothing for this period unless the Edison agent succeeded in booking her. It is not surprising that the jury thought it most improbable that such a unilateral contract was made. If the defendant's theory of the agreement be sustained the plaintiff was bound hand and foot; she could work for no one but the Edison Company during the term of her contract. Unless that company chose to give her employment she was, so far as appears from this record, without the means of livelihood. Such a contract might be made, it is true, but the presumptions, conceding the sanity of the singer, are overwhelmingly against it.

[2] We think the testimony shows that Fuller was the defendant's agent with authority to make the contract which the plaintiff asserts was made. Whether or not it was made is a question of fact which was properly sent to the jury and their verdict should not be disturbed by this court.

The judgment is affirmed with costs.

UTAH POWER & LIGHT CO. v. UNITED STATES.

UNITED STATES v. UTAH POWER & LIGHT CO.

(Circuit Court of Appeals, Eighth Circuit. June 4, 1917.)

Nos. 4506, 4507.

APPEAL AND ERROR ⊂⊃1221—MODIFICATION OF OPINION.

Where, in a suit by the government to recover public lands unlawfully appropriated by a power and light company without compliance with the regulations of the Secretary of the Interior, the Circuit Court of Appeals decided that the damages sustained by the government were measured by the charges imposed by such regulations, and in a similar case the Supreme Court subsequently *held* that the scale of charges imposed by such regulations was not binding, and that the government was entitled to the reasonable value of the occupancy and use, the Circuit Court of Appeals will modify its opinion to conform to that of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4722.]

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

On application by each party for rehearing or modification of opinion. Applications granted.

For former opinion, see 230 Fed. 328, 144 C. C. A. 470.

William W. Ray, U. S. Atty., of Salt Lake City, Utah, and J. F. Lawson, of Ogden, Utah, for the United States.

Graham Sumner, of New York City, and John F. MacLane, of Salt Lake City, Utah, for Utah Power & Light Co.

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

PER CURIAM. November 24, 1915, we filed our opinion in the above-entitled causes (230 Fed. 342, 144 C. C. A. 484), wherein, upon the cross-appeal of the United States, we said:

"It remains to consider the contention of the government upon its cross-appeal, viz. that the courts should have decreed an accounting and damages as prayed. We are unable to perceive why that contention is not sound, and this notwithstanding the lands have not been injured and would not, perhaps, have been otherwise leased or used by the government during the same period. United States v. Bernard (C. C. A.) 202 Fed. 728–731, 121 C. C. A. 190; St. Louis v. Western Union Telegraph Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810. It would seem further that the charge imposed by the regulations should fairly and reasonably measure the value of such use. Congress clearly has the power to prescribe the terms upon which it will permit the lands of the United States to be used or otherwise disposed of; and the authority to make such rules conferred upon executive officers is not a delegation of legislative power."

The cause was remanded to the District Court for an accounting for the reasonable value of use and occupation, and for such other proceedings as might be necessary in accordance with the views therein expressed. Since then, at the October term, 1916, the Supreme Court, in Utah Power & Light Company, Appellant, v. United States, Appellee, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791, No. 202, and other cases consolidated for argument, Nos. 203 to 207, inclusive, involving the same question, has announced the rule with respect to the measure of compensation in the following language:

"As the defendants have been occupying and using reserved lands of the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges named in the regulations, as prayed in the bill. However much this scale of charges may bind one whose occupancy and use are under a license or permit granted under the statute, it cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or assented to the regulations in any way."

Both parties hereto have united in an application for such modification of our opinion as may be necessary to make it conform to that of the Supreme Court as hereinabove set forth. In our opinion, this application is meritorious and should be sustained, and the directions to be included in the mandate should be shaped accordingly.

It is so ordered.

DICKINSON et al. v. HARRIS.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2974.

1. APPEAL AND ERROR ⟸866(3)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.

Where each side moved for directed verdict, and the judge, treating the case as submitted to him on the facts and law, entered a general judgment for plaintiff, defendant, on writ of error, can only attack the judgment as being unsupported by any substantial evidence; there being no findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3474, 3475.]

2. MASTER AND SERVANT ⟸302(1)—INJURIES BY SERVANT—SCOPE OF SERVANT'S AUTHORITY.

In an action against a railroad company for injuries inflicted on plaintiff, when defendant's station agent caught him and forced him to load barrels into a car, the fact that the agent, when the barrels were on the previous day tendered for delivery, demanded that plaintiff load them into the car, and on plaintiff's refusal declined to issue a bill of lading, though the loading was no part of plaintiff's duties, warrants a finding that the agent, in forcing plaintiff to load the barrels, was acting within the scope of his authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217, 1225.]

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

Action by Archie C. Harris against Jacob M. Dickinson and others, receivers of the Chicago, Rock Island & Pacific Railway Company. There was judgment for plaintiff, and defendants bring error. Affirmed.

Wright, Miles, Waring & Walker, of Memphis, Tenn., for plaintiffs in error.

Anderson & Crabtree, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Harris, the plaintiff below, was a porter employed by a shipper of freight at Edmonson, a station on the Rock Island line, in Arkansas. As such porter, he delivered at the railroad freight house three empty oil barrels for shipment. The station agent directed him to load the barrels into a freight car, and declined to issue a bill of lading until this was done; but Harris refused, and left the barrels on the platform. Under the rules and tariffs in force, plaintiff had performed the full duty of the shipper, it was the duty of the station agent to load the barrels into the car, and his demand that plaintiff do so was wholly unjustified. The next day, as plaintiff was passing by the station on other business, the station agent, by intimidation and force, took him from the street to the freight house and compelled him to put these barrels on the car. For the resulting physical

injury, plaintiff brought this action against the operating receivers of the railroad. On the ground of diverse citizenship, they removed it to the court below. At the conclusion of a jury trial, each side asked for a directed verdict. The judge thereupon treated the case as submitted to him upon the facts and the law (Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; see Bank v. Maines [C. C. A. 6] 183 Fed. 37, 41, 105 C. C. A. 329), and entered judgment in favor of plaintiff. No special or general findings of fact or law were requested or made.

[1, 2] The only question presented to us is whether the act of the freight agent was so far within the scope of his employment as to make the railroad liable therefor. The question is in specially narrow compass. The judgment being general, and there being no findings, the utmost right of the defendant to be heard in this court is to urge the proposition that there is no substantial evidence tending to support the conclusion that the agent's act was within the scope of his employment. Upon this issue, we consider the case ruled by our former decision in Shadoan v. Cincinnati, etc., Ry., 220 Fed. 68, 72, 135 C. C. A. 636. See also Goodwin v. Cincinnati Co. (C. C. A. 6) 175 Fed. 61, 99 C. C. A. 661. If the agent had used this force upon Harris at the time of the first bringing in of the barrels, and for the purpose of compelling complete delivery in the manner that the freight agent was declaring to be the only right manner, it would hardly be thought that the agent was wholly outside the scope of his duty, however wrong he might be in interpreting that duty; and the delay which intervened here, does not serve to make the agent's later acts wholly independent of the original delivery. There is ample room to conclude that he did not regard the transaction as finished, and so was merely causing it to be completed according to his conception of his duty to the railroad. The refusal to issue the bill of lading until the manner of delivery suited the agent of itself tends to show the dependence of the later event upon the former.

The judgment must be affirmed.

ECLIPSE LIGHTERAGE & TRANSPORTATION CO. v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1917.)

No. 181.

COLLISION ⊜72(1)—SINKING OF MOORED BARGE—FAULT.

Respondent's tug moored a barge in a canal some time after 1 o'clock at night in such manner as to strike another barge lying alongside, awakening the watchman and causing a leak, from which she sank in the morning. The watchman made an examination, but found no leak. *Held* that, from the injury caused by the blow, there must have been a leak at the time of such extent that he should have found it with proper care, and that the trial court properly held respondent liable only for the dam-

age caused by the blow, and not by the sinking, which the watchman might have prevented.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102.]

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

Suit in admiralty for collision by the Eclipse Lighterage & Transportation Company, owner of the barge Amherst, against the Cornell Steamboat Company, owner of the tug Williams. Decree for libelant for part damages, and it appeals. Affirmed.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin and Robert S. Erskine, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. On the night of April 14, 1912, a tier of barges had been moored on the north side of the Gowanus Canal and another tier had been moored beyond them at their sterns. The outermost barge of the second tier was the Amherst, which was injured. She arrived at about 6 o'clock in the evening in tow of a tug which put her in place. There was only one man aboard the barge; he was in full charge. He retired about 1 o'clock a. m. Respondent's tug Williams came into the canal with a tow of two barges, one of which was loaded with stone and had a freeboard of about 15 inches. The District Judge found that she was moored alongside the Amherst. The question is whether the faulty seamanship of the tug in mooring her alongside the Amherst caused the leak which produced the injury. There is no doubt that there was a collision between the stone barge and the Amherst sufficiently severe to wake up the latter's watchman, who came on deck and then went into the hold of the Amherst and, as he testifies, examined her throughout. Seeing nothing amiss, he came to the conclusion that there had been no serious damage and retired to his bunk. He was awakened the next morning by a shout that his barge was sinking and got on deck just in time to avoid being carried down with her.

There can be little doubt that this injury was caused by the collision, the rake log of the Amherst having received a transverse blow. The evidence justifies such a finding as the injury could not have been occasioned by the mere turning over of the barge. No plausible reason other than the transverse blow is suggested for the sinking. The testimony justifies the inference that the blow caused the leak which resulted in the capsizing of the barge. This being so, we are not justified in setting aside the finding of the trial judge upon a pure question of fact. Assuming the injury to be the result of the blow on the rake log it is clear that the libelant was required to exercise ordinary care and prudence to prevent the sinking of the Amherst after the blow. Nelson, who represented the libelant on the Amherst, testified as to the force of the blow. He thought that the blow was sufficient to cause serious damage, but an examination by him directly after the blow was received failed to discover a leak although a large amount of water

must have entered the barge during the time that he was making the examination.

If the leak had been discovered, and it seems to us that it might have been, the damages would have been reduced to the comparatively small sum of $200; that it was not discovered must be attributed to the negligence of the libelant's representative on the barge. If he had made a diligent search he might have discovered the leak and by setting the pump at work he would in all probability have prevented the disaster. Instead of doing this he made a casual examination and retired to his bunk. The trial judge limited the recovery to the injuries received by the blow and did not allow damages for the sinking of the barge for the reason that these damages might have been avoided if ordinary diligence had been exercised in discovering the extent of the damage occasioned by the collision. We think he was right in so holding.

The decree is affirmed with costs of this court to the appellee.

GOLDEN RULE, Inc., v. B. V. D. CO.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1917.)

No. 4661.

COPYRIGHTS ⊜52—USE—RIGHT TO.

Plaintiff, the manufacturer of underwear, copyrighted the print of a figure of a young man clad in a suit of underwear. Defendant purchased underwear from plaintiff, and without the plaintiff's permission used such print in advertising the underwear, omitting the notice of copyright. *Held*, that there was an infringement of copyright, which was designed for and used in detached advertising, defendant having no right, on the theory that the copyright constituted a trade-mark, to use the same in advertising plaintiff's goods, for such print was not a trade-mark worked into the goods.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 50.]

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit by the B. V. D. Company against the Golden Rule, Incorporated. From a decree for plaintiff, defendant appeals. Affirmed.

C. D. O'Brien, of St. Paul, Minn., for appellant.

Amasa C. Paul, of Minneapolis Minn. (Hans v. Briesen, of New York City, on the brief), for appellee.

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

HOOK, Circuit Judge. This is a suit by the B. V. D. Company against the Golden Rule, Incorporated, for infringement of a copyrighted print of the figure of a young man clad in a suit of underwear. The plaintiff is a manufacturer in New York of a particular class of underwear, which it sells to the jobbing trade. The print was copyrighted by registration in the Patent Office (Act June 18, 1874, c. 301, § 3, 18

Stat. 78) and not with the Librarian of Congress or Commissioner of Copyrights, as required in the case of "pictorial illustrations or works connected with the fine arts." The plaintiff used it in advertising its manufactured goods. The defendant operates a retail department store in St. Paul, Minn. Having bought a quantity of the "B. V. D." underwear made by plaintiff, it reproduced plaintiff's print without its permission in advertising the goods for sale in the daily newspapers, and in doing so omitted the copyright notice from the reproduction. The case was submitted on the pleadings without proof. The trial court held that the validity of the copyright was not put in issue, but that if it were, and were to be decided upon the face of the pleadings and an inspection of the print, the copyright should be upheld. A decree was accordingly rendered for the plaintiff, and the defendant appealed.

We think the court was right in holding that the validity of the copyright was not in issue; and, as the plaintiff still continues before us its insistence upon that condition of the case, we will so confine our consideration of it. In other words, we will take the plaintiff's print as an admitted valid copyright. The defendant argues that the rules of trade-mark, as expressed in Coca Cola Co. v. Bennett (D. C.) 225 Fed. 429, are applicable, and that, as it restricted its use of the print to advertising the goods manufactured by plaintiff, the latter had no cause for complaint—was in fact benefited, not damaged. But, as above indicated, the print was registered in the Patent Office as a copyright, not as a trade-mark. So far as the pleadings show, it was designed for and used in detached advertising. We need not consider what the rights of the parties might have been, had the plaintiff used the print as a trade-mark by attaching or weaving reproductions of it into the garments it manufactured, put upon the market, and sold. That is not involved in the case, and we put it aside. The plaintiff had the right to advertise its goods in its own way, and in the use of its copyrighted print for that purpose it had the exclusive right. The defendant was at liberty to advertise the underwear it bought and owned by other prints and illustrations, but not to copy or reproduce a copyright of the plaintiff.

The decree is affirmed.

THE BLACK DIAMOND.

THE CHARLES McNEILL.

(Circuit Court of Appeals, Second Circuit. April 26, 1917.)

No. 244.

COLLISION ⊂⊃95(2)—MEETING TUGS—CHANGE OF COURSE.

A collision in East River between a schooner in tow of a tug passing down and a carfloat on the side of a meeting tug *held*, on conflicting evidence, due solely to the fault of the down-bound tug in changing course to starboard after a signal agreement to pass starboard to starboard.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

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

Suit in admiralty for collision by Freeman Hatfield against the steam tug Black Diamond, the Lehigh Valley Transportation Company, claimant, with the steam tug Charles McNeill, Charles McNeill, claimant, impleaded. Decree for libelant against the McNeill, and her claimant appeals. Affirmed.

The following is the opinion of Van Vechten Veeder, District Judge, in the court below:

This case arises out of a collision, on April 30, 1915, about noon, at a point 600 or 700 feet off the Whitehall Ferry slips, between the schooner Gypsum Queen, in tow of the tug Charles McNeill, proceeding down the East River, and a carfloat in tow on the starboard side of the tug Black Diamond, which had another carfloat on its port side, and was bound up the East River. The owner of the schooner libeled the Black Diamond, which brought in the Charles McNeill by petition.

The captains and crews of the two tugs differ as to whether they were in a position to pass starboard to starboard or port to port, as well as to what signals were given. The acceptance of either tug's claim involves the other in gross fault. The crews of the tugs differ radically. Each party is more or less supported by an imposing array of apparently disinterested witnesses, but the witnesses for neither side, agree upon details. It is obviously a case which calls for discrimination in judging the intelligence and veracity of witnesses. In both respects the witnesses for the Black Diamond were, as a whole, distinctly superior to the witnesses for the Charles McNeill. Moreover, several of the disinterested witnesses on behalf of the claimant viewed the collision from positions which gave them superior opportunities for observation. I was particularly impressed with the testimony of claimant's witnesses Matthew Murphy and George M. Bunce.

Of course, the actual relative positions and courses of the two tugs are practically decisive of the controversy as to whether they agreed to pass starboard to starboard or port to port. I find as facts established by a distinct preponderance of the credible testimony that, when the Black Diamond straightened up on her course, the two tugs and tows were in a position to pass starboard to starboard; that they exchanged two whistle signals for such passage; and that thereafter the Charles McNeill changed her course to starboard and attempted to cross the bow of the Black Diamond, thereby causing the collision. Evidently other signals were given after the two whistles passing agreement and before the collision, but the testimony concerning them is so conflicting that it is difficult to arrive at a satisfactory conclusion. The disinterested testimony tends to show that they were a mixture of signals in the nature of alarms when collision was imminent. However, it is clear that the change of course by the Charles McNeill was the proximate cause of collision, and was a fault which fixes her liability. This conclusion necessarily discredits the testimony of the captain of the Charles McNeill, which varied from his statement to the local inspectors, and places reliance upon the testimony of the captain of the Black Diamond, especially in so far as it is corroborated by the testimony of disinterested witnesses who were in a position to know the facts.

A decree in accordance herewith may be settled on notice.

G. V. A. McCloskey, of New York City, for appellant.

T. C. Jones, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

Appeal of COOK.

(Circuit Court of Appeals, Third Circuit. July 2, 1917.)

No. 2270.

ALIENS ⊂=68—REVIEW—DECISIONS REVIEWABLE.

Appellate review is not a matter of right, and must rest on a constitutional and legislative provision; hence a decision denying an application for naturalization cannot be reviewed by the Circuit Court of Appeals on writ of error or on appeal, there being no provisions for such review.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145.]

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

Application of James Cook for naturalization was refused (239 Fed. 782), and applicant appeals. Appeal dismissed.

John M. Russell, of New York City, for appellant.

J. L. Bodine, Asst. U. S. Atty., of Trenton, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The District Court of New Jersey refused to naturalize the appellant for the reasons stated by Judge Haight in 239 Fed. 782, and this appeal challenges the correctness of that decision. We do not consider it, for in our opinion we have no appellate jurisdiction in this class of controversies. We so decided in U. S. v. Neugebauer, 221 Fed. 938, 137 C. C. A. 508, following U. S. v. Dolla (C. C. A. 5) 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665; and, although each of these cases was a writ of error, and was an attempt to review an order granting the alien's petition, we think no difference in principle is presented by the facts that the petition here was refused instead of granted, and that the case comes before us by appeal instead of by writ of error. The general rule of law is that appellate review is not a matter of right, and must rest on a constitutional or legislative provision (3 Corpus Juris, page 297); and we are aware of no provision that authorizes a disappointed alien to appeal from the refusal to grant his application.

To avoid a possible misunderstanding, we may add that this decision has no bearing upon a suit by the United States under section 15 of the Act of June 29, 1906 (34 Stat. 601, c. 3592 [Comp. St. 1916, § 4374]), to cancel a certificate.

The appeal is dismissed.

CORRUGATED BAR CO. v. TRUSSED CONCRETE STEEL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1917.)

No. 4734.

PATENTS ⊂=328—INVENTION—CONCRETE AND METAL FLOOR CONSTRUCTION.

The Johnson patent, No. 633,285, for a concrete and metal floor and ceiling construction, consisting of a slab of concrete having transversely corrugated bars of metal embedded in the lower portion thereof and loops of pliable wire suspended across such bars, with the ends projecting below the concrete to support the ceiling below the floor, is void for lack of patentable novelty and invention, in view of the prior art, which disclosed in earlier patents all the essential elements of the patented structure, requiring only mechanical skill for their combination.

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

Suit in equity by the Corrugated Bar Company against the Trussed Concrete Steel Company and others. Decree for defendants, and complainant appeals. Affirmed.

James A. Carr, of St. Louis, Mo. (T. Percy Carr and Amasa M. Holcombe, both of St. Louis, Mo., on the brief), for appellant.

Fred L. Chappell, of Kalamazoo, Mich. (C. C. Linthicum, of Chicago, Ill., and Edward C. Eliot, of St. Louis, Mo., on the brief), for appellees.

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

SANBORN, Circuit Judge. The Corrugated Bar Company, a corporation, the plaintiff below, appeals from a decree by which its complaint for an infringement by the defendants, Trussed Concrete Steel Company, a corporation, and others, of letters patent No. 633,285, issued to Albert L. Johnson, September 19, 1899, for an improvement in fireproof floor construction was dismissed. Johnson's improvement consisted principally: (1) In the use of transversely corrugated metallic bars embedded in the lower part of concrete slabs forming the flooring, or embedded in concrete ribs on the lower side and forming a part of such a flooring, for the purpose of increasing the tensile strength of the lower portion of the flooring, or of the ribs below it; and (2) in the use of a loop of pliable wire suspended astraddle such bars and embedded with them in the concrete ribs or the lower portion of the concrete flooring, with the ends of the wire projecting below the concrete for the purpose of hanging or supporting the ceiling below the floor. In this patent there are nine claims. The first six relate to combinations of the patentee's transversely corrugated bars with concrete flooring, with concrete flooring provided with ribs, with concrete flooring strengthened by expanded metal embedded therein, and with such flooring resting upon concrete ribs and concrete haunches based on the flanges of supporting I-beams. But the use of the specific transversely corrugated bars of Johnson conditions the novelty and

patentability of each of them. Claim 1 illustrates them and reads in this way:

"1. In a concrete and metal construction, a slab of concrete having bars of metal embedded in the lower portion thereof, each of said bars being of substantially uniform thickness throughout its length and having corrugations arranged in planes substantially perpendicular to the axis of the bar, substantially as described."

Claims 7, 8, and 9 rest upon the use of the suspending loops of wire imbedded in the concrete floor straddling the reinforcing rods embedded in the concrete and extending below the flooring for the purpose of hanging the ceiling beneath it. Claim 7 illustrates them and reads in this way:

"7. A fireproof flooring and ceiling construction comprising a main flooring layer of concrete having strengthening ribs on its under side, transversely corrugated bars of substantially uniform thickness throughout their length embedded in said ribs, and ceiling hangers suspended from said bars, substantially as described."

The maintenance of this suit is dependent, first, upon the novelty and patentability of Johnson's transversely corrugated bar in the combinations of the first six claims, for the bar made and used by the defendants in their concrete floors undoubtedly infringes, if the devices of these claims were patentable; and, second, upon the patentability of the devices described in the three claims for the combinations of the suspended ceilings, and, if these claims were patentable, upon the infringement thereof. Were Johnson's claims for the combinations of his corrugated bars with concrete flooring, in the various ways he specified, novel and patentable? Laying aside for the moment his corrugated bars, every other element and device described in the first six claims of his patent was old and well known before he made his alleged invention, and a careful review of the prior art has convinced that there was nothing required beyond the skill of the ordinary mechanic to conceive and construct any of the devices of these claims unless Johnson's corrugated bar was novel and made them patentable. Concrete flooring, ribbed concrete flooring, concrete haunches to protect steel and iron from fire and to sustain flooring, concrete flooring reinforced by rods or by expanded metal embedded therein to increase the tensile strength of the flooring, had been constructed, detailed descriptions of them had been published, patents for many forms of them had been issued before Johnson conceived or formed the devices of any of these first six claims. Indeed, in his specification he writes:

"The present system of fireproof floor construction consists of haunches of concrete *1*, resting on the lower flanges of adjacent I-beams *2*, incorporated into the building structure, a series of concrete ribs *3*, extending from I-beam to I-beam, and a main floor sheet or layer *4* of concrete on said ribs and haunches and covering all the space between the I-beams, all incorporated as one solid mass."

It is, therefore, upon the novelty and patentability of his transversely corrugated bar that the plaintiff must rely to sustain the validity of the first six claims of his patent. There was no novelty in the use of bars or rods of metal, round, square, twisted, smooth, or rough, in con-

crete floors, or of concrete ribs to increase their tensile strength. It was not, therefore, the novelty of this use upon which Johnson relied for his patent, but upon the novelty and utility of the specific form of his bar. His argument was:

Smooth bars slip when embedded in the concrete, much of their tensile strength is thereby lost, and the thing desired is a bar which will not slip and will not split the concrete. My transversely corrugated bar is new; it is less liable to slip and less liable to split the concrete than any other bar and hence for the purpose of reinforcement is the most useful. Therefore it, and the combinations of it with concrete flooring, which I claim, are patentable.

Thus he wrote in his specification:

"Although the bond between concrete and metal is originally strong, such bond becomes broken or weakened in the course of time by the ordinary use and wear of the floor. For this reason transverse indentations or corrugations are formed in the bar, so that, regardless of the bond, the bar is so incorporated into the rib as to utilize its full tensile strength. The best arrangement of the indentations or corrugations is in planes at right angles to the axis of the bar; but considerable variation in their direction is permissible. * * * But under ordinary circumstances such variations should not exceed 15 degrees from the perpendicular plane above defined. When the indentations or corrugations are inclined to the axis of the bar, their ridges act as wedges tending to split the concrete."

So it is that in the last analysis the question is whether or not the fact that Johnson described and claimed "corrugations arranged in planes substantially perpendicular to the axis" of his bar sustains the validity of his patent.

In the Swiss patent, No. 10,703, of June 29, 1895, to Fietz & Leuthold, there is a description of precautionary measures against longitudinal thrust of iron reinforcements of cement structures. It is there stated that the subject of the invention is round iron fitted with projections located at short distances on the periphery and that:

"On the round iron *a* * * * are provided the projections *b*, which may be of any given form; e. g., in the shape of teeth, bosses," etc.

It is also there stated that:

"This invention relates to such precautionary means in connection with iron reinforcements for cement structures, the subject of the invention being round iron fitted with projections located at short distances on the periphery. Figs. 1, 2 and 3 show an example of such round iron; Figs. 1 and 3 being views of the same, respectively, at an angle of 90 degrees to each other."

A glance at these Figures 1 and 3 satisfies that they disclosed protuberances in the form of rings upon the iron bars which were substantially perpendicular to the axis of the bars.

Hyatt, in letters patent No. 206,112, issued July 16, 1878, wrote thus in his specification:

"Fig. 2 represents a flat tie, formed with raised or protuberant parts *a a*. These protuberances may be shaped according to fancy. They may be pins or bosses, as shown; or the surface may be crimped, corrugated, or indented, as shown in Figs. 3 and 4. Nonslipping ties, made substantially as herein described and illustrated, I propose to make and put upon the market as a new manufacture, and as a substitute for metal in beam form."

The corrugations in Hyatt's Fig. 3 appear to have been in planes substantially perpendicular to the axis of the tie.

Ransome, in his patent No. 516,111, issued March 6, 1894, claims:

"In concrete construction a monolithically embedded tension bar" and a monolithically embedded compression bar.

In his specification he presents a figure of a compression bar of cast iron which has corrugations arranged in planes substantially perpendicular to the axis of the bar. After describing his compression bars and his tension bars, he writes:

"These bars can be forged, rolled, cast, or otherwise formed, with any of the usual bonds on or in their surfaces for their more perfect union with the concrete."

The bars shown in the Ransome patent were tapering bars of maximum size about their center, tapering or stepping smaller from that point to the ends. The examiner in the Patent Office rejected claims 1, 2, 3, and 5 of Johnson's original application upon Ransome's patent, until Johnson amended them by describing his bar as "of substantially uniform thickness throughout its length," and upon that amendment they were allowed. The descriptions in the specifications and claims of the patents to which reference has been made seem to deprive the corrugated bar of Johnson of the requisite novelty to entitle it to patentability. There was evidence in the case upon the question of whether or not Johnson's bar was less likely to split the concrete than that of Ransome, but it does not satisfy that the affirmative of that proposition was sustained.

Counsel argue, however, that notwithstanding the prior description and patents of metal bars provided with corrugations arranged in planes substantially perpendicular to the axis of the bars, for the express purpose of bonding them more securely to the concrete in which they were embedded, Johnson's bar was patentable because he perceived and stated in his specifications that corrugations thus arranged were more efficient than they would be if they varied more than 15 degrees from the perpendicular to the axis, and no one had ever stated this fact before; and they cite Badische Anilin & Soda Fabrik v. Kalle (C. C.) 94 Fed. 163, 166, 168, Keasbey & Mattison Co. v. Philip Carey Mfg. Co. (C. C.) 139 Fed. 571, 576, A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 126 C. C. A. 290, Brill v. Third Avenue R. Co. (C. C.) 103 Fed. 289, 292, 293, and other authorities of like nature. They have been read and considered. But the fact remains that the purpose of the protuberances and corrugations on the bars of Fietz & Leuthold, Hyatt, and Ransome was the same as the purpose of Johnson's corrugations. That purpose was to bond the metal bars to the concrete. Fietz & Leuthold disclosed protuberances or corrugations on their bars for this purpose, arranged in planes substantially perpendicular to the axis of their bars. It is true that they also disclosed protuberances otherwise arranged and for the same purpose. But, given a metal bar, corrugations thereon, and the desideratum to prevent that bar from slipping when embedded in concrete, and it does not require the genius of an inventor to perceive, and to apply the knowledge, that corrugations

of a given size, arranged substantially perpendicular to the axis of a bar, will accomplish the object of preventing its slipping more effectually than when they are inclined more nearly to the horizontal. Such knowledge and its application fall far within the attainments of a mechanic skilled in the art, if not within the attainments of men of still less skill and mechanical information.

A review of the prior art and a consideration of the object Johnson sought to attain by his corrugated bar and of the means he conceived to accomplish his purpose have satisfied that there was no such novelty in the arrangement of its corrugations or their use for this purpose as rendered either the bar or its corrugations patentable. And when we go farther, when we turn to the combinations of this unpatentable corrugated bar with concrete slabs (claim 1), with concrete ribs and concrete slabs (claim 2), with concrete slabs reinforced with expanded metal (claim 3), with concrete flooring and strengthening concrete ribs (claim 4), with I-beams, fireproof concrete flooring, and concrete ribs thereunder (claim 5), and with I-beams, concrete haunches on the flanges thereof, concrete flooring strengthened by expanded metal and concrete ribs (claim 6), it is difficult to discover any novel discovery or invention in any of them. It is true that no single patent in the prior art discloses the exact combination of some of these claims, so that such prior patent can be declared absolutely to anticipate them. But Orr, in his patent No. 471,772, issued March 29, 1892, described the combination of I-beams, metal rods extending from the I-beams drooping from the top to near the bottom thereof between the beams, concrete flooring between the I-beams, with concrete ribs beneath it resting on the supporting rods, "so that the cement is bonded together by the suspenders and the load sustained thereby." McCarthy, in his patents No. 520,489 and No. 520,490, issued May 29, 1894, portrays wires fastened to the upper flanges of I-beams or to anchor plates secured thereto, drooping between the I-beams, embedded in concrete flooring and supporting it. The fact that in these patents the rods and wires support the concrete flooring and are not used, as in Johnson's combinations, solely to increase the tensile strength of the lower part of the floor or the ribs, has not been overlooked. But in view of the fact that before Johnson claimed to have made his alleged invention the use of rods and wires embedded in concrete and bonded thereto by protuberances, roughness, and corrugations so arranged as to be substantially perpendicular to their axis, for the purpose of increasing the tensile strength of the concrete, was well known to those skilled in the art, in view of the fact that the use of ribs of concrete under slabs and floors of concrete was not new, that the use of expanded metal embedded in concrete to give it tensile strength was old, and the use of concrete haunches to protect steel and iron from fire and to support weight was familiar to constructors of buildings, it is impossible to resist the conclusion that nothing more than the skill of the mechanic was required or used in making any of the devices and combinations found in the first six claims of Johnson's patent.

The three remaining claims are for the combination of the metal rod of Johnson, or a similar rod unfastened and embedded in the lower

part of a concrete flooring, or of the concrete ribs forming part of a concrete flooring, or of the concrete ribs forming part of it, with wires suspended from the bar extending out of the concrete below the floor or ribs, and constituting ceiling hangers by which metallic or other lathing or ceiling may be, and in some claims is, described as suspended beneath the flooring. There was nothing new in the suspension of metallic lathing and ceilings beneath concrete floor by means of wires suspended upon metal rods in or beneath those floors when Johnson claims to have made his invention. Orr, in his patent No. 471,772, March 29, 1892, shows a ceiling suspended on wires looped around the metal supporting rods of his concrete flooring. It is said that Orr's patent does not anticipate the claims in Johnson's patent upon this subject because the supporting rods were not embedded in the concrete. It is true that in one place in his specification Orr writes of the cement ribs resting on the bars. But in another portion of his specification he writes:

"The lathing *C* of woven wire or perforated metal is secured to the suspenders, preferably by lacing wires *a*, as shown in Fig. 2, these wires being placed about the suspenders before the cement is applied."

And in the second claim of his patent he writes, speaking of the body of the cement forming a web:

"Said web lying above said suspenders, and the ribs extending downward from said web, and having the suspenders embedded therein, substantially as described."

So that the contention that the rods of Orr were not embedded in the concrete is not sustained. Moreover, even if they were not so embedded, no man of ordinary mechanical skill, with Orr's patent and the problem of suspending a ceiling below the concrete flooring of Johnson before him, could fail to conceive the idea of hanging it by wires attached to the rods embedded in the lower part of the concrete flooring or of the ribs, and allowing these wires to depend below it to uphold the ceiling. There are other descriptions and patents of ceilings hanging below concrete flooring, antedating Johnson's alleged invention, too suggestive to allow the combinations of claims 7, 8, and 9 of his patent to be attributed to his genius as an inventor.

The conclusion is that all the devices and combinations of the claims of this patent to Johnson were so obvious, in the light of the state of the art when Johnson claims to have conceived them, that they can be legally attributed to nothing but the skill of the ordinary mechanic, that the decree below was right, and that it must be affirmed.

It is so ordered.

NATIONAL BINDING MACH. CO. v. HARPER PAPER CO.

(Circuit Court of Appeals, Second Circuit. June 6, 1917.)

No. 243.

PATENTS ⇐328—INVENTION—STRIP-SERVING APPARATUS.

The Elliott patent, No. 868,977, for a strip-serving apparatus, for supplying strips of paper gummed on one side, and moistening the gummed side of the paper so that it may be used for binding packages, *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 the National Binding Machine Company against the Harper Paper Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Augustus N. Hand, District Judge, on final hearing:

This is a suit to enjoin the infringement of letters patent No. 868,977. The patent relates to a device for supplying strips of paper gummed on one side and moistening the gummed side of the paper, so that it may be used for binding packages. The claims relied upon are the following:

"12. A strip-serving apparatus adapted to serve strips of paper or the like for wrapping or binding packages, comprising a strip support, a strip moistener operatively related to said support and adapted to moisten the leading end of the strip as it passes the moistener from the support in the operation of the apparatus, and strip-severing means located to sever the strip in the rear of the moistener.

"13. A strip-serving apparatus adapted to serve strips of paper or the like for wrapping or binding packages, comprising a strip support, a strip moistener operatively related to said support and adapted to moisten the leading end of the strip as it passes the moistener from the support in the operation of the apparatus, and strip-severing means positioned with relation to the moistener and adapted to sever the strip in the rear of the moistened portion thereof, without necessitating further serving of the strip from the support after the moistening to effect the presentation of an unmoistened portion to such strip-severing means."

I am of the opinion that the foregoing claims of the patent in suit are void for lack of invention. The Piper patent, No. 700,816, seems to have differed little from the patent in suit, except for the fact that the knife was placed in the Piper device before rather than in the rear of the moistening pad, and in that device the paper was drawn by hand rather than served by a mechanism. In view of the state of the art as disclosed in the Loree patent, No. 546,961, the McDade patent, No. 549,650, and the Tzschucke and Engelmann patent, No. 687,928, in each of which there was a strip-serving device and knife in the rear of the moistening pad, I do not think the cutting of the strip in the rear of the moistener is a sufficient improvement over the Piper device to show invention. I furthermore do not think infringement has been proved. Where a combination involving such slight improvement and novelty is shown, it at best cannot be given the broad construction urged by complainant. The defendant seems to be right in saying that his device does not feed, wet, or sever the strip. All this must be done by hand, as in the Piper and other earlier machines, and not by any mechanism, such as the crank and rollers shown in the diagrams of the patent in suit.

The complaint must be dismissed.

Lucius E. Varney, of New York City, for appellant.

I. M. Obreight, of New York City (Everett E. Kent, of Boston, Mass., of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This is a suit for infringement of United States letters patent No. 868,977 for a strip-serving device granted to the complainant as assignee of Elliott, the inventor. The claims in issue are 12 and 13, but it will be necessary only to state the latter:

"13. A strip-serving apparatus adapted to serve strips of paper or the like for wrapping or binding packages, comprising a strip support, a strip moistener operatively related to said support and adapted to moisten the leading end of the strip as it passes the moistener from the support in the operation of the apparatus, and strip-severing means positioned with relation to the moistener and adapted to sever the strip in the rear of the moistened portion thereof, without necessitating further serving of the strip from the support after the moistening to effect the presentation of an unmoistened portion to such strip-severing means."

Although the device for feeding the dry end of the tape forward so that it can be grasped by the fingers was stated in the specification as one of the objects of the invention, it is entirely omitted in the claim. We will assume, however, that it should be treated as included. Patents for tape-moistening machines are numerous and have been several times before the courts in this circuit. National Binding Machine Co. v. McLaurin (C. C.) 186 Fed. 992; Same v. Eisler (D. C.) 197 Fed. 175; Same v. Larkin, 233 Fed. 998, 148 C. C. A. 8. The District Judge apparently thought that the tape is continuously served in Elliott's device by a mechanism indicated on the figure by a handle *17* and a pawl and ratchet *18* and *21*, whereas this mechanism serves the dry end of the tape after it has been severed only far enough forward to pass between the presser and the moistener, where it can be grasped by the fingers, and from that point on the tape is served by hand. The operation of the defendant's device is exactly similar, except that the first step, to wit, the serving of the dry end of the tape forward, so that it may be grasped by the fingers, is done not by a mechanism, but by the application of the fingers to the tape. We hardly think this difference sufficient to avoid infringement.

The real ground, however, of Judge Augustus N. Hand's decision, is that the device involves no invention, and in this we concur. The placing of the cutting knife behind instead of in front of the moistener, as in Piper, was a mere mechanical improvement. If the U-shaped arm were made to swing backward far enough to admit the fingers, the dry end of the tape could be drawn out by them and, if room enough was not left it was not invention to use the handle, pawl, and ratchet to serve the dry end of the tape forward to a point where it could be grasped by the fingers.

Decree affirmed.

ELLIOTT CO. v. ROTO CO. et al.

(Circuit Court of Appeals, Second Circuit. June 11, 1917.)

No. 271.

1. JUDGMENT ⟸675(1)—CONCLUSIVENESS ON PARTY PARTICIPATING IN DEFENSE.

A judgment for complainant, in a suit against a seller of a motor manufactured by defendant for infringement of a patent, was conclusive against defendant, where it conducted the defense of such suit, the nominal defendant taking no part in it whatever, though defendant concealed the fact that it was defending the suit, and did not know that complainant was aware thereof, since, while an estoppel, to be effective, must be mutual, this mutuality exists when the defense conducted by a third party is either open and avowed, or known to the opposite party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1194.]

2. JUDGMENT ⟸951(1)—CONCLUSIVENESS ON PARTY PARTICIPATING IN DEFENSE.

A complainant, relying upon the judgment in a prior patent infringement suit as an estoppel against defendant, must show that defendant actually conducted the defense in the prior suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1809.]

3. JUDGMENT ⟸951(1)—CONCLUSIVENESS IN FAVOR OF PARTY PARTICIPATING IN DEFENSE.

A defendant, relying on a judgment in a prior suit for infringement of a patent as an estoppel in its favor, must show, not only that it conducted the defense in such suit, but that plaintiff knew it was conducting the defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1809.]

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

Suit by the Elliott Company against the Roto Company and another. From a decree for complainant, defendants appeal. Affirmed.

Gifford & Bull, J. Edgar Bull, and Charles S. Jones, all of New York City, for appellants.

Bakewell & Byrnes, of Pittsburgh, Pa., and George E. Beers, of New Haven, Conn. (George H. Parmelee and Clarence P. Byrnes, both of Pittsburgh, Pa., of counsel), for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a suit against the Roto Company and Philip J. Darlington, its president, for infringement of United States letters patent No. 983,032, for turbines, and No. 1,045,134, for rotary motor, duly assigned to the complainant.

The sole question to be determined is whether the defendants are bound by a decree in favor of the complainant in a prior suit instituted by it on the same patents in the District Court of the United States for the Western District of Pennsylvania against one Robertson, a seller of the same motor manufactured by the defendant, the

Roto Company, as is complained of in this suit. It appears that the Roto Company did conduct and pay for the expenses of the defense in the prior suit; the actual defendant, Robertson, taking no part in it whatever, not even as a witness. The defendant Darlington was present at the taking of some of the depositions and for a part of the time at the trial. The complainant knew that the Roto Company was defending the case for Robertson, having been informed of this by him through one of its salesmen before the trial began. Judge Thomas held that the defendant was estopped, because of this decree in the prior suit, from contesting the validity of the patents in this suit.

[1-3] The defendant objects that its defense of the prior suit was not open and avowed, and that, because it did not know that the complainant was aware it was defending the case, there can be no estoppel for want of mutuality. In other words, it says that a decree in favor of the defendant in that case would not have been res adjudicata in a subsequent suit by the complainant against it. It is quite true that an estoppel, to be effective, must be mutual. The principle has been expressed in various cases by saying that a defense conducted by a third party "must be open and avowed," or "must be known to the opposite party." Either category in our opinion is sufficient. Cramer v. Singer Co., 93 Fed. 636, 35 C. C. A. 508; Hanks v. Dental Association, 122 Fed. 74, 58 C. C. A. 180; Penfield v. Potts, 126 Fed. 475, 61 C. C. A. 371; Jefferson Co. v. Westinghouse Co., 139 Fed. 385, 71 C. C. A. 481.

When the defense is not open or avowed, the estoppel becomes matter of proof. If the plaintiff relies upon it, he must show that the defendant actually did conduct the defense in the prior suit. If the defendant relies on it, he must show not only that he did conduct the defense, but that the plaintiff knew he did. In the present case the Roto Company did not directly avow that it was defending the suit against Robertson, nor authorize him to inform the Elliott Company of that fact. Its intention was to conceal what it was doing. All the same, it was defending the suit. Robertson did inform the Elliott Company of the fact, and the defendant Darlington, president of the Roto Company, did openly participate to some extent. We do not think it was necessary that the defendant should have known that the claimant was aware that it was defending the suit against Robertson to make the estoppel effective. If the decree had been in favor of Robertson, and the Roto Company could have proved that the complainant knew that it had defended that suit, which we have little doubt it could have done, then the decree would have been res adjudicata against the complainant in a subsequent suit.

Decree affirmed.

DOMESTIC VACUUM CLEANER CO. v. BISSELL CARPET SWEEPER CO.

(District Court, S. D. New York. March 20, 1917.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—VACUUM SWEEPER.
The Quist and Blanch reissue patent, No. 13,508 (original No. 976,494), for a hand-operated vacuum sweeper, one feature of which is the means of attachment of the dust receptacle, so that it is readily removable for employing and readily reattached by an unskilled operator, was not anticipated and discloses patentable invention; also *held* infringed by a sweeper in which the nozzle head and dust receptacle are in one piece, instead of separable, as in the patented device.

2. PATENTS ⟸157(2)—CONSTRUCTIONS—VALIDITY.
Courts will not permit mere literalism to defeat a meritorious patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 231.]

In Equity. Suit by the Domestic Vacuum Cleaner Company against the Bissell Carpet Sweeper Company for infringement of claim 4 of reissued letters patent No. 13,508, for a vacuum sweeper, granted to Quist and Blanch January 7, 1913. On final hearing. Decree for complainant.

L. W. Southgate, of Worcester, Mass., and C. L. Sturtevant and L. S. Bacon, both of Washington, D. C., for plaintiff.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for defendant.

MAYER, District Judge. The reissue was applied for only five months after the original patent was issued under circumstances which bring it well within the doctrine of cases in this circuit. Autopiano Co. v. Amercan Player Action Co., 222 Fed. 276, 138 C. C. A. 38; Baldwin v. Abercrombie & Fitch Co. (D. C.) 227 Fed. 455, aff'd 228 Fed. 895, 145 C. C. A. 293; Iowa Washing Machine Co. v. Montgomery Ward & Co. (D. C.) 227 Fed. 1004; aff'd 234 Fed. 88, 148 C. C. A. 104; Motion Picture Patents Co. v. Laemmle et al. (D. C.) 214 Fed. 787.

[1] The invention concerns a hand-operated carpet sweeper, and the patentees state:

"Further objects thereof are to provide a compact arrangement of the motors, wheels, and dust receiver, whereby they can be contained in a small space and covered by a small and neat casing having no projections liable to injure furniture when in operation; to provide an improved location and arrangement of motors whereby the suction will be continuous; and to provide a convenient way of removably holding the dust bag in position."

Utilizing the so-called "1–2–3 arrangement" of the prior art (see opinion in National Sweeper Co. v. Bissell Carpet Sweeper Co., 242 Fed. 947, decided herewith), Quist and Blanch arranged the parts of their pneumatic carpet cleaner, so that the dust receptacle could easily be removed by the housewife or domestic servant for the purpose of emptying the contents, and then put back and locked in position, so as to obtain the necessarily tight seal.

A mere inspection of the commercial device will demonstrate its admirable simplicity and usefulness. This Quist and Blanch patent

is the second chapter of note in the story of this art of dust and dirt, of which Kenney's was the first. A young doctor of Worcester, Mass., interested in the pursuit of bacteria, conceived this invention and with the aid of Blanch gave it practical form. These patentees realized the necessity of making simple and easy the handling of the dust bag and the disposal of its contents.

These are compact hand-propelled devices. They must be sold at a price well below that brought by the more elaborate cleaners in which electric power is used, such as were under consideration in the Innovation Electric Co. Case (D. C.) 234 Fed. 942. They necessarily either came into competition with or were adjunctive to the Bissell sweeper, which had become almost a household word. Beginning in 1910, the Quist and Blanch was placed on the market, and, from the outset, sold itself. The business grew by leaps and bounds, until now fully 400,000 of these sweepers have been sold by those who control this patent. The M. S. Wright Company and the National Sweeper Company admittedly copied the Quist and Blanch construction, and, cross-licenses having been given around the circle by the plaintiff company and these other two, in a comparatively few years the three companies have sold over 1,000,000 sweepers containing the Quist and Blanch improvement at an aggregate price of several millions of dollars. Such a result indicates a remarkable commercial achievement, not lessened by the fact that the Bissell sweeper is still in large demand. If, notwithstanding the success which so well-known an article as the Bissell sweeper, backed by a business institution long established and of high repute, continues to retain, a new device so rapidly and extensively impresses the market, it is obvious that it possesses singular merit. Of course, it is not possible accurately to apportion how much of this success is due to Quist and Blanch alone; but it is at least certain that their feature contributed a fair share to the result in a very practical art, where the purchaser who desires to spend only $5 to $10 wants something that will suit the purpose and do the thing. It is manifestly important that, after the dust and dirt are collected, the disposal shall be as easy and as sanitary as practicable, and, undoubtedly, this characteristic has been a convincing selling point.

Defendant determined to undertake the manufacture of its two alleged infringing devices in December, 1913, and thereafter, with full knowledge of the Domestic and National machines, defendant began the development in its factory of these two sweepers, until in November or December, 1914, it placed them on the market. The reason why this step was taken is stated by Mr. Shanahan, defendant's general manager, as follows:

"Well, it is evident that with the development of the vacuum cleaner that a demand was created for it. Our customers, and we have a great many, were urging us to make a vacuum sweeper. We always hesitated about that, because we wanted to remain in the distinct carpet sweeper business. But our customers urged it so strenuously that we finally concluded that it was the business-like thing to do, to get into the vacuum cleaning business. We had been in the carpet cleaning device business for a great many years. The trade generally looked to us, I think, and we can say that, without any sug-

gestion of conceit in the matter, they looked to us for the development of a vacuum sweeper that would be in every way efficient. We had hundreds of such letters urging us, hoping that we would go into the business, until finally we did go into it."

Undoubtedly, defendant has honestly endeavored to avoid the patent, and to find its justification in the prior art and in the history of the patent itself. We shall see whether it has succeeded. Claim 4 in issue reads:

"4. A pneumatic cleaner, comprising a casing opening at its front end, a dust receptacle in said casing detachably connected therewith, a nozzle head detachably connected with said casing and covering the open front end thereof and the open end of said dust receptacle to hold the dust receptacle in position, said nozzle being provided with an opening therethrough connecting with said dust receptacle, a suction creating device connected with said casing, and sustaining wheels connected with said casing and operatively connected with and operating said suction device by the backward and forward travel over any surface."

As to patentability, I do not entertain any doubt. This is one of those simple arrangements which looks easy after it has been done, but nowhere in the prior art can a patent or structure be found which will read on claim 4, supra, and some of the patents, such as Conover, No. 847,278, show how not to do what Quist and Blanch accomplished. A detailed discussion on this branch is unnecessary, for mere inspection of the various models will at once demonstrate that workers in the prior art either did not think of this feature in combination or did not know how to attain it.

The important question is that of infringement. On this branch defendant insists that the file wrapper history requires that the claim shall be so strictly limited that it cannot apply to defendant's device, and also that the prior art demands a similar limitation. Defendant's structure follows Quist and Blanch, with the modification that the nozzle head and the dust receptacle (the upper plane surface of which forms the horizontal screen) are in one piece, and the closed back of the dust receptacle can be opened by a clasp, when the contents are to be emptied. Of course, in a one-piece structure, the bag being closed at the rear, the clasp for opening and closing is an obvious expedient.

This narrows the controversy to a single point; i. e., is infringement escaped by making the nozzle head and dust receptacle in one integral piece, instead of in two pieces? Counsel for defendant have painstakingly analyzed the claims of the original and reissued patents, the amendments and arguments of counsel, and the rulings and comments of the Patent Office. But all must be read in the light of the art as then understood. While much can be said to the effect that claim 4 can be construed as not excluding the use of the nozzle head and dust receptacle as one piece, more especially in view of the language of claims 5 and 6 ("a nozzle * * * removable from the casing independently of said receptacle; * * * a nozzle head independent of said dust receptacle * * * "), yet I am willing to adopt the construction that claim 4 means a dust receptacle separable from the nozzle head.

[2] In determining whether the obvious equivalent of defendant defeats claim 4, it must be remembered that the test is the character of

treatment to be accorded to the patent. There will not be found a better illustration of the proposition that courts will not permit mere literalism to defeat a meritorious patent than Auto Vacuum Freezer Co. v. William A. Sexton Co., 239 Fed. 898, in which Judge Coxe recently said:

"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. 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."

And some of the principles which should govern the construction of claims have also been recently stated by Judge Hough in Outlook Envelope Co. et al. v. General Paper Goods Mfg. Co. et al., 239 Fed. 877, — C. C. A. —, decided January 12, 1917.

Now to the prior art: If anybody thought of utilizing (for this hand-operated carpet sweeper) C. J. Harvey's (No. 673,603) Fig. 5, with its bung and ring arrangement, he would soon abandon it for Quist and Blanch, because it would be a clumsy affair in this compact device.

The Conover (No. 847,278) model, in evidence, is its own best refutation, as are the models of Baender and Dudley. In Dudley, for instance, the bottom side up arrangement of the dust receptacle, and the necessity of tipping the machine upside down, constitute a convincing tribute to Quist and Blanch's ingenuity; and one need but read the Sturgeon and the Applegate patents to see how far in this regard they were from Quist and Blanch.

The Hatch and Goeser device (No. 980,944) has a fan and motor back of the casing, and the nozzle must be screwed into position, and the nozzle and front casing are in two parts.

The failure in this regard, among others, of Baender, Dudley, and Sturgeon, who devoted themselves especially to pneumatic carpet sweeping devices of this type, is perhaps the best evidence in support of the conclusion that, but for the teaching of Quist and Blanch, the arrangement in defendant's structures would never have been thought of, except, of course, by some one who in turn would have been an inventor.

When an accomplishment is known, it is not difficult to recur to the prior art, and to reconstruct with the knowledge of to-day what no one knew yesterday, and then to add something here and there to remedy the defects which even such a reconstruction exposes; and the trite but none the less sound observation may be repeated that

defendant may always utilize any disclosure or disclosures of the prior art or any combination thereof without fear or favor.

This patent is entitled to fair consideration, and Quist and Blanch would, indeed, fail to reap the full reward for their labors if the claim in issue could be avoided by doing the same thing in substantially the same way, with the same result, by means of a colorable change, which makes one piece out of two.

Plaintiff may have the usual decree and costs. Submit decree on five days' notice.

NATIONAL SWEEPER CO. v. BISSELL CARPET SWEEPER CO.

(District Court, S. D. New York. March 20, 1917.)

PATENTS ⟸328—INVENTION—PNEUMATIC SWEEPER.

The Baender patent, No. 1,138,437, for a pneumatic sweeper *held* void for lack of invention in view of the prior art.

In Equity. Suit by the National Sweeper Company against the Bissell Carpet Sweeper Company for infringement of letters patent No. 1,138,437, for a pneumatic sweeper, issued to Baender May 4, 1915. On final hearing. Decree for defendant.

C. L. Sturtevant, of Washington, D. C., L. W. Southgate, of Worcester, Mass., and L. S. Bacon, of Washington, D. C., for plaintiff.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for defendant.

MAYER, District Judge. "This invention" Baender states, "relates to a carpet sweeping appliance operating by atmospheric pressure to draw in and gather the dust and 'sweepings' from a carpet while the appliance is moved over its surface. The carpet sweeper of my invention operates on the principle of producing a continuous suction or exhaustion of the air in a closed receptacle sufficiently below the normal pressure of the atmosphere to induce an inflow of air through a slit or nozzle, and thereby draw the dust and sweepings into the receptacle as the appliance is moved over the carpet. The invention embraces the novel construction and combination of a dust receptacle on wheels, suction bellows, and means for operating the bellows in such manner as to produce and maintain a continuous suction at the inlet slit in the receptacle as the same is moved over the surface of the carpet."

Claim 2 is for:

"2. The combination, in a pneumatic cleaner having traction wheels supporting the rear thereof, of a dust receptacle removable from the cleaner and having a horizontal screen device in its upper portion, a suction nozzle supporting the front end of the receptacle, the exit from the nozzle entering the receptacle below the screen device, a suction device above the receptacle, and connecting devices between the wheels and the suction device for operating the latter."

Claim 4 reads:

"4. In a sweeping appliance, the combination of a dust receptacle, a nozzle communicating therewith and supporting the front end thereof, a suction device over said receptacle and communicating therewith, screening means located between the nozzle and suction device, wheels forming the rear support of said appliance, and operative connections between the wheels and the suction device adapted to operate said device upon the rotation of the wheels."

Concededly every element is old, and, to support the combination, it is urged that invention was required to utilize the so-called "1–2–3 arrangement" in a hand-propelled sweeper, and to so dispose the suction nozzle that it always acts as a support for the front end of the device when in operation on a carpet to be cleaned. The "1–2–3 arrangement" is a brief phrase coined by counsel, and means, in this case, that the flow of the air through the apparatus will be (1) through the suction nozzle, (2) through the screen device, and (3) in and out of the suction device. But that arrangement was old in the art, as witness (a) Fig. 9 of J. J. Harvey's American patent, No. 577,854, dated March 2, 1897, Harvey's English patent being dated January 10, 1893; (b) C. J. Harvey's patent, No. 673,603, dated July 11, 1899; and (c) Kenney's patent, No. 847,947, dated March 19, 1907. Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 227 Fed. 998, 1004. Something might be said about Anders (British) No. 28,087 of 1906–1908, and Dudley's Exhibit D might be discussed with some particularity; but, as "enough is as good as a feast," further elaboration is unnecessary.

Notwithstanding these prior art references, it is urged that, because they were not utilized in a commercially successful compact hand-operated sweeper, Baender somehow evidenced inventive genius. The history of the art as developed in the Vacuum Cleaner Co. Case, supra, in Vacuum Cleaner Co. v. Innovation Electric Co. (D. C.) 234 Fed. 942, affirmed 239 Fed. 543, — C. C. A. —, and in this and the two companion cases at bar, shows that the art of cleaning by suction or vacuum devices never attained substantial utility until after Kenney's invention, and, for that reason, that the old-fashioned and (for its purposes) efficient Bissell carpet sweeper, with its commercial success of over 30 years, was good enough for day by day domestic needs.

Undoubtedly the Kenney invention gave an impetus to the art, and, presumably, it occurred to Baender, just as it did to Dudley, and later to Sturgeon and Quist, that a cheap hand-propelled device, small and compact, which utilized the suction idea (not now referring to suction or vacuum technically), would go a step further and supply a want that the Bissell carpet sweeper had not filled and that the Kenney patent had created.

The advantage, already old, of having the separator or dustbag as No. 2 in the "1–2–3 arrangement" had been made especially clear in its then most advanced form by the Kenney patent and to an experimenter skilled in the art, the obvious first step was to see what could be done with the "1–2–3 arrangement" in a compact hand-propelled machine. Indeed, the tortuous history of this patent, illuminated by a

file wrapper as voluminous as might be expected of the most complicated device in the mechanical or electrical arts, demonstrates that the "1–2–3 arrangement" was not, as indeed it could not be, the gist of the so-called invention, but that the emphasis was on the distribution of the load. The far from vigorous conclusion of the board of examiners in chief on an insufficient record was as follows:

"In all of these claims there is defined a special arrangement of the dust box and the suction device, as well as of the supporting and driving wheel and the suction nozzle; the suction device being disposed above the dust box and the suction nozzle being at one end, while the driving wheel (or wheels) is situated at the other end. This arrangement of the parts is compact, and therefore advantageous, and, furthermore, is such as to provide for a distribution of the load between the wheel and the suction nozzle. It required some ingenuity to devise the above-described arrangement of the parts, although it is true that they individually operate in about the same way as the corresponding elements found in the cited patents. The device as covered by the first five claims is new and useful and therefore patentable."

Of course, any one who knew the many devices of the prior art would know that the dirt should be sucked up or blown in at the front end of the device, and any one who knew only the Bissell carpet sweeper (not to speak of other prior art) would know that the proper location of wheels would facilitate the movement of the machine, and the only problem, if such it may be called, was of the simplest mechanical kind; i. e., to distribute the load between the wheels and the suction nozzle. This Baender accomplished operatively in the patent sense, but most ineffectively, by producing a device which worked only one way and with enough noise to destroy the nerves of even a placid housewife.

If it be assumed that Baender, if called, could show that he had sold 2,000 machines, it does not take the foresight of a prophet to predict that the Baender device in the form of the teaching of his patent would have been short-lived. From the foregoing it will be seen that discussion of infringement, about which so much was argued, becomes unnecessary, and that further testimony as to the controverted Dudley Exhibit (which, if in the prior art, obviously disposes of Baender) need not be taken.

For want of invention, the patent is void, and the bill is dismissed, with costs. Submit decree on five days' notice.

M. S. WRIGHT CO. v. BISSELL CARPET SWEEPER CO.

(District Court, S. D. New York. March 20, 1917.)

PATENTS ⇐328—INVENTION—PNEUMATIC CARPET CLEANER.

The Sturgeon patent, No. 996,810, for a pneumatic carpet cleaner, *held* void for lack of invention, in view of the prior art.

In Equity. Suit by the M. S. Wright Company against the Bissell Carpet Sweeper Company for infringement of letters patent No. 996,810, for a pneumatic carpet cleaner, issued to Harold M. Sturgeon July 4, 1911. On final hearing. Decree for defendant.

L. S. Bacon and C. L. Sturtevant, both of Washington, D. C., and L. W. Southgate, of Worcester, Mass., for plaintiff.

Drury W. Cooper, of New York City, and Fred L. Chappell, of Kalamazoo, Mich., for defendant.

MAYER, District Judge. Claim 1 will sufficiently illustrate this patent. It reads:

"1. The combination, in a pneumatic carpet cleaner, of a dust box, a screen device, slidably mounted in the upper portion of said box, adapted to be removed and replaced within said box, a suction nozzle, secured to and supporting the front end of said box, the exit therefrom entering said box under said screen device, journal bearings, secured to the rear end of said box, a crank shaft in said bearings, cranks in said shaft, a suction device above said box, communicating with the interior thereof above said screen device, pitmen extending between the cranks in said crank shaft and said suction device, and traction wheels, secured on said crank shaft, adapted to support the rear end of said dust box and rotate said crank shaft, substantially as set forth."

What Sturgeon did differently from the Baender patent was (1) to provide a slidable screen and (2) to employ a crank shaft for the traction wheels and hitch it up directly with the bellows through single pitman mechanism. He used V-shaped bellows with their hinged ends "adjacent to the suction nozzle and the vibrating ends thereof adjacent to the supporting wheels"—an element in substance disposed of in the case involving the Baender patent, and certainly, in view of the Baender patent, not imparting novelty to the combination here claimed.

The slidable screen element is not novel, in view of Applegate, No. 1,016,600, dated February 6, 1912, and applied for July 10, 1909, and the Dudley models D and G, or Applegate alone. The V bellows and the crank and pitman mechanism eliminate the noise made by the Baender device and enable the machine to be moved forward and backward; but these mechanical expedients, when applied to the device of the Baender patent, must have been well within the skill of any competent mechanic, and certainly, in view of the Conover patent, No. 847,278, of March 12, 1907, and the Dudley patent, No. 924,542, of June 8, 1909, and the Buell patent, No. 949,370 of February 15, 1910, the Sturgeon patent in this regard discloses, at best, improvements which fall far short of patentable novelty.

Any one would have known that a carpet sweeper must be moved

back and forth before the housewife would consider using it more than once, and such had been one of the attributes of the old-fashioned Bissell carpet sweeper for over a quarter century. Thus it remained for Sturgeon, or any one else, in view of the Baender patent and the prior art, only to apply ordinary skill to improve the Baender device to meet this requirement. Indeed, in this regard, Baender showed a conspicuous lack of that knowledge which even a man of such modest attainments as Dudley possessed, and what Sturgeon did surely did not amount to invention.

The bill is dismissed, with costs. Settle decree on five days' notice.

MALLINSON et al. v. RYAN.

(District Court, S. D. New York. April 19, 1917.)

1. PATENTS ⇐313—SUITS FOR INFRINGEMENT—MOTIONS TO DISMISS.
Motions to dismiss under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) are to be encouraged in suits for infringement of simple design patents, where a mere inspection of the patent is all that would be necessary on final hearing.

2. PATENTS ⇐328—VALIDITY—DESIGN FOR FABRIC.
The Hanson design patent, No. 50,307, for a design for a textile fabric having stripes defined by irregular and wavy dividing lines, *held* void for lack of invention.

3. COURTS ⇐290—JURISDICTION OF FEDERAL COURTS—JOINDER OF CAUSES OF ACTION.
In the absence of diversity of citizenship, a federal court is without jurisdiction of a suit for unfair competition, although joined with a cause of action for infringement of patent, where the alleged unfair competition arises from acts independent of the infringement, and, even though arising out of the acts constituting infringement, the court is not obliged to take jurisdiction.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832.]

In Equity. Suit by Hiram Royal Mallinson and Eugene Irving Hanson, copartners doing business as H. R. Mallinson & Co., against Matthew W. Ryan, trading as Wm. H. Brown & Co. On motion to dismiss bill. Motion sustained.

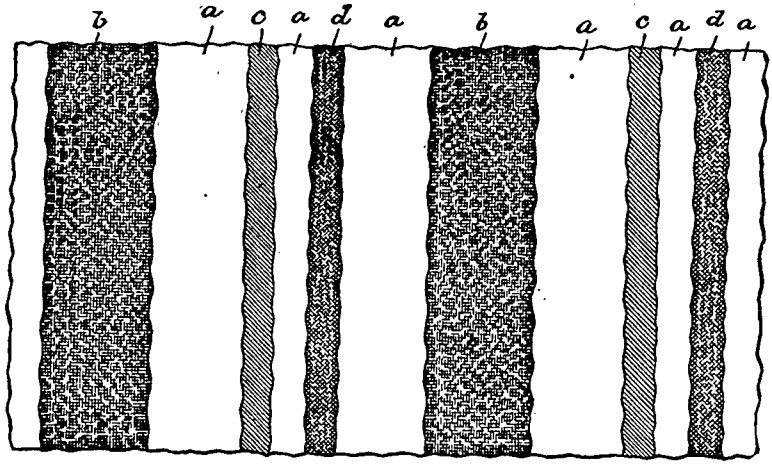
T. Hart Anderson, of New York City, for the motion.
Briesen & Schrenk, of New York City, opposed.

MAYER, District Judge. The suit is between citizens of the state of New York, and the bill alleges the infringement of a design patent, and "that the court's jurisdiction is invoked primarily under the patent laws of the United States," and then concludes with allegations of unfair competition.

[1] The motion to dismiss is made on the ground (1) that the patent on its face is void for lack of invention; and (2) that the court has not jurisdiction in respect of the cause of action for unfair competition because of lack of diversity of citizenship. Such motions to dismiss, made under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) are to

be encouraged in the case of simple design patents, where the mere inspection of the patent is all that would be necessary on final hearing, and this practice saves time and expense and tends to prompt disposition of litigation—all to the benefit of litigant, court, and counsel.

[2] 1. The design of the patent in suit (No. 50,307, to Eugene Irving Hanson) is for a textile fabric, and is represented by the drawing below:



"The stripes *a*, *b*, *c*, and *d* composing my design," says the patentee, "are separated or defined, not by straight lines, but by irregular and wavy lines, whereby the monotonous continuity of the stripes is broken and a soft draped effect is imparted to the fabric bearing my design. The design is intended to be repeated on the fabric."

How such a design involves invention is beyond my comprehension, especially in view of what has been recently said in Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56, and Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. at page 130, 148 C. C. A. 620. Can it conceivably involve patentable novelty to draw a few spaced apart parallel lines on a gown, a parasol, a shirt, a shawl, a rug, or the many other articles made up of textile fabrics? To so hold would undignify the whole theory of invention and transmute the simplest effort (not merely of a man skilled in the art, but of almost any person of ordinary intelligence) into the basis for the monopolistic grant which was intended to be a valuable reward for that which was really a contribution to the arts and sciences.

[3] 2. The complaint alleges a cause of action for unfair competition. This unfair competition is alleged to consist in the adoption by defendant of certain details and nonfunctional characteristics which identify and individualize the fabrics marketed by plaintiffs. In other words, the charge, in effect, is that, in addition to adopting the irregular lines in the manner of the patent, defendant has presumably used the same colors as plaintiffs, arranged in the same succession.

Obviously, if plaintiffs put out a fabric, for instance, in lines of

black, letting the intervening space be white, and defendant puts out a fabric with lines of blue, letting the intervening space be yellow, there would not be unfair competition; assuming that defendant did not do any other acts by way of misrepresentation, similarity, and the like, which would tend to deceive the public. Therefore, as the unfair competition would arise essentially from acts independent of the infringement, the facts making up the unfair competition would constitute an independent cause of action. In such a case it is settled beyond question that this court is without jurisdiction, in the absence of diversity of citizenship. It is enough to refer to Ross v. H. S. Geer Co. (C. C.) 188 Fed. 731, at page 733, where the court concisely says:

"As the parties are all citizens of the state of New York, this court has no jurisdiction of an action for unfair competition in trade pure and simple."

The court, however, may take jurisdiction where a federal question is presented in good faith, and local or state questions are intertwined with the situation disclosed, as in Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753. This is the theory to which Judge Ray referred in Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C.) 182 Fed. 832, and to which Judge Baker referred in Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194. Judge Baker states the principle as follows:

"Under such circumstances (whether the compactness for cheapness of manufacture and the ornamental form are within the protection of the claims or not) a federal court of equity, in granting relief for the infringement of the mechanism, ought not to remit the complainant to another forum to mete out the damages which necessarily appear in proving the infringement, and which, though in one aspect arising from fraud in trade, in a fairer aspect are aggravations of the infringement."

In the Onondaga Indian Wigwam Co. Case, the court merely passed on demurrer on the question of multifariousness. If the bill in the suit at bar be regarded as setting forth a case of unfair competition arising out of the acts constituting infringement and sufficiently interrelated therewith, nevertheless the court is not obliged to take jurisdiction. Doubtless there are many cases where it is desirable to retain jurisdiction, but there are other cases where the contrary is the case, and such is the suit at bar; for here the parties can litigate their controversy competently in the state court where it belongs, and, the patent question having been determined at the threshold of the litigation, there is no good reason why the United States courts should permit a litigation to continue, and especially where numerous causes properly here are entitled to the attention of the court.

Motion to dismiss bill granted, with costs.

THE TALUS.

(District Court, S. D. Alabama. May 26, 1917.)

No. 1642.

1. SEAMEN ⊂⊃24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS—CONSTRUCTION OF STATUTE.

Under Rev. St. § 4530, as amended by Seaman's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322), a seaman on either a domestic or foreign vessel, who has rendered at least five days' service, has the right to demand at each port of the United States where the vessel loads or delivers cargo one-half the wages he shall at the time of the demand have earned since he signed, or since the last previous payment under the act, provided at least five days have elapsed since such payment, and it is not necessary that the vessel shall have been in that port for five days before the demand may be made.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123–128.]

2. SEAMEN ⊂⊃3—WAGES—LAW GOVERNING PAYMENT.

The rights of a seaman in the courts of the United States are governed by such act, and not by the law of the flag of the vessel on which he is serving.

3. SEAMEN ⊂⊃20—WAGES—PART PAYMENT AT INTERMEDIATE PORTS—CONSTRUCTION OF STATUTE.

Under such provision, which is expressly made applicable to seamen of foreign vessels in ports of the United States, construed in connection with Act March 4, 1915, c. 153, § 11, 38 Stat. 1164, 1168, which also reenacts and amends Dingley Act June 26, 1884, c. 121, § 10a, 23 Stat. 55 (Comp. St. 1916, § 8323), as amended by act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763, making it unlawful in any case to pay any seaman wages in advance, and providing that the payment of advance wages shall in no case absolve the vessel, master, or owner from the payment of full wages after the same shall have been actually earned, the amount of any advance payment, although made in a foreign country, where it was lawful, cannot be deducted from the wages earned, and to which the seaman is entitled to half payment.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 86–91.]

In Admiralty. Suit by Erik Sandberg and others against the British ship Talus. Decree for certain libelants, and against others.

Alex Howard, of Mobile, Ala., for libelants.

Jos. N. McAleer and Jas. H. Kirkpatrick, both of Mobile, Ala., for claimant.

ERVIN, District Judge. The libel in this case was filed by the seamen, claiming one-half part of the wages which they had earned up to the time of their demand for such part of their wages. It appears that the libelants were shipped as seamen aboard the British ship Talus in Liverpool, England, and began their services about the 1st of December, 1916; that the vessel arrived in this port on February 11th, and the men were paid some money on account of their wages; that about the 22d day of February, 1917, libelants, in the port of Mobile, demanded one-half part of the wages which they had then earned, and this demand was refused by the master of the Talus, he claiming that the libelants had been paid more than one-half part

of the wages then earned by them, because there had been advanced to the libelants certain sums when they signed in England.

The question, therefore, is the same one presented and ruled on by me in the case of Koskeimer v. The Imberhorne (D. C.) 240 Fed. 830, in which case I held that, under the provisions of the Seaman's Act, the vessel could not charge against the one-half part of the wages earned by the sailor an advance made in England at the time of the sailor's being signed.

[1] I am now asked to reconsider by conclusion reached in the Imberhorne Case, and it is urged upon me that, under the provisions of section 4530 of the Seaman's Act, the only part of the wages which the seaman, shipped in a foreign country, is entitled to demand in this country of a foreign vessel, is one-half part of such wages as may have been earned after such foreign vessel reaches her port in this country. The various admiralty courts in this country have had presented to them for consideration many phases of the Seaman's Act, and it is natural that there has been some difference of opinion in its construction.

In the case of the Strathearn (D. C.) 239 Fed. 583, the libel was dismissed by the judge, because he held the demand for wages was made by the seamen before they had been five days in the port of Pensacola. This holding is along the same line as the contention that is now urged upon me, but I cannot agree to that contention. The whole question depends, of course, upon the proper construction of the terms of the Seaman's Act, as found in 38 Statutes at Large, 1164, which reads as follows:

"Sec. 4530. 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." (Italics mine.)

"Sec. 10 (a). That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $25.00 nor more than $100.00, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case, except as herein provided, absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages."

Let us now analyze the language of this act. It will be noted in the first place that the act does not give to the seaman one-half part of

such wages as he may earn in every port where such vessel shall load or deliver cargo. The language is that he shall be entitled to receive on demand one-half part of the wages which he shall have *then earned.* If it had been intended to give to the seaman only a half of such wages as he should earn in each port where the vessel receives or delivers cargo, the language would have been entirely different, and, instead of saying the seaman was entitled to one-half part of the wages which he shall have then earned, it would have provided that he was entitled to receive one-half part of such wages as he may earn in any port where such vessel received or delivered cargo.

The use of the expression "one-half of the wages which he shall *have then earned*" can only indicate that it was the intention of Congress to give seamen the right to demand one-half of all the wages which such seamen shall have then earned at the time of the demand made. I grant that there is some confusion in the way the act is worded, because of the placing of the words "at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended." It is hard to word a statute so as to make its provisions absolutely plain and simple and avoid more than one construction, and, in wording a statute, words are sometimes put into it in a parenthetic way in a part of a sentence which makes confusion, when they could have been transposed so as to make the meaning more clear.

My own idea is that the words "at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo," were intended to designate the places at which the seamen would have the right to *demand their wages,* and were not intended to indicate the place at which such wages *were earned by the seamen.* Omitting certain of the words for the purpose of making my construction of the statute clear, I rearrange the terms of this part of the act so as to express my conclusion as to its meaning, and as so rearranged it would read as follows:

"A seaman shall be entitled to receive on demand, at each port where such vessel shall load or deliver cargo, one-half part of the wages which he shall have then earned: Provided, such demand shall not be made before the expiration of, and not oftener than once in, five days."

Again, the whole act must be construed together, in order to determine the meaning of any portions thereof, which may be doubtful, if construed alone. In section 10(a) I find the following provisions:

"The payment of such advance wages or allotment shall not in any case, except as hereafter provided, absolve the vessel, or the master, or the owner thereof from the *full payment* of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages."

The reference here about the full payment of wages, "after the same shall have been actually earned," it seems to me, shows that the words used in section 4530 necessarily have reference to the total wages earned at the time the demand is made, and not to such

wages as may be earned by the seaman after the vessel arrives in a port of this country for the purpose of loading or discharging cargo. I therefore hold that the act gives to every seaman the right to demand from the vessel at each port where such vessel, during her voyage, loads or delivers cargo, one-half of such wages as the seaman shall, at the time of such demand, have earned; that such seaman cannot demand any wages until at least five days' service has been rendered; that he cannot thereafter again demand the half part of such wages as may be subsequently earned until five days have elapsed from the last or prior payment of one-half his wages.

I do not think that the vessel must be in port five days before the seaman can make his demand, provided there has been five days or more of service by the sailor since he signed. I think the words, "Provided, such demand shall not be made before the expiration of, nor oftener than once in, five days," mean shall not be made before the expiration of five days of service, during which wages were earned, and not oftener than once in each five days thereafter. The Jacob N. Haskell (D. C.) 235 Fed. 914; The London (D. C.) 238 Fed. 645.

[2] The rights of a seaman in this country are controlled by this act, and not by the flag of the vessel on which he is serving. The Ixion (D. C.) 237 Fed. 142.

[3] As I am asked to review the conclusion I reached in the Imberhorne Case, and after considering the matter, I still think the conclusion there reached was correct, and as this case may be taken up, and that one was not, I here refer to the portions of my opinion in the Imberhorne Case which set out my views as to the reasons advances made by a foreign ship in a foreign port to the sailors when there signed, cannot be allowed when the sailor here claims the half part of such wages as he may have earned when he reaches this port. See 240 Fed. 831–834.

Upon considering the evidence as to the amounts earned by each of the libelants and the amounts paid them, exclusive of the advances made at the time of shipment, I find that Magnus Persson and Andreas Evanger had, at the time of making their demand for one-half of their wages on February 22, 1917, been already paid more than the one-half of their wages earned up to that time, so that they were not entitled, at that time, to demand anything of the vessel. As the demand in each of these cases was not justified, and as each of these seamen abandoned the vessel when further payment to them was refused, I find that they have deserted the vessel, and are not entitled to receive anything from the vessel, so that the libel is hereby dismissed as to Magnus Persson and Andreas Evanger.

As to Erik Sandberg, I find that this man, at the time he made his demand on February 22, 1917, had earned $90.85; that he had been paid $37.34; that there was coming to him $8.09. I find that the captain of the vessel refused to pay him anything on account of his wages, because the vessel had advanced him, at the time of signing, $19. I therefore find that the vessel wrongfully refused to pay him, and that under the terms of the act he is entitled to his discharge, and to all

of the balance of the wages then earned by him, which amount to $53.51, exclusive of the $19 advanced to him.

As to Carl Jannson, I find that, at the time he made his demand for one-half of his wages on February 22, 1917, he had earned $90.85; that there had been paid to him by the vessel $39.49; that there was then due him $5.94 as a balance of the one-half of wages then due him. I further find that, when he made his demand on February 22, 1917, the captain of the vessel refused to pay him anything, because the vessel had advanced to him at the time he signed, $9.50. I therefore find that the vessel wrongfully refused to pay him, and that under the terms of the act he is entitled to his discharge, and to all of the balance of the wages then earned by him, which amount to $51.36, exclusive of the $9.50 advanced to him.

As to S. K. Benjaminsen, I find that, at the time he made his demand for one-half of his wages on February 22, 1917, he had earned $90.10; that there had been then paid to him by the vessel $26.19; that there was then due him $18.86 as a balance of the one-half of wages then due him. I further find that, when he made his demand on February 22, 1917, the captain of the vessel refused to pay him anything, because the vessel had advanced to him, at the time he signed, $28.50. I therefore find that the vessel wrongfully refused to pay him, and that under the terms of the act he is entitled to his discharge, and to all of the balance of the wages then earned by him, which amount to $63.91, exclusive of the $28.50 advanced to him.

As to John Perannen, I find that, at the time he made his demand for one-half of his wages on February 22, 1917, he had earned $201.40; that there had been then paid to him by the vessel $78.23; that there was then due him as a balance of one-half of the wages due him $21.47; I further find that, when he made his demand on February 22, 1917, the captain of the vessel refused to pay him anything, because the vessel had advanced to him, at the time he signed, $52.25. I therefore find that the vessel wrongfully refused to pay him, and that under the terms of the act he is entitled to his discharge, and to all of the balance of the wages then earned by him, which amount to $123.17, exclusive of the $52.25 advanced to him.

As to Erik Sandberg, Carl Jannson, S. K. Benjaminsen, and John Perannen, they are hereby discharged from the steamship Talus, and decrees will be entered in their behalf against said vessel for the amounts found due them.

THE TEMPLE E. DORR.

(District Court, D. Oregon. April 30, 1917.)

No. 7040.

COLLISION ⇐101—OVERTAKING VESSELS.

Two tugs were proceeding up the Columbia river in the daytime, one behind the other and connected by a line, although each was under its own steam. There was some ice in the river, through which the leading tug was breaking a channel until it struck an obstruction in the ice and

stopped. The other tug came alongside, and then backed slowly away to prevent fouling the propeller of the leading vessel. When the tugs stopped, the steam schooner Dorr was some quarter of a mile behind, following. When within about 300 feet she signaled her intention to pass to starboard and come ahead, coming into collision with the near tug. *Held*, that neither tug was chargeable with fault contributory to the collision for not giving alarm signals or backing signals, since the facts that they had stopped and the backing movement of one were known to the Dorr, but that the latter, whose duty it was to keep out of the way, was solely in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 216.]

In Admiralty. Suit for collision by the Port of Portland, owner of the steam tug Ocklahama, against the steam schooner Temple E. Dorr, the Hicks-Hauptman Navigation Company, claimant, with cross-libel. Decree for libelant.

Wood, Montague, Hunt & Cookingham, of Portland, Or., for libelant.

Snow & Bronaugh, of Portland, Or., for claimant.

WOLVERTON, District Judge. This is a libel by the port of Portland against the Temple E. Dorr, to recover damages on account of alleged negligence on the part of the Dorr, whereby she was brought into collision with the tug Ocklahama, and a cross-libel by the Dorr against the port of Portland, claiming that the fault for the collision was on the part of the tugboat Wallula, having in tow the Ocklahama, and especially on account of the negligent acts and maneuver of the Ocklahama.

On the morning of the collision, the same occurring on January 20, 1916, there was considerable ice in the river. The Wallula was steaming up stream, breaking the ice as she proceeded, and the Ocklahama was following, attached to the Wallula by a hawser; but both were navigating under their own steam. When the boats came nearly abreast of Elliott Point, the Wallula ran into some partly submerged piles incased in the ice, which were bound together at one end, and proved to be a floating dolphin, which had broken loose from its anchorage. This brought the Wallula to a full stop, and the Ocklahama ran up on her starboard side; some of the witnesses say to one-half of the length of the Wallula, and others to quite her full length. In order to prevent the hawser from fouling the Wallula's wheel and rudder, the Ocklahama backed away. The tide at the time was ebbing slightly, but the Ocklahama used her wheel a first and second time. It was when she had stopped her wheel the second time, or shortly thereafter, that the Dorr, while steaming up from the rear, came into collision with the stern of the Ocklahama, and the damages complained of ensued. The Dorr blew a passing whistle, indicating that she was going to starboard, as she approached the Ocklahama. There is a dispute as to whether there was an answering whistle blown. The Wallula's pilot says not, but others affirm that there was.

About opposite Elliott Point the channel makes a slight curve to port, looking up the river, and the testimony seems to indicate that the

Wallula and Ocklahama had entered upon the curve at the time the former came to a stop. It was thought by one, if not two, of the witnesses, that the Wallula had changed her course out of the channel and toward the Washington shore; but this is not substantiated, in the light of the other testimony. The testimony is in conflict touching the time that elapsed after the passing whistle was sounded by the Dorr to the time of the collision. The witnesses on the Wallula and Ocklahama at the time, speaking to the subject, are impressed that it was very short, measured by a few seconds only. The witnesses who were on the Dorr fix the time ranging from 1½ to 3 minutes. Elliott, who from the shore saw the boats come into contact, estimates the time at about 3 minutes, and he further thinks that the Dorr was about 300 feet from the Ocklahama when the whistle was sounded. Captain Turppa, who was on the Ocklahama, says in effect that, after she had run up on the starboard side of the Wallula, the Ocklahama backed a first and a second time, meaning by that that she used her wheel to propel her astern; that the first time was to stop her headway, and the second to carry her astern; and that her movement was straight astern of the Wallula in the channel, without veering to starboard, or, if she veered in that direction at all, that it was caused by the current. At no time did the Ocklahama navigate so far astern of the Wallula as to take the bight out of the tow line. A witness on the Dorr thinks that the line was rendered taut by the Ocklahama's backing, even to the extent of drawing the Wallula after her; but this was not the case, as none of the witnesses who were in better position to observe the situation so testify.

There were at the time on the bridge of the Dorr Julius Allyn, the pilot in charge of the ship; E. R. Hoffman, second mate, an experienced mariner; and Capt. M. Bliesath, the master—all of whom have given their testimony. According to these witnesses, the Dorr was from 800 feet to a quarter of a mile away from the Wallula and Ocklahama when they became aware that the latter boats had come to a stop in the channel. Orders were at once given to stop the engine and put the wheel hard over to port, which would throw the ship's course to starboard. When within 500 or 600 feet of the boats ahead, the Dorr's engines were ordered full speed astern, which, with the style of her propeller, had the effect to accentuate her movement to starboard. She had commenced to answer her helm before the last order was given. The Ocklahama was observed to be backing her wheel, when an order was given the Dorr to stop her engine. The three witnesses differ somewhat as to the relative time in which these incidents transpired. Allyn, the pilot, says that shortly after he put his engine astern he saw the Ocklahama commence to swing to starboard, and when about 300 feet away from the boats ahead he gave the passing signal of one whistle. He was then asked, "How was the Ocklahama lying at that time?" to which he answered, "Swinging out across the channel." He further says, "The nearer we approached the Ocklahama, the faster she swung out." Bliesath was impressed that the three orders, namely, one whistle blown as a passing signal, the wheel of the Dorr put hard aport, her engines stopped and put full speed astern, all happened

inside of two or three seconds, all of which was done when the Dorr was about 800 to 1,000 feet away from the other boats. At this time the witness had noticed that the paddlewheel of the Ocklahama was backing. Hoffman's testimony is that, when the Dorr was a quarter of a mile away, he told Allyn that the Ocklahama was working her wheel astern, and that immediately he (Allyn) gave the order, "Hard aport."

The witness Elliott was on shore at Elliott Point at the time of the collision, and he thinks about 550 feet distant. His testimony is to the effect that the Ocklahama backed at an angle across the channel, and was still in motion, moving astern, when the collision occurred; that she had moved away from the Wallula about 75 feet, but the witness could not say whether the Dorr had changed her course or not. He does say, however, that the Dorr kept coming up straight, right against the ice on the starboard side. Witnesses on the Ocklahama seemed to think the Dorr approached to port, which would be to the starboard of the Ocklahama looking astern.

The relative positions of the two boats at the time they came into collision are fixed satisfactorily by the angle at which the Dorr struck the Ocklahama. Her nose struck the beam supporting the cylinder timbers from 2 to 3 feet to the starboard of the center looking from the Dorr, and, after breaking it, struck the cylinder timber to the right several feet further ahead, and left its mark there. After so striking the Ocklahama, the Dorr backed up somewhat, and attempted to go forward again, when the port bluff of her bow came in contact with the Ocklahama's fantail. This accounts for the scar found on the Dorr's port bow. This shows that, if the Dorr had changed her course two points, as one of the witnesses seemed to think she had, it would be nearly sufficient, if not quite, to account for the angle at which she collided with the Ocklahama. The Ocklahama's backing across the channel could not, therefore, have been at any considerable angle.

Two rules of admiralty are invoked—one by the libelant, namely, that an overtaking vessel shall keep out of the way of the overtaken vessel; and the other by the respondent, that, when vessels are in sight of one another, a steam vessel under way, whose engines are going full speed astern, shall indicate that fact by three short blasts of the whistle. The first rule has but little application here, because the Wallula and Ocklahama were not moving ahead. The Wallula was virtually at anchor, or, if moving at all, was drifting very slowly astern with the current. The Ocklahama was maneuvering to keep her line from fouling the Wallula's wheel and rudder. By a stronger reason, an approaching vessel is required to keep out of the way of another at anchor, or at a full stop, knowing her condition and position. It may well be doubted whether the Ocklahama comes within the rule invoked by respondent. She can hardly be said to have been under way, with her engines going full speed astern. At no time were her engines going full speed astern, and she was not navigating astern in the sense that she was moving from one place to another in the water. The case of The Sicilian Prince (D. C.) 128 Fed. 133, is cited. The ship had been backing full speed astern, but had stopped her engines, and was held at fault in not giving the proper signals under the rule.

This case is illustrative only so far as it has any bearing on the present case.

But, conceding the application of the rule, and that it was the duty of either the Ocklahama or the Wallula to blow three blasts of the whistle, and conceding even further, as it is argued, that it was incumbent upon them, or either of them, to give a danger signal, or to have a watch upon the Ocklahama, I am of the firm opinion that the omission to do either of these things did not contribute in the least to the collision that ensued. All the witnesses on the Dorr concede that they observed the positions of the Wallula and the Ocklahama, that they had come to a halt in the ship's channel, and that the Ocklahama was backing her wheel when the Dorr was from 800 feet to a quarter of a mile distant. Further than this, they knew, if their testimony is true, that the Ocklahama was backing diagonally in the channel only a little time after they had observed that the boats had come to a stop. Indeed, Allyn gave a passing whistle when, according to his own statement, the Ocklahama was swinging across the channel. All this goes to show that the Dorr knew perfectly well the position of the boats ahead of her, and the exact maneuver of the Ocklahama, and, notwithstanding, the Dorr attempted to pass to the starboard. Any signaling of the Ocklahama or the Wallula could not have put the Dorr more into actual cognizance of the real situation than she was already, and it was the duty of the Dorr to keep out of the way of these boats. It is manifest that the Dorr was holding to the channel in the ice which the Wallula had broken through. This channel was perhaps 70 feet in width, or thereabouts, and it is probable that the Dorr attempted to pass without breaking through ice outside of it. Elliott says the Dorr was running along against the ice on her starboard when she came into collision with the Ocklahama. There was plenty of room in the river to have passed safely upon either side of the Wallula and Ocklahama. It is quite probable that the Ocklahama was backing slightly across the channel made in the ice at the time, as the Wallula had partially made the curve in the channel to port, and therefore, if the Ocklahama had backed straight astern of the Wallula, it would have thrown her slightly across the channel. But, knowing the situation of these boats and the maneuver of the Ocklahama perfectly, as it seems to have, the Dorr was at fault when it attempted to pass on so narrow a margin, and this fault was the proximate cause of the collision. Whatever omission in observing the rules of navigation there might have been on the part of the Wallula and Ocklahama, it could not in the slightest degree have contributed to the accident, as the Dorr had all the knowledge of the situation that any signals from the two boats could have given her.

The case of The Erandio (D. C.) 163 Fed. 435, is one where the leading boat became stuck fast in the ice, and the one following her was so near that a collision was unavoidable, although proper effort was made to prevent the boats coming together. It was held that neither vessel was at fault. The case is not in point here.

The conclusion is that the Dorr was solely at fault, and is liable for the injuries sustained by the Ocklahama.

In re VOCKE.

(District Court, W. D. Kentucky. January, 1917.)

1. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS BY TRUSTEE—ADVERSE CLAIMANTS.

A licensed saloon keeper, being unable to pay for his state and city licenses as they became due, applied to the C. Company for a loan with which to pay therefor, and pledged the licenses to that company as surety for the indebtedness, at the same time giving its secretary a power of attorney to sell them and apply the proceeds to the payment of such debt. Thereafter, and before he became bankrupt, his landlord sold his stock and fixtures under a distress warrant and the C. Company became the purchaser. That company sold the stock and fixtures to the claimant, and also assigned the licenses to him. The claimant procured an assignment of the state license by the state authorities, and surrendered the city license to the city authorities, which issued a new license to him in the place thereof. *Held*, that the trustee's right to such licenses should be tried out in a plenary action, and not in a summary proceeding upon rule to show cause, as his right to the licenses depended upon important and far-reaching questions, and the claim of the claimant was not merely colorable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

2. BANKRUPTCY ⟸302(2)—PROCEEDINGS BY TRUSTEE—PLEADING.

A response by the claimant to a rule to show cause was sufficient, where it set up the facts as to its acquisition of the licenses and the surrender thereof to the state and city authorities in exchange for new licenses, as it could not be required to surrender licenses which it did not have the power to surrender.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456.]

3. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS—ADVERSE CLAIMS.

When it developed that the claimant made an adverse claim to the licenses, which was not merely colorable, the referee should have discharged the rule, as he had no jurisdiction to determine the issues.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

In Bankruptcy. In the matter of August H. Vocke, bankrupt. On review of an order of the referee. Order reversed.

Gifford & Steinfeld, of Louisville, Ky., for trustee.

Kohn, Bingham, Sloss & Spindle, of Louisville, Ky., for petitioners.

EVANS, District Judge. A. R. Cooper, the trustee of this bankrupt, in November, 1916, filed a petition before the referee, asserting that the bankrupt had a license issued by the city of Louisville and one issued by the state of Kentucky to conduct a saloon business in this city, neither one of which had expired on September 2, 1916, when the adjudication was made. It appears that the license showed that the business was to be conducted at 106 South Fourth street. The trustee showed that, prior to his election as such, a corporation, styled "Jul's Café," had been created under the law of Kentucky, and this corporation had purchased the bankrupt's place of business from the Central Consumers' Company, which had attached it for rent before the adjudication, and subsequently had it sold under the attachment, and that the respondent, Jul's Café, had taken possession of the licenses in the

saloon without right and without paying the trustee the value thereof. The trustee asserted that the licenses were his property, and that he was entitled to have possession of them. He thereupon prayed the referee to enter an order directing Jul's Café to show cause why it should not surrender the licenses. The referee issued the rule as prayed for. The Jul's Café responded as follows:

"The respondent, Jul's Café, for response to the order entered herein requiring it to show cause, if any it has or can, why it shall not turn over to the trustee herein the licenses mentioned in said order, states that it has not in its possession or under its control any of the licenses referred to in said order, and that the only licenses which it has in its possession are the licenses that were assigned to it by the state of Kentucky and Jefferson county, or issued to it by the city of Louisville, authorizing it to conduct a saloon at 106 South Fourth street, in Louisville, Ky., and that it acquired the said licenses in the following manner, to wit: It states that, prior to the adjudication of the said August Vocke a bankrupt, he was engaged in the business of operating the said saloon at 106 South Fourth street; that he got behind in his rent and a distress warrant was sued out by his landlord and levied upon the stock and fixtures contained in said saloon; that a sale was made under the said distress warrant, and the Central Consumers' Company became the purchaser of said stock and fixtures, and afterwards this respondent bought the said stock and fixtures from the said Central Consumers' Company. It states that at the time it also bought from the Central Consumers' Company the state and city licenses that had been issued to the said August H. Vocke authorizing him to conduct a saloon at said 106 South Fourth street.

"Respondent states that it is informed and believes and charges the fact to be that the Central Consumers' Company acquired the said licenses from the said Vocke under the following circumstances, to wit: That in May, 1916, when his state license became due, the said Vocke was unable to pay for said licenses and applied to said Central Consumers' Company for assistance in obtaining them; that the said Central Consumers' Company thereupon advanced to said Vocke the money to pay for said state license, and simultaneously with the said advance or loan the said Vocke pledged the said state license to said Central Consumers' Company as security for the repayment of said advance, and at the same time executed and delivered to Charles P. Dehler, the secretary of said Central Consumers' Company a power of attorney in and by which he authorized the said Dehler 'to indorse, sell, and deliver the said licenses,' and 'to collect and receive the proceeds of said licenses,' and to apply the proceeds of said licenses to the payment of the said advance made to him by said Central Consumers' Company. It states that likewise, in August, 1916, the said Vocke's city license became due and he was unable to pay for same, and again he applied to the Central Consumers' Company for assistance, and that said Central Consumers' Company thereupon advanced to said Vocke the money to pay for said city license, and simultaneously with said advance or loan the said Vocke pledged to the said Central Consumers' Company the said city license as security for the repayment of said advance, and at the same time executed and delivered to Charles P. Dehler, the secretary of said Central Consumers' Company, a power of attorney in and by which he authorized and empowered the said Dehler 'to indorse, sell, and deliver the said licenses,' and to collect and receive the proceeds of sale thereof, and to apply the proceeds of sale to the payment of said advance made to him by said Central Consumers' Company.

"Respondent states that said licenses, state and city, issued to the said Vocke as aforesaid, were assigned and transferred to this respondent by the said Charles P. Dehler under the authority vested in him by the two powers of attorney above mentioned, and that the said state license was duly assigned to this respondent by the proper authorities of the state of Kentucky; that the said city license was surrendered by this respondent to the city of Louisville, and there was issued to this respondent by the proper authorities of said city new licenses in the name of this respondent, authorizing it to con-

duct the saloon business at said place, and these licenses assigned to it as aforesaid and issued to it in its name are the only licenses in the possession of this respondent or under its control. Respondent further states that it is informed and believes, and charges the fact to be, that the value of said state and city licenses issued to said Vocke as aforesaid at the time of their sale to this respondent by said Central Consumers' Company and the amount paid therefor by this respondent is less than the amount that was then due to said Central Consumers' Company by said Vocke on account of said two advances made by said company to said Vocke to pay for said licenses.

"Wherefore, having fully responded to the said order, the respondent prays that this, its response, be adjudged sufficient, and that it be relieved of further attendance on the court."

The general question presented upon the rule and the response thereto was whether the latter was sufficient in law. This question was argued before the referee, who thereafter, pursuant to a written opinion filed, entered an order as follows:

"At Louisville, in said district on the 20th day of December, 1916, this matter having been heretofore submitted to the court as to the sufficiency of the response by Jul's Café to the order entered herein requiring it to show cause why it should not turn over to the trustee herein the licenses mentioned in said order, and the court, now being advised, delivered a written opinion which is now filed herein and made part of the record in this proceeding, and pursuant to said opinion, it is now ordered and adjudged by the court that the assignments by the bankrupt herein to the Central Consumers' Company of the state license issued to him in May, 1916, and the city license issued to him in August, 1916, are void and of no effect, and that said Central Consumers' Company took no interest therein, or lien upon the said licenses by such assignments, and that the transfer of said licenses to the said respondent, Jul's Café, by Charles P. Dehler, who is secretary of said Central Consumers' Company, under and by virtue of the powers of attorney executed and delivered to said Dehler the secretary of said Central Consumers' Company, is null and void and of no effect. It is further ordered and adjudged that at the time of the adjudication herein, and at the time of the transfer of said licenses by said Central Consumers' Company by virtue of said powers of attorney to said Charles P. Dehler, said licenses were the property of and belonged to this estate, free from any right, title, interest, or lien of the Central Consumers' Company, and that, upon his election and qualification as trustee herein, A. R. Cooper, as such trustee, became vested with all of the right, title, and interest of the bankrupt in said licenses, subject to such limitations imposed by law free from any such right, title, interest or lien of the Central Consumers' Company, together with all the powers or privileges granted to the bankrupt by virtue of said licenses subject as aforesaid to such limitations imposed by law. It is therefore ordered and adjudged by the court that the response filed herein by said Jul's Café to the said order mentioned herein be and the same is now adjudged insufficient, and said Jul's Café is now ordered and directed to turn over and deliver to A. R. Cooper, trustee, said state and city licenses referred to herein."

Both the Jul's Café and the Central Consumers' Company (the latter was a creditor of the bankrupt, but had not been a party to the proceedings under the rule) joined in a petition for a review by the court of the order of the referee requiring the Jul's Café to surrender the licenses. If this were a plenary action between proper parties in interest, several interesting and possibly far-reaching questions might be raised for decision under the state and municipal laws of Kentucky, if we may so separately designate them. Some of those questions might be:

1. Whether the original licenses issued to the bankrupt were transferable, even under the circumstances stated in the response?

2. If transferable even to a limited extent, what interest, legal or equitable, did the respondent acquire in them?

3. What was the effect of the surrender of the old licenses and the issuance of new ones in their stead?

4. The trustee does not show that he made any claim to the leased premises under the lease, nor that either himself or the creditors manifested any desire or purpose to conduct the saloon business there in succession to the bankrupt under the licenses. Under these circumstances what, if any, interest does the trustee have in those documents or the rights or privileges they confer?

5. It appears from the response that the bankrupt, not being able otherwise to secure the money for paying for the licenses, obtained it from the Central Consumers' Company, and to secure its repayment indorsed on them, respectively, certain powers of attorney to sell and receive the money and to repay the Central Consumers' Company what it had advanced to pay for them. In this state of fact, what interest, legal or equitable, did the Central Consumers' Company acquire by these indorsements?

6. What was the surrender value of the licenses at the time of the adjudication, and was the trustee entitled to the whole or any part of that value, and, if so, who owed it to him? Did the Jul's Café or the Central Consumers' Company owe the money to the trustee? In this connection it might also be a question as to whether any right of action by the trustee would exist, in the absence of a claim by the trustee of the right of occupancy of the leased premises, in such way as to make valuable the right to the licenses under which to operate a saloon.

[1] Certainly these are interesting and important questions, to be determined by the law of Kentucky, and upon the record we may at this stage determine whether the claim of Jul's Café to the licenses is fairly to be considered an adverse one, or is it one that is merely colorable? Considering that question, we think it cannot be held, on the face of the record, that its claim to the papers is merely colorable. On the contrary, it is manifestly an adverse claim. That being so, we think the questions we have indicated, and others which might arise upon the facts shown by the record, should be tried out in a plenary action, and not in a summary proceeding like the one adopted by the trustee. This seems to be clear from authorities like Courtney v. Shea (C. C. A. 6th Cir.) 34 Am. Bankr. R. 753, 225 Fed. 361, 140 C. C. A. 382; 1 Loveland on Bankruptcy, § 36, p. 122; In re Mimms & Parham (D. C. Ky.) 27 Am. Bankr. R. 469, 193 Fed. 276; In re Yorkville Coal Co. (C. C. A. 2d Cir.) 33 Am. Bankr. R. 633, 211 Fed. 619, 128 C. C. A. 570; In re Rathman (C. C. A. 8th Cir.) 25 Am. Bankr. R. 246, 183 Fed. 913, 106 C. C. A. 253; Collier on Bankruptcy (10th Ed.) 476, 489.

[2] Coming now to the question more directly involved on this petition for review, we think the referee was in error in holding that the response to the rule was insufficient. Upon the facts shown we think it was a good response to the rule—the summary process—to say in the manner shown that the licenses issued to the bankrupt were not in

possession of the respondent, that the respondent claimed as its own those which were in its hands, that those issued to the bankrupt had been surrendered to the state and city of Louisville, respectively, and that the licenses to do business at the place indicated had been transferred to the Jul's Café. It appearing that the licenses issued to the bankrupt had been surrendered by the respondent and were not in its possession, a rule to surrender them becomes a vain thing, because the corporation could not be punished for contempt for not surrendering what it did not have the power to surrender.

[3] The real questions are those hereinbefore suggested, or similar ones, and their settlement must be obtained, not in a summary proceeding, but in a plenary action, or by some adjustment between the parties in interest. Whether the respondent is bound to surrender any licenses issued to it in its own name or otherwise in substitution for the original licenses to the bankrupt is a question to be determined in a plenary action, inasmuch as respondent makes an adverse claim to them which obviously is not merely colorable. When this situation developed, the referee should have discharged the rule, as he had no jurisdiction to determine such issues. Courtney v. Shea (C. C. A. 6th Cir.) 34 Am. Bankr. R. 753, 225 Fed. 361, 140 C. C. A. 382.

A decree will be entered, reversing the order sought to be reviewed, and the referee will be directed to discharge the rule to show cause, but without prejudice to the rights of the trustee to bring any appropriate action to enforce his rights as he may be advised.

A decree accordingly may be entered

BERGHER et al. v. GENERAL PETROLEUM CO. et al.

(District Court, N. D. California, First Division. May 23, 1917.)

No. 16153.

1. SALVAGE ⟸18—COMPENSATION—RIGHTS OF CREW.
   The right of the crew of a salving vessel to compensation for salvage services cannot be destroyed by any contract between the owners of such vessel and the owners of the vessel salved.
   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 31–43.]

2. SALVAGE ⟸36—COMPENSATION—RIGHTS OF CREW.
   Contracts between the owners of salved and salving vessels, fixing the amount which is to be paid for the salvage service, are binding upon the parties, but not upon the crew of the salving vessel, unless they assent to it. If the amount agreed upon is reasonable payment for the entire service, the salvor receiving it may be compelled to distribute to the crew their just proportion; but the crew are not bound to look to him, but may look to the salved vessel and its owners.
   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 85–91.]

3. SALVAGE ⟸23—COMPENSATION—RIGHTS OF CREW—EFFECT OF CONTRACT BETWEEN OWNERS.
   A steamer became disabled 60 miles off the coast of Mexico, because of dirt and water in her fuel oil, and could not make steam. She called by wireless to her owner in California, who sent a tug to her assistance; but for some reason it did not find her. Two days later the owner contracted with another vessel in San Francisco to go to her relief and tow

her to San Pedro, for which it agreed to pay an agreed sum per day and fuel cost; the amount being no more than the actual value of the use of the vessel at charter rates. The disabled vessel was found, after she had drifted for 4 days and was within 10 miles of the coast, and was towed to San Pedro and the agreed compensation paid. *Held*, that the service was not one of towage merely, but of salvage, and that the crew of the salving vessel, who had signed on for a voyage, were entitled to recover from the owner of the salved vessel half a month's wages for their part in the service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 53, 54.]

In Admiralty. Suit by C. Bergher and others against the General Petroleum Company and others. Decree for libelants.

F. R. Wall, of San Francisco, Cal., for libelants.

A. L. Weil, of San Francisco, Cal., for libelee.

Ira S. Lillick, of San Francisco, Cal., for J. R. Hanify and others.

DOOLING, District Judge. On August 1, 1915, the steamer Mills, under charter to respondent General Petroleum Company, became disabled while off the west coast of Mexico because, owing to dirt and water in her fuel oil, she was unable to make steam. In this condition she drifted with the wind and current at the rate of about a mile an hour until August 5th, when she was picked up by the steamer Francis Hanify and towed to San Pedro. During the four days before she was picked up she drifted from a position about 60 miles from shore to a position about 10 miles off shore. On August 1st her master sent the following message to San Pedro:

"Owing to dirt and water in fuel oil, engineers cannot furnish steam to proceed and hold out no hopes. They say fires may go out at any time, putting wireless out of commission. You will have to arrange to tow ship in. Our position is lat. 30° 15', long. 117° 03'."

On the same day respondent Petroleum Company replied:

"We are sending towboat from San Diego, having given them your position."

Later, but apparently on the same day, respondent sent the following:

"Towboat left San Diego at 6 p. m., owned by Spreckels Company. Accept other assistance. Have towboat proceed with steamer to San Pedro, not San Diego. Wireless your position often."

On August 2d respondent sent the following:

"Confirm receipt of wires concerning dispatch of towboat. Tug should reach you this afternoon."

To this the Mills replied on the same day:

"Your message received concerning towboat. Current and wind setting us one mile per hour from last position to S. S. E. magnetic."

Thereafter, and on the same day, at 1 p. m., the Mills sent the following:

"Position S. S. Mills 11:15 a. m. lat. 29° 51', long. 117° 16'."

And at 5:07 p. m. she sent the following:

No towboat in sight. Position at 4 p. m. lat. 29° 44' north, long. 116° 53' west. Drift one-half mile S. S. E. per hour. What towboat has come, and has she a wireless?"

Why the tug sent out did not find the Mills does not appear. On August 2d the steamer Francis Hanify left San Francisco for San Pedro, there to take on a cargo of fuel oil for Tocappila, Chile. Her crew shipped at San Francisco under this agreement:

"Office of the United States Shipping Commission, for the Port of San Francisco, California, August 2, 1915. It is agreed between the master and seamen, or mariners, of the steamer Francis Hanify, San Francisco, California, of which F. D. Zaddard is at present master, or whosoever shall go for master, now bound from the port of San Francisco, California, to San Pedro, California, to Arica, Chile, or such other ports as the master may direct, on the west coast of South America, thence to New Orleans, Louisiana, and such other ports and places in any part of the world as the master may direct, and back to a Pacific Coast port, with final discharge in the United States, for the term of not exceeding twelve months."

On the arrival of the Hanify at San Pedro, her master was directed by her owners to take on sufficient oil for the purpose and proceed to the Mills and tow her into San Pedro. This was in pursuance of a contract made at San Francisco on August 3d, between the General Petroleum Company and the owners of the Hanify. According to the former, the contract was that the Petroleum Company agreed to pay $400 a day for the time consumed and to reimburse the Francis Hanify for the value of the oil used, and for this the Hanify was to proceed to the position of the Mills as reported by wireless and tow her into San Pedro. As stated by the owners of the Hanify, the contract was that the Petroleum Company was to pay them $400 per day for the time consumed, and to reimburse them for the value of the oil used in the service of towing the steamer Mills, and the Hanify Company agreed to send the Francis Hanify out from San Pedro, and pick up the Mills, and tow her back to San Pedro for that compensation. Under either version, the finding of the Mills and the towing of her into San Pedro would seem to be essential to a claim for payment. Pursuant to the agreement, the Hanify found the Mills and towed her to San Pedro, the time consumed being three days and four hours, for which the Petroleum Company paid the owners of the Hanify the amount agreed upon; that is to say, $1,266.66. In addition, they paid $323.12 for the oil consumed, making a total amount paid of $1,589.78. No agreement was made with the crew of the Hanify, nor was anything paid to any of them for the services that were rendered to the Mills, except their regular wages.

This action was brought by some of the crew, in behalf of themselves and all others interested, against the owners of the Francis Hanify and owners of the Mills; the libelants claiming that the services rendered to the Mills were salvage services, and asking for a decree that the court fix the value of such services in the lump sum of $7,500, and direct the owners of the Hanify to account for the amount received by them, and that the owners of the Mills be compelled to pay into court the remainder for the benefit of those entitled thereto. Both respondents answer, setting up the fact that the services rendered were purely towage services, that their full value has been paid, according to the agreement, and that the crew of the Hanify are not entitled to any extra compensation beyond their wages for anything done by them in

the premises. The libel was filed February 2, 1917. The value of each of the vessels was at the times mentioned $200,000.

The case thus presented is an interesting one, and the principles that should govern its determination are very important, involving, as they do, the rights of the crew of the Hanify to recover for salvage services, if these were such, and the rights and obligations of the owners of the Hanify and Mills under the contract between them, already fully carried out by each. Yet the governing principles do not seem to me to be at all obscure.

[1] In the first place the rights of the crew of a salving vessel to compensation for salvage services cannot be destroyed by any contract between the owners of that vessel and the owners of the vessel saved. Indeed, the law is so tender of their rights that it makes void any assignment by seamen of salvage made prior to the accruing thereof. If the seaman himself cannot by agreement deprive himself of the right to salvage prior to its accrual, certainly no contract between other parties can deprive him of that right.

[2] In the second place, contracts between the owners of the salved and salving vessels are binding, but binding only on the contracting parties. The owner of a salving vessel may by agreement fix the amount which is to be paid to him for salvage services, and this agreement will be enforced. But such agreement cannot bind his crew unless they assent to it. If, however, the amount received by him under the agreement is a reasonable compensation for the full salvage service, including the services of the crew, he may be compelled to distribute to the crew their proportion of such amount. The crew, however, are not bound to look to him for their reward, but may look to the salved vessel and its owners, for neither the agreement of the owners nor the payment of the money is binding on them without their assent thereto. If it were, the owners would always have it in their power to defeat the rights of the crew by fixing the amount to be paid at such a trifling sum as to make it impossible for the crew to receive any commensurate reward, even if the whole sum agreed upon were distributed among them. If the owner of the salved vessel shall have paid to the owner of the salving vessel the full value of the service, including the service of the salving crew, and is thereafter called upon by the crew to answer to them, I am confident that under the general admiralty practice he could bring in the owner of the salving vessel to answer jointly with himself, and the rights of all the parties could be adjusted in the single action.

[3] Applying these principles to the case at bar, I am of the opinion that the service performed was a salvage service, and not merely one of towage. The Mills was disabled, drifting at the mercy of the winds and currents, and had so drifted for four days before she was picked up. In that time she had drifted to within 8 or 10 miles of the shore, from a position 60 miles distant therefrom. Her first telegram announced the danger of her wireless becoming unserviceable. The tug first sent to her relief had for some reason not found her. I think these facts stamp this as a salvage service within well-recognized rules. That both respondents unite in calling it a towage service is

not really of much moment as affecting the rights of the crew. But it is in evidence that the owners of the Hanify received for this service under their contract no more than the actual value of the use of their vessel at her charter rates. This being so, it cannot be said that there was included in the amount received by them any compensation for the salvage services of their crew for which they should be held to account to them. The crew, therefore, must in this action look for their compensation wholly to the General Petroleum Company. In a somewhat similar case (The Roanoke, 209 Fed. 114) this court allowed one-half month's pay to each of the crew of the salving vessel. The Circuit Court of Appeals, while not disturbing the award, declared it to have been very liberal. I am disposed, however, to make the same award in the present case, but only to the actual libelants.

The prayer for a lump sum will be denied, but to each of the crew who has appeared herein will be awarded one-half month's wages, with costs, the decree to run against the respondent General Petroleum Company only.

Let such decree be prepared.

In re NATURALIZATION OF SUBJECTS OF GERMANY.

(District Court, E. D. Wisconsin. May 14, 1917.)

ALIENS ⊂=61—ENEMIES—NATURALIZATION—"APPLICATION."

Rev. St. § 2171 (Comp. St. 1916, § 4362), first enacted in 1802 (Act April 14, 1802, c. 28, 2 Stat. 153), declares that no alien who is a native, citizen, or subject, or a denizen, of any country with which the United States is at war at the time of his application, shall then be admitted to become a citizen of the United States. In 1906 (Act June 29, 1906, c. 3592, 34 Stat. 596) the naturalization law was changed, and aliens were for the first time required to file a petition for citizenship, giving a 90-day notice before the certificate could be granted. Prior to this time applications had been granted without such notice. During the interim between the filing of a petition for citizenship and the hearing on such petition a state of war was declared between the United States and the German Empire, of which the petitioners were subjects. *Held* that, as the change in the naturalization law was for the protection of the United States, and as the obvious purpose of section 2171 was for the protection of the United States, such section must be construed as inhibiting the granting of citizenship to the petitioners, on the theory that the formal application in court is the one referred to.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.

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

In the matter of certain petitions for naturalization filed by subjects of Germany. Petitions denied.

William T. Birkby, Naturalization Examiner, of Chicago, Ill., for the United States.

GEIGER, District Judge. At the last hearing of naturalization matters, there were presented four petitions by persons who were sub-

jects of Germany. These had been filed, and notice of their pendency given, in the regular manner. The proofs upon each were taken, and it is conceded in each case that the applicant, though a subject of Germany, is qualified to become an American citizen. No bar is interposed to admission, save such as arises—if any does arise—by virtue of a statute of the United States, viz.:

"Sec. 2171. No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States." Comp. St. 1916, § 4362.

So much of the statute is material for present consideration. It contains certain other provisos, to which allusion will be made. On its face this statute appears quite plain. It so happens that on the 6th day of April, 1917, the Congress of the United States passed a resolution declaring that a state of war exists between the United States and the Imperial Government of Germany, and hence, when these cases were called, the examiner, upon the authority of this statute, objected to the issuanec of a certificate of naturalization to the four applicants to whom I have referred.

The question arises: What is meant by the language "with which the United States are at war," etc.? On the one hand, it may be urged that "at the time of his application" refers to the time of filing the formal written petition with the clerk of the court, and whereof 90 days' notice must be given before the actual naturalization can take place. On the other hand, it may be urged that the word "application" means what it meant when the law was passed, 115 years ago. At this time the formality respecting the proceeding for naturalization consisted in a declaration of intention, as under the present law, and the subsequent coming into court of the applicant with his witnesses, and in open court asking that his proofs be received, and, if found sufficient, the oath be administered and the certificate of naturalization granted; in other words, that he be adjudged admitted to citizenship. So we have this situation: That when this law was passed, in 1802, the term "application," as then used, referred to that manner of proceeding. That law remained in force, and now remains in force; but, 104 years later, the present naturalization law, providing for the present routine of proceedings, was passed, and for the first time introduced the requirement of the filing by the applicant for citizenship of what is denominated in the law a "petition," which, being filed by the clerk is entered of record as a proceeding by the applicant to procure naturalization. A 90 days' notice is given, with the further limitation upon the court that no one shall be naturalized unless that petition shall be heard in open court by and in the presence of the judge, upon the testimony of the applicant and his witnesses.

Four weeks ago, after a very brief opportunity for investigation, I expressed the informal opinion that the statute means the same thing to-day, has the same meaning to-day, as it had at the time it was passed; and, with the investigation that I have been able to give the matter in the meantime, my then expressed informal view has not only not been shaken, but has been fortified, so that to-day I am ready to say

that I am entirely clear as to the meaning of the statute, and as to the course which the court must pursue in respect of these four applicants, and any other application that may come before it for hearing during the time of the present hostility between this country and Germany.

The statute, obviously, at the time of its passage, could have but one meaning. If the application at that time referred to the act of coming into open court, presenting the proofs which, if found sufficient, entitled the administration of the oath and the issuance of a certificate, it could mean nothing else but this, and its purpose was to declare in plain language: That when this country is at war with another country, no subject of that country shall then be naturalized. That language of the act remains the same to-day, and if this section 2171 had first appeared in 1906, when the present law was passed, we could all agree that its terms might be broad enough to apply to either situation. That is to say, that the language "application" might refer to the petition that had been filed, and might refer to actual appearance for naturalization in court; but if we are to give effect to the statute as it reads to-day, its language plainly bars the naturalization of subjects of an enemy country in either event, because it reads:

"No alien who is a native," etc., "of any state or sovereignty with which the United States are at war *at the time* of his application shall *be then* admitted to become a citizen of the United States."

Obviously, if any effect is to be given to the word "then," if that word is not to be eliminated from the statute, the same meaning of the statute must be ascribed to it to-day that was plainly disclosed at the time of its original passage; because, if construed to refer to the *time of filing* the petition, it would be absurd, because he could not under the present statute be *then* admitted in any event. So I have no hesitation in saying that this means to-day what it meant when it was passed in 1802.

Now there are certain considerations that, it seems to me, tend conclusively to support this view. Congress, when passing this law—and it is found in one of the first general naturalization laws that was passed—was dealing, not with matter relating to any particular equity or consideration for particular aliens, but dealing broadly with the relation of this sovereignty toward those domiciled here who were subjects of a country and owed actual legal allegiance to a sovereign with whom this nation may be at war; and the obvious purpose of the statute was to declare and effectuate a public policy with respect to those so circumstanced. There inheres in the statute the same declared policy found in many other situations when once a state of war arises. It is but a further declaration of what is recognized generally, that when hostilities arise between this nation and another nation, the courts of this nation are not, as a matter of right, open to subjects of the other nation who may be domiciled in this country. It is a recognition of what I believe is legally and practically true, that when once hostilities arise between this sovereignty and another sovereignty, the recognition accorded to aliens, subjects of the enemy country, domiciled here, is a matter of executive grace. In other words, when once hostility arises between the two countries, the subjects of the enemy

who may be in this country, take on legally, though perhaps not actually, the attributes of hostility which their sovereign takes on, and they are dealt with upon considerations, as I have just said, of executive grace, and not upon considerations of legal right.

Now, take a practical view of the construction of this statute. There are aliens, subjects of Germany, who have filed petitions prior to the declaration of the existence of hostilities. There are others who are in all respects similarly situated, except that they did not file their petitions on or before the 90 days prior to April 6th. What sound reason or what logic can there be in dealing with the man who had in fact filed his petition, upon entirely different considerations, than are to be put forward in dealing with a man who had not filed his petition? It is my judgment that it cannot be done, unless we concede that the man who had in fact filed his petition had acquired some different or advanced status through the filing of his petition, which the other man had not acquired. I do not believe the one who has done that has acquired any other or different status. He is still an alien, and does not have any legal status as a quasi alien or as a quasi citizen. He becomes a citizen only through his act, in open court, of abjuring, under oath, the old, and assuming the new, sovereign allegiance; and, by way of illustration, I believe that the executive proclamation, issued shortly after the declaration of hostility, on April 6th, includes as a matter of law and in fact all those who had filed their petitions just as certainly as it included all those who had not filed their petitions, and that those who had filed their petitions are subject to executive control, just as much as those who had not filed their petitions. But that they acquired a status through the filing of the petition, involving, legally, anything more than the standing of an alien, cannot be entertained.

By way of further illustration, these aliens, whether they had filed their petitions or not, would be subject to the ordinary disabilities attending alien enemies, as, for instance, the right to resort to courts to prosecute suits—in fact, every disability which settled principles impose upon them because of their legally hostile status. Now, looking at the matter in the light of these considerations, is it sensible to ascribe to Congress in 1906, in so far as it was dealing with matter of procedure and practice, an intention in the slightest degree to recede from the declared policy of the statute of 1802, or that, in so far as it was seeking by a variety of new sections to place greater safeguards about the whole field of naturalization, it should deliberately, through equivocal nonaction, relax at the point where, presumptively, at least, the greatest scrutiny was necessary—the naturalization of those with whose legal sovereign we may be at war?

I am satisfied that nothing short of a clear legislative declaration, expressly amendatory of the section dealing with this matter, should be allowed to bring about a result operating to impair a policy upon so important a matter, plainly embodied in a statute passed over a century ago. The amendatory provisos to this section, passed to meet situations growing out of the war of 1812, serve, in my judgment, to support the view that the policy declared in the original enactment was not only clearly understood and reaffirmed, but that it was intended to impose upon courts a limitation against the exercise of their jurisdic-

tion in favor of such aliens during the existence of hostile relations with the sovereign whose allegiance had not been renounced. And as already observed, we should not ascribe to Congress an intention, by indirection, to fix a different period or date at which the limitation upon the court may be effective.

It is needless to add that the interpretation of the statute cannot be made to depend upon considerations of equity or hardship respecting individual applicants; but the particular applications may be ordered to stand and await remedial legislation, if Congress shall see fit to pass it, or the pursuit of another course, if appellate judicial authority shall give the statute a different interpretation.

In re COLLINS.

(District Court, M. D. Alabama. S. D. May 24, 1917.)

No. 351.

1. SALES ⟸45—FRAUD—DISAFFIRMANCE.
When one not intending to pay induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, the seller may, if no innocent third party has acquired an interest in the goods disaffirm the contract and recover the goods on account of the fraud; the seller's rights being superior to the lien of a judgment creditor of the buyer.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 94.]

2. BANKRUPTCY ⟸140(2)—RIGHT OF TRUSTEE—STATUTE.
Despite Bankr. Act July 1, 1898, c. 541, § 47a, cl. 2, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), which declares that trustees shall collect and reduce to money the property of the estates for which they are trustees, and shall as to all property in the custody, or coming into the custody of the bankruptcy court, be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee is not as to property which the bankrupt purchased with the fraudulent intention of not paying therefor, an innocent third party, and hence the seller may disaffirm the contract and reclaim the property; the lien of a judgment creditor being inferior to the rights of the seller.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219.]

3. BANKRUPTCY ⟸140(2)—FRAUD—EVIDENCE.
On a petition in bankruptcy by a seller to reclaim goods sold a bankrupt, evidence *held* to show that the bankrupt secured the goods through fraud, knowing his inability to, and not intending to, make payment.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219.]

4. SALES ⟸15—FRAUD—WHAT CONSTITUTES.
An insolvent, who purchased goods without any intention or expectation of paying therefor, is guilty of fraud, though he made no representations as to his ability to pay, for one who buys on credit impliedly represents that he is or will be able to pay.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 94.]

In Bankruptcy. In the matter of the bankruptcy of B. A. Collins. Petition by the H. M. Hobbie Grocery Company for review of an order of the referee denying reclamation of certain merchandise sold the bankrupt. Petition for review granted, and reclamation allowed.

Weil, Stakely & Vardaman, of Montgomery, Ala., for claimant.
Farmer & Farmer, of Dothan, Ala., for trustee.

HENRY D. CLAYTON, District Judge. This matter comes before the court upon the petition of the H. M. Hobbie Grocery Company, of Montgomery, for a review of the order of the referee denying its right to reclaim certain goods, which it alleges the bankrupt fraudulently induced it to sell him shortly before the filing of the voluntary petition in bankruptcy by him.

[1, 2] At the threshold of the matter we are confronted with the insistence of counsel for the trustee of the bankrupt that section 47a, clause 2, of the Bankruptcy Act, as amended in 1910, prevents the maintenance of reclamation proceedings against the trustee of a bankrupt, by a seller of merchandise to the bankrupt, when the sale was induced and procured through the fraud of the buyer. The court is unable to agree to this contention. The doctrine is well established that a party—

"not intending to pay, who induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." Donaldson, Assignee, v. Farwell, 93 U. S. 631, 23 L. Ed. 993.

But the amendment of 1910 to section 47a, clause 2, of the Bankruptcy Act, does not put the trustee in the position of a bona fide purchaser for value. He is not an "innocent third party." The amendment gives him only the rights of a lien creditor. In re Appel Suit & Cloak Co. (D. C.) 198 Fed. 322, 28 Am. Bank. Rep. 818. And under the laws of Alabama the vendor's right to rescind the sale and recover the property, where he was induced to make the sale by the fraud of the buyer, is superior to the lien of a judgment creditor and enforceable against all except bona fide purchasers for value. McKensie v. Rothschild, 119 Ala. 421, 24 South. 716. In that case McKensie had attached the goods of one Blumberg, the sale of which goods Blumberg had fraudulently induced Rothschild to make, and the court held very properly that Rothschild was entitled to recover the goods even though McKensie, the judgment creditor of Blumberg, had levied an attachment on the goods. Reclamations for fraud have been maintained in Re Underwood & Daniel (D. C.) 215 Fed. 279, in the case of Re Hansley & Adams (D. C.) 228 Fed. 564, and other cases decided since the amendment to section 47a, clause 2, of the Bankruptcy Act, and the right of the defrauded creditor to maintain the reclamation upon proper proof does not appear to have been questioned.

[3] We are thus brought to a consideration of the facts of this case. The court has made a careful examination of all the testimony in the case, and is satisfied that the claimant has proved the allegations of its petition. The testimony as to the identity of the goods is sufficient, though it is true that the bankrupt, Collins, testifies that to the best of his knowledge he bought the tobacco sought to be reclaimed from the American Tobacco Company, and not from the Hobbie Grocery Company. However, it is a significant fact that, when the bankrupt, Collins, filed his schedules in bankruptcy, a short time after the alleged

purchase from the American Tobacco Company, he did not schedule them as a creditor, nor does it appear that he ever paid them anything. The Hobbie Grocery Company is scheduled as a creditor, and the testimony is convincing that this firm sold the bankrupt the goods now sought to be reclaimed.

According to the summary of debts and assets, filed by the bankrupt as a part of his sworn petition, it appears that the bankrupt owed debts to the amount of $9,893.46, and that his assets amounted to $4,595. The petition was filed December 17, 1916, and the goods were delivered to the bankrupt 10 days before (on December 7th) on his order given November 27, 1916. No change for the better appears to have taken place in the bankrupt's financial condition during that time; indeed, it seems to have become worse, and it is clear that the bankrupt was hopelessly insolvent when he ordered and received the goods. And, considering the conduct of the bankrupt at the time the order for the goods was given the salesman of the Hobbie Grocery Company, and the other evidence in the case, the court is satisfied that the bankrupt had no intention, or reasonable expectation, of paying for the goods, and that he did not disclose his financial condition to the seller, but, on the other hand, willfully misled the Hobbie Grocery Company as to his condition, and deceived them into the belief that their bill would be discounted upon delivery of the goods.

[4] The following remarks of Justice (afterwards Chief Justice) McClellan, in delivering the opinion of the court in the case of Maxwell v. Brown Shoe Co., 114 Ala. 304, 21 South. 1009, may be aptly quoted in regard to the facts of the instant case:

"One who comes to buy goods on a credit impliedly represents that he is or will be able to pay for them, and that he intends to pay for them, and he impliedly promises to pay for them; and he knows that the seller parts with them on the faith of these implied representations and this implied promise. If in fact he intends not to pay for them, * * * and is insolvent or in failing circumstances, so that payment cannot be coerced, he deceives the seller and practices a fraud upon him in the very act of purchasing his property. The purchase itself being a representation that the buyer intends to pay the price, to so represent or profess by the act of purchasing when in truth he intends to do the contrary, 'is as clear a case of misrepresentation and of fraud as could be made.' Bigelow on Frauds, 484; Swift v. Rounds [19 R. I. 527, 35 Atl. 45] 33 L. R. A. 561 [61 Am. St. Rep. 791]. Obviously there need be no misrepresentation by word of mouth, and no affirmative concealment, so to speak, of the purchaser's insolvent condition, or of his intention not to pay, or of his want of reasonable expectation of being able to pay. If these facts exist, and are not disclosed, the seller, proceeding, and known by the purchaser to be proceeding on the assumption of their nonexistence, or, in other words, on the assumption that the purchaser is solvent and intends and reasonably expects to pay, is deceived and defrauded. * * * A sale and purchase of goods is fraudulent and open to disaffirmance by the seller, when the purchaser was at the time thereof insolvent, or in failing circumstances, and had the design not to pay for them, or had no reasonable expectation of being able to pay for them, and either represented that he was solvent, or intended to pay, or had reasonable expectation of being able to pay, or failed to disclose his financial condition, or the fact that he did not intend to pay, or expect to be able to pay, for the goods."

An order will be made granting the petition for review and allowing the reclamation.

UNITED STATES v. ALPHA PORTLAND CEMENT CO.

(District Court, E. D. Pennsylvania. May 23, 1917.)

No. 4072.

PLEADING ⊜350(3)—RULE FOR JUDGMENT ON PLEADINGS—DETERMINATION OF QUESTIONS OF FACT.

Defendant owned certain properties, which it had improved by an outlay of moneys, which brought its total cost value to over $800,000, at which value it was carried on defendant's books. It organized a subsidiary company, to which such properties were transferred in exchange for $2,000,000 in stock, substantially all of the stock of such subsidiary company, which stock was distributed among defendant's stockholders as a stock dividend. The two companies then merged or consolidated, with a capital stock of $10,000,000, which was distributed among the stockholders of the two companies in exchange for the stock held by them in their respective companies. The government sought to tax the difference between the cost value of such properties and the $2,000,000 for which they were sold as a profit. *Held* that, where the affidavit of defense denied that there was in fact such a profit, this was a question of fact, and could not be determined on a rule for judgment for want of a sufficient affidavit of defense, the equivalent of a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077.]

At Law. Action by the United States against the Alpha Portland Cement Company. On rule for judgment for want of sufficient affidavit of defense. Rule discharged.

John H. Hall, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Wm. S. Furst, of Philadelphia, Pa., and Louis H. Porter, of New York City, for defendant.

DICKINSON, District Judge. The question involved in this case may be said to be a very narrow one, and its decision to turn upon a very sharp point. The following three propositions will present the positions of the parties to the controversy: From the viewpoint of the taxing authorities the defendant had property which it had acquired at a price, and which it disposed of at an enhanced price, thereby reaping at taxable profit. From the viewpoint of the defendant, the whole transaction was nothing more than a revaluation of the property. The retort of the United States is that the defendant declared it had made a sale of its property at an advance in price, that it received payment at an advanced price, and that it could not have done what it did do, nor have enjoyed the benefits of the transaction, unless the transaction had in fact been what on its face it was. The defendant in consequence will not be heard to deny that it received the profit it thus is shown to have received. It is thus seen that we are down to the determination of a fact, and as the facts must be sought in the affidavit of defense, the quest is narrowed to an inquiry into what the affidavit discloses.

The thing over which there is controversy is one of the creations of those Aladdins of finance who employ their genius in the reorganization of corporations. The defendant company February 24, 1909,

bought a property known as the "Buckhorn." The price was $415,000. It also bought for $416,627.27 a number of shares of the stock of the Catskill Cement Company, together with letters patent No. 677,870, issued for an invention. We state these as purchases made by the defendant, ignoring the fact that the purchases were made in the names of others for it. The defendant company had a capital stock of $2,000,000. What may be aptly termed as a plan of reorganization was adopted. This involved, as part of the details, the organization of a subsidiary company and the subsequent consolidation of the two companies, the merged corporation having a capitalization of $10,000,000. Other details of this plan of reorganization were that this subsidiary company, subsequently organized under the name of Cement Manufacturing Company, was given an authorized capital of $2,001,000, $1,000 of which was issued for cash, and $2,000,000 for property. The cash stock was issued to individuals, to whom the stock was nominally issued. The real owner of it, however, was the defendant company. The subsidiary company then issued its stock to the par value of $2,000,000, receiving therefor the Buckhorn property above mentioned. This $2,000,000 of the stock of Cement Manufacturing Company went to the defendant company and was distributed by it among its stockholders as a property dividend. The Cement Manufacturing Company and the original company, now the defendant company, were then merged or consolidated under the name of the latter company, and the consolidated company was given a capital stock of $10,000,000, as originally planned. This capital stock was in the form of $2,000,000 preferred and $8,000,000 common shares of that nominal par value. The $2,000,000 of preferred stock was issued to the Cement Manufacturing Company stockholders and the $8,000,000 of common to the stockholders of the original defendant company, in exchange for the stock they held of their respective companies. It may be added as a fact that the properties above mentioned of the original company defendant have been developed and improved at an outlay of moneys which brought these assets of the company, as the books of account had been kept, up to a total asset value, as carried upon the books, of $868,315.01. Whether the original defendant company had other assets to represent its total capitalization of $2,000,000 we do not know, and the fact is of no importance, as in financial transactions, such as the one under consideration, a few millions, more or less, is a negligible sum. Assuming the assets represented by the figures $826,315.01 to be the whole of its possessions, we have this state of affairs existing at different times or during the whole time. It may help to clarify our view by stating separately the conditions (1) as affecting stockholders; (2) as affecting the company; (3) the transaction as it was; and (4) the transaction as it was made to appear to be.

1. The stockholders at first held certificates of stock representing shares in the assets of the original defendant company. These assets (as we are assuming) had been acquired by the company at a cost of $868,315.01, and had been so entered on the books of the company. The certificates of stock, as a mode of expressing the proportionate shares of the stockholders in the assets, represented the entire holdings of the company by the figures $2,000,000, or this was given as the

nominal par value of the total number of ownership shares into which its ownership was divided. When the transaction was done, the stockholders had precisely what they had before, so far as ownership of assets goes. The books of account had been rewritten, so as to show that the assets had cost the company $10,000,000, instead of $868,315.01, and the certificates of stock had been reprinted, so as to represent the total ownership, in which the stockholders shared, by the figures $10,000,000, instead of $2,000,000. Intermediately the stockholders, instead of holding certificates of stock in the Alpha Portland Cement Company for $2,000,000, representing the entire ownership in which they shared, held also for an instant of time certificates of stock in the Cement Manufacturing Company for $2,001,000, representing the entire ownership in which they shared the latter company.

2. At the end of the transaction, the defendant company had precisely what it had before. Its bookkeeping figures had been changed as to the value of its assets from $868,315.01 to $10,000,000, and there had been a like change in the figures of its capital stock account from $2,000,000 to $10,000,000. The Cement Manufacturing Company had intermediately enjoyed a transitory life of short duration.

3. The real transaction was nothing more than effecting a reorganization of the defendant company, for the purpose of increasing its nominal capital, in the sense of changing the figures which represented its total stock issue.

4. The transaction as it was made to appear to be was this: The company owned the Buckhorn and other property already mentioned. It carried them upon its books at a cost value of $868,315.01. It sold them for $2,000,000, and reinvested the money received in the stock of the Cement Manufacturing Company. It then declared a dividend, payable, not in money, but in this stock of $2,000,000 representing the profit of $1,131,684.99 received on this sale, and the balance received through an enhancement in value of other assets. Its stockholders then exchanged this $2,000,000 of stock in the Cement Manufacturing Company for preferred stock of the defendant merged company of like nominal value.

The thing done belongs to the legerdemain of finance. The taxing authorities claim the transaction discloses a profit made during the year of $1,131,684.99, and this results as a legal judgment from the facts revealed by the affidavit of defense. The defendant denies the conclusion, but denies it as a fact conclusion. This brings us to the question of whether what is to be found is to be found as a conclusion of law or as a finding of fact. This is the fine point spoken of, to which the discussion is reduced. We think the case is one to be determined by a finding of fact, and in the face of the denials of the affidavit we do not see our way clear to find the essential fact in favor of the plaintiff. The question is a trial question, and cannot be determined on a demurrer, the legal equivalent of which the present motion is.

The rule for judgment is discharged.

MADDEN v. NORTHERN PAC. RY. CO.

(District Court, W. D. Washington, N. D. May 5, 1917.)

No. 3596.

MASTER AND SERVANT ⊂⊃401—WORKMEN'S COMPENSATION ACT—PLEADING AS DEFENSE.

Under Industrial Insurance Act Wash. (Laws 1911, p. 362) § 8, depriving employers in default in the payment of premiums of the benefits thereof, and making them liable to suit by the injured workman, and Rev. St. § 721 (Comp. St. 1916, § 1538), providing that the laws of the several states shall be regarded as rules of decision in trials at common law, where a third person seeks to evade liability for injuries on the ground that the Insurance Act provides the exclusive remedy, compliance by the injured person's employer with such act is an affirmative defense, to be pleaded and proved by such defendant.

At Law. Action by Minnie E. Madden against the Northern Pacific Railway Company. On demurrer to the complaint. Demurrer overruled.

James T. Lawler, of Seattle, Wash., for plaintiff.
Charles H. Winders, of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action by the plaintiff, surviving widow, to recover from the defendant damages occasioned because of the death of her husband, which she charges is due to the negligence of the defendant company. The complaint, in substance, alleges that the deceased was employed by the Chicago, Milwaukee & St. Paul Railway Company, and that while in the due course of his employment the defendant Northern Pacific Railway Company ran into and upon the engine upon which the deceased was employed, negligently and carelessly causing his death. The defendant demurs to the complaint, on the ground that:

"It does not state facts sufficient to constitute a cause of action against the defendant."

And further:

"That this court has no jurisdiction of the subject-matter of this action, for the reason that it affirmatively appears under the allegations of plaintiff's complaint that at the time of the fatal accident to Theodore V. Madden, on account of whose death this action is brought, said Madden was working in the course of his employment within the plant and upon the property of his employer, within the city of Seattle, King county, Washington, and his heirs were within the protection of what is known as the Workmen's Compensation Act of the state of Washington, which act withdraws the jurisdiction of all courts in all actions for wrongful death and coming thereunder."

Defendant, in support of its contention, cites Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F, 319. This was an action to recover for damages claimed to have been occasioned by reason of malpractice of the attending surgeon, furnished by the master at the time of the injury, pursuant to a condition of the employment, whereby $1 a month was retained out of the wages of the employes for the purpose of furnishing medical skill. The claim for

damages sustained on account of the primary injury had been presented to the Industrial Insurance Commisson and full settlement made. The issue before the court was whether, under the circumstances, the settlement for the primary injury did not include all damages occasioned, and it was held that the action could not be prosecuted. Stertz v. Industrial Ins. Commission, 91 Wash. 588, 158 Pac. 256, also cited by the defendant, was an action brought against the Insurance Commission for injury caused by a discharged employé, who waylaid the logging train of the employer and wounded one and killed others of the workmen, including Stertz, who was in charge of the train as foreman. The question for decision was whether the plaintiff was killed in the course of his employment, either upon the premises or away from the plant, and the court held that he was and directed judgment against the Commission. In Meese et al. v. Northern Pacific Ry. Co. (D. C.) 206 Fed. 222, and Northern Pac. R. Co. v. Meese, 239 U. S. 614, 36 Sup. Ct. 223, 60 L. Ed. 467, it was held that a person injured "at the plant," from whatever agency, came within the Industrial Insurance Act.

Section 8 (page 362, Laws 1911) of the Insurance Act provides:

"In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman * * * as he would have been prior to the passage of this act."

The Legislature in the same act, undertook to withdraw all phases of liability for negligence from private controversy, and provided "sure and certain relief for workmen," and abolished "all civil actions and civil causes of action for such personal injuries," and abolished all jurisdiction of the courts over such causes except as in the act provided. The Supreme Court of Washington, in Acres v. Frederick & Nelson Co., 79 Wash. 402, 140 Pac. 370, held that it was the duty of the party invoking the Industrial Insurance Act provisions to plead and prove compliance with the act, in view of the provisions of section 8, supra, and the same court in Reynolds v. Day, 79 Wash. 499, at page 507, 140 Pac. 681, at page 685, L. R. A. 1916A, 432, said:

"We again impress the fact that the common-law action may still be maintained and its remedy enforced as against an employer in this state in all cases not specifically covered by the Industrial Insurance Act. Moreover, the Industrial Insurance Act, upon which the respondents rely as the sole manifestation of a public policy of this state inimical to the common-law action, expressly excepts cases where the employer is in default in his contribution to the statutory insurance fund. We have held that such payment is a matter of affirmative defense, which must be pleaded and proved, in order to defeat an action at law against the employer for injury to his employé."

With equal, if not greater, emphasis would this apply to a third person who committed the injury, if seeking to evade liability by reason of the provisions of the act, to show that the employer of the injured person had complied with its requirements. The same court, in Replogle v. Seattle School District No. 1, 84 Wash. 581, at page 584, 147 Pac. 196, at page 197, said:

"This court, in an action for personal injuries prosecuted by a servant against his master, held that it was the duty of the latter to plead and prove a

compliance with the Industrial Insurance Act as a condition precedent to making the objection that the Industrial Insurance Law had withdrawn the action from the courts."

The rule of procedure in the state court, I think, should apply in this case. Section 721, Rev. Stat. U. S. (Comp. St. 1916, § 1538).

Under these decisions the complaint is sufficient, and the demurrer is overruled.

UNITED STATES ex rel. LAZARUS v. BROWN, Commander of the First Regiment of the National Guard of Pennsylvania, et al.

(District Court, E. D. Pennsylvania. May 23, 1917.)

No. 3.

1. ARMY AND NAVY ⇐44(3)—MILITARY COURTS—PERSONS SUBJECT TO JURISDICTION.
Though an enlistment by a person under military age was voidable at the election of his parents, it was a lawful enlistment, and subjected him to military authority, and to the tribunals constituted to try military offenses, until such enlistment was terminated by the parents' election to nullify it.
[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 92.]

2. ARMY AND NAVY ⇐44(3)—MILITARY COURTS—PERSONS SUBJECT TO JURISDICTION.
Where a person enlisting while under military age committed military offenses before his father's election to terminate the enlistment, for which he was taken into custody by the military authorities before the issuance of a writ of habeas corpus upon his behalf, the military court had jurisdiction to try him for such offenses, though he was not taken into custody before the father's election to terminate the enlistment.
[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 92.]

3. ARMY AND NAVY ⇐19—ENLISTMENT OF MINORS—RIGHT TO DETAIN.
The military authorities cannot detain an enlisted man by virtue of his contract of enlistment, made while under military age and terminated by the election of his parents or guardians.
[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45–50.]

4. HABEAS CORPUS ⇐109—PERSONS UNDER CONTROL OF MILITARY AUTHORITIES.
In a habeas corpus proceeding to secure the release of an enlisted minor, whose father has elected to terminate the enlistment, where it appears that the minor is in custody for offenses against the military law and the army regulations, committed during the term of enlistment and before its termination by the father's election, he will be remanded to the custody of the military authorities, to answer to the charges preferred and to carry out any sentence imposed, but thereupon to be released from such custody.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98.]

Habeas corpus by the United States, on relation of Harry J. Lazarus, against Lieut. Col. Millard D. Brown, Commander of the First Regiment of the National Guard of Pennsylvania, now in the service of the United States Army, and another. On hearing upon petition and return of writ. Relator remanded conditionally.

A. L. Moise, of Philadelphia, Pa., for petitioner.
Francis Fisher Kane, U. S. Dist. Atty., of Philadelphia, Pa., for respondents.

DICKINSON, District Judge. The petition for the writ in this case is by the parent of the relator. It is based upon the proposition of fact that the relator was under military age at the time he entered the service. There has been no traverse of the return. We must, in consequence, take the facts as presented by the return. The questions before us are in further consequence raised as upon a demurrer to the return. The return sets forth two independent grounds of detention. The first is based upon the fact of enlistment of the relator and of actual military service. The second is that the relator is in custody of the military authorities, because of alleged offenses committed against the military law and army regulations, and his commitment to answer to the military tribunal having jurisdiction to try such offenders.

[1] That the relator was under military age when he enlisted, and his enlistment, because of this, voidable at the election of his parents, is conceded. If, therefore, this were the only cause of detention set up in the return, the relator must be discharged from custody. It must be observed, however, that the concession is not of the principle that the enlistment was void, and by reason of this the relator never subject to military authority, but that the enlistment is voidable only at the election of the parents or guardian of the minor, whose right of custody of the relator thereby becomes superior to that of the military authorities. This admission of the judge advocate and of counsel for the United States is in accordance with the ruling in Re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. The enlistment of the relator was, therefore, a lawful enlistment, and subjected him to military authority and to the tribunals constituted to try military offenses until such enlistment was terminated by the election of the parents to nullify it. This election, for the purposes of this case, may be said to have been exercised on May 15th. It is averred that before that date the relator had committed offenses against the military law. One of these is voiced in the charge of what is termed a fraudulent enlistment, but it is clear that the acts charged to have been committed do not constitute a military offense. No point need be made of this, however, for the reason that other acts are charged which admittedly are offenses, if the charge turns out to be well founded.

[2] A point is made, however, of the further facts that, although the alleged offenses were committed before the parents' exercise of their election to terminate the enlistment, the relator was not taken into custody until after the exercise of this election, although again this was before the writ issued, and the relator was in fact in custody to answer to these charges before the writ of habeas corpus issued, and, of course, at the time of the return day, and of this hearing thereon. The relator having been subject to the jurisdiction of the military tribunal which will pass upon the offenses charged at the time the offenses are charged to have been committed, the military authorities may assert and exercise their jurisdiction to try the offender. We are of

opinion that the lawfulness of the exercise of this jurisdiction turns upon the two facts: First, that the alleged offenses were committed before the termination of the enlistment by the election of the parent; and, secondly, that the relator was in custody of the military authorities to answer to these charges when the writ issued, the return was made, and the hearing thereon had. This conclusion is in accordance with the following cases: Hoskins v. Dickerson, 239 Fed. 278, — C. C. A. —; Hoskins v. Pell, 239 Fed. 279, — C. C. A. —.

[3, 4] The logic of the arguments addressed to us, in which we understand all counsel to concur, leads to two conclusions: One is that, if no cause of detention of the relator appeared, other than his contract of enlistment, which by reason of his being under military age had been terminated at the election of his parents or guardian, he would be in law entitled to be set at liberty. The other is that, it appearing that the relator is in custody to answer military charges before the military tribunals for offenses against the military law and the army regulations, committed during the term of his enlistment and before this had been terminated by the election of his parents, the relator should be remanded to the custody of the defendant to answer to the charges thus preferred. All that remains, therefore, is to fix the terms of the order now to be made. The order might take the form, followed in Hoskins v. Dickerson, of simply remanding the relator to the custody of the military authorities, and the writ dismissed without prejudice to the right of the parent to seek the relief asked, if such custody was unlawfully prolonged. It seems, however, to be good practice, and through being a more definite disposition of the case a method more convenient to the military authorities, in which view we understand all of counsel to concur, to now make a final disposition of all the questions involved through such form of order as will dispose of all of them, and, because of this, dispose of the whole case now, without the necessity for further proceedings.

The order is that the relator be remanded to the custody of the defendants, or other proper military authorities, to be held for trial before proper military tribunals on the charges preferred against him, and after the termination thereof, and also the satisfaction and carrying out of any sentence which may be imposed upon him, be thereupon released from such custody and committed to the petitioner as his parent and guardian. The costs of this writ and these proceedings to be paid by the relator.

PORT OF SEATTLE v. OREGON & W. R. CO. et al.

(District Court, W. D. Washington, N. D. May 8, 1917.)

No. 118–E.

1. REMOVAL OF CAUSES ⇐⇒86(6)—PETITION FOR REMOVAL—AMOUNT IN CONTROVERSY.

Where no issue was taken as to the averment in a petition for removal of an action to the federal court that the amount in controversy exceeded $3,000, such averment must be considered conceded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 175.]

2. INJUNCTION ⇐⇒114(1)—PARTIES—REAL PARTY IN INTEREST—TIDELANDS—STATE.

Under Laws Wash. 1913, p. 584, declaring that, where waterways covering tidelands are within the territorial limits of any port district, the duties assigned to the state land commissioner shall be exercised by the port commission of such district, the rentals being apportioned between the county treasurer and the state treasurer, and that nothing shall confer upon, create, or recognize in any abutting owner any right or privilege to such property, the state has no interest in tidelands located within a port district, and hence, in a suit by the district to enjoin one asserting ownership from exercising control over such lands, is not a party in interest.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202.]

3. REMOVAL OF CAUSES ⇐⇒48—SEPARABLE CONTROVERSY—PARTY IN INTEREST.

A railroad company executed a lease to abutting tidelands, but its tenant attorned to the port district in which the lands were located. The port district sued the railroad company and its tenant, praying that the railroad company be enjoined from exercising any control over the lands, and that an accounting be had between the company and its tenant. *Held* that, as the port district could obtain no greater relief against the tenant than had been secured by the attornment, the tenant was not a necessary party, and the controversy was separable, so that the railroad company, which was a citizen of a state other than that of which the port district and the tenant were citizens, might remove the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94.]

4. REMOVAL OF CAUSES ⇐⇒74—AMOUNT INVOLVED—LEASE OF PROPERTY.

Where the prayer of a complaint was to enjoin defendant from exercising control over land forever, and not for the time for which it was demised, the value of the land, and not the rents reserved by the lease, fixes the amount in controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 130, 131.]

At Law. Bill by the Port of Seattle against the Oregon & Washington Railroad Company and another. The action was removed to the federal court on petition of the first-named defendant. On motion to remand. Motion denied.

C. J. France, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for moving defendant.

NETERER, District Judge. The Seattle port commission has filed a bill of complaint against the defendants, in which it seeks to enjoin the defendant Oregon & Washington Railroad Company from exercising any jurisdiction over a certain waterway abutting upon property in Seattle described in the bill of complaint, and also a plea directing that the Oregon & Washington Railroad Company reform a certain lease executed to J. F. Duthie & Co. covering certain tidelands, and for certain accounting between the defendant companies. Petition for removal is filed by the defendant Oregon & Washington Railroad Company on the ground of diverse citizenship and separable controversy, alleging that the amount involved is in excess of $3,000.

[1] It is contended on the part of the plaintiff that Duthie & Co. is a Washington corporation, and hence the cause is not removable on the ground of diverse citizenship. It is also contended that the rental value of the land involved, as shown by the lease attached to the complaint and made a part thereof, is $1,728.96, and, further, that the state of Washington is a real party in interest, in that it reserved interest in tidelands, pursuant to the provisions of chapter 168, Laws Wash. 1913, and that it has legislated with relation to the use of water areas between the boundaries thereof and government pier lines, and provided for disposition of receipts therefrom. The moving defendant contends that the amount involved is in excess of $3,000; and, no issue being taken to the allegations of the petition for removal, that must be conceded, and likewise that there is a separable controversy, that is disclosed by the face of the complaint, and that Duthie & Co. is not a real party in interest, and, further, that the state of Washington is not a party to this proceeding, nor is it the real party in interest.

[2] There is nothing disclosed upon the face of the complaint or the petition for removal which would indicate to the court any interest in the controversy on the part of the state of Washington, but on argument the court's attention was called to Session Laws 1913, supra, and the thought emphasized that the entire control of the waterway and the lands in dispute is in the state, and, such being the fact, that the state is the real party in interest. On page 584, Laws 1913, supra, it is provided:

"In any case where such waterway shall be within the territorial limits of the port district given under the laws of the state of Washington, the duties herein assigned to the state land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows. * * *"

And it is then provided that 75 per cent. shall be paid to the county treasurer in which the district is situated and 25 per cent. to the state treasurer. It further provides that:

"Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such streets, but the control of right to use such strip is hereby reserved to the state of Washington, except that in cases situated in a port district such control and use shall vest in such port district."

From an examination of the act I think it is apparent that it was the intent and purpose of the state that all interest of the state was vested

in the port district, and hence the state, so far as the issue here is concerned, is not a party in interest.

[3] I think there is a separable controversy. I do not think that Duthie & Co. is a real party in interest. Whatever interest Duthie & Co. asserted by reason of the lease from the Oregon & Washington Railroad Company was surrendered to the port of Seattle by attorning to it in the execution of the lease with the port of Seattle. All of the rights which the port of Seattle could hope to obtain from Duthie & Co. by decree of the court already are vested in it by the operation of the lease executed voluntarily by the said defendants. Hence the defendant Duthie & Co. is not a party in interest to determine the issue between the port of Seattle and the defendant Oregon & Washington Railroad Company. If an accounting is necessary between the Oregon & Washington Railroad Company and Duthie & Co., that is a concern of theirs, and not of the port of Seattle; nor is the court concerned about that in this case.

[4] The amount involved the court must find to be in excess of $3,000. The rental value of the property in dispute for three years is not the criterion of the value of the property. The object of the prayer of the complainant is not to enjoin the defendant from exercising acts of ownership over the land in dispute for the period of the lease, but forever. Hence, in view of the allegations of the petition for removal as to value, the court must find that the value is such as to bring it within the jurisdiction of this court.

The motion to remand is denied.

CITY OF SEATTLE v. BEER'S BLDG. CO. et al.

(District Court, W. D. Washington, N. D. April 20, 1917.)

No. 3563.

REMOVAL OF CAUSES ⟸49(2)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

In an action for breach of a building contract against the contractor and the surety on its bond for performance of the contract, there is but one cause of action, and the controversy is not separable, within the meaning of the removal statute.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 96.]

At Law. Action by the City of Seattle against the Beer's Building Company and the Guardian Casualty & Guaranty Company. On motion to remand to state court. Motion granted.

Hugh M. Caldwell, Corp. Counsel, and Robert H. Evans, Asst. Corp. Counsel, both of Seattle, Wash., for plaintiff.

Grinstead & Laube, of Seattle, Wash., for defendant Guaranty Co.

NETERER, District Judge. This action has been removed to this court from the state court on the petition of the defendant Guardian Casualty & Guaranty Company. Motion to remand is now made by the plaintiff.

The petition for removal alleges separable controversy and fraudulent joinder. It appears upon the face of the complaint that the plaintiff is a municipal corporation of Washington; that the Beer's Building Company is a corporation organized under the laws of the state of Washington, and the defendant Guardian Casualty & Guaranty Company a corporation organized under the laws of the state of Utah; that pursuant to law a contract was entered into between the plaintiff city and the defendant Beer's Building Company for the construction of a certain bridge in the city of Seattle; that by the terms of the contract the Beer's Building Company was required to furnish a bond in the sum of $50,000 for the faithful performance of said contract, and the payment of all labor and material used in the construction of said bridge, and the completion of the same within a specified time; that the defendant Guardian Casualty & Guaranty Company, as surety, executed such bond for the faithful performance of said contract and the payment of all laborers, mechanics, subcontractors, materialmen, and payment of all supplies and provisions in the carrying on of such work; that the Beer's Building Company entered upon the said contract, and neglected and refused to carry out the same as provided by the terms of the contract; and that the Guardian Casualty & Guaranty Company, upon such default, proceeded with the said contract for a time, and thereafter notified the plaintiff city that it would not complete the same, and did abandon the same, and refused to be bound by the terms and conditions of the contract. The plaintiff alleges damages in the sum of $110,000.

This court, in German-American Mercantile Bank v. Gas Service Corporation of America et al., 228 Fed. 827, at page 828, said:

"It is also proper to unite in the same action causes arising out of the same transaction. Harding v. Ostrander Timber Co., 64 Wash. 224 [116 Pac. 635]. And by the same logic parties involved in the same transaction, as maker of a note and guaranty under a separate instrument, may be jointly sued. Bank of California v. Union Packing Co., 60 Wash. 456 [111 Pac. 573]. There is in the complaint but a single cause of action. There is but a single controversy, and that is the alleged indebtedness due the plaintiff. Each of the defendants may have a separate defense, but that does not create separable controversies within the meaning of the Removal Act. Louisville & Nashville Ry. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Pirie et al. v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Starin v. New York, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388."

In this case there is but one cause of action. The cause is the failure to carry out the contract which was entered into by the Beer's Building Company, and the completion of which was guaranteed by the Surety Company. Trinity Parish of Seattle v. Ætna Indemnity Co., 37 Wash. 515, 79 Pac. 1097. The transaction is one. The plaintiff, having elected to sue the parties liable jointly, is pursuing a right given it by law. The issue in a case of removal is what the plaintiff makes it in his complaint. Bradshaw v. Bowden (D. C.) 226 Fed. 323. The Beer's Building Company, being a citizen of the state, may not deprive the plaintiff of its cause of action against it by the removal of the officers of the company from the state, and in such event, under the provisions of the laws of Washington (section 227, Rem. & Bal.

Code), service may be made upon the secretary of state and the corporation be bound thereby. Section 976, Rem. & Bal. Code, cannot avail defendant, as the section expressly provides that the proceedings of the plaintiff shall not be affected; nor can the fact that the prayer is for $110,000 and $50,000 against the respective defendants control the controversy, considered with the allegations in the complaint. The only damage claimed is $60,000, and no recovery under the allegations could be permitted in excess of the bond sued on.

From an examination of the files in this case and the law governing the issue, I think the conclusion is inevitable that the cause must be remanded; and such is the order.

Ex parte MARGIASSO.

(District Court, S. D. New York. January, 1917.)

BANKRUPTCY ⇐393—RELEASE OF BANKRUPT FROM IMPRISONMENT.

Under Bankr. Act July 1, 1898, c. 541, § 9, 30 Stat. 549 (Comp. St. 1916, § 9593), providing that a bankrupt shall be exempt from arrest on civil process, except when issued from a court of bankruptcy, or from a state court upon a debt or claim from which his discharge in bankruptcy would not be a release, a bankrupt in custody under a body execution on a judgment dischargeable in bankruptcy will be released on habeas corpus, though the arrest was prior to the filing of the petition, especially in view of General Order 30 (89 Fed. xii, 32 C. C. A. xxx) providing that, if the petitioner during the pendency of the proceedings be arrested "or imprisoned" upon process in any civil action, the District Court may issue a writ of habeas corpus, and ascertain whether such process has been issued for the collection of a provable claim, and, if so, he shall be discharged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 619–622.]

Petition by Charles Margiasso, alleged bankrupt, for a writ of habeas corpus. Writ sustained, and prisoner discharged.

Sternberg, Jacobson & Pollock, of New York City (Samuel H. Sternberg and Henry W. Pollock, both of New York City, of counsel), for petitioner.

Felix Antonacchio, of New York City, for judgment creditor.

AUGUSTUS N. HAND, District Judge. This is an application on a writ of habeas corpus to discharge a bankrupt, who was arrested prior to the filing of a voluntary petition in bankruptcy. The body execution was issued by reason of a judgment obtained in the state court for negligence arising out of an automobile accident. I do not understand it to be disputed that the debt is dischargeable in bankruptcy.

Judge Brown, in Re Claiborne (D. C., N. Y.) 5 Am. Bankr. Rep. 812, 109 Fed. 74, held that the ninth section of the Bankruptcy Act did not authorize the discharge of bankrupts from imprisonment where they had been arrested prior to the filing of the petition. Judge Brown said that the language of General Order XXX (89 Fed. xii, 32 C. C.

A. xxx) only authorizes a writ of habeas corpus ad testificandum where the bankrupt was already under arrest when the petition was filed. Judge Holt, in the case of People ex rel. Taranto v. Erlanger, Sheriff (D. C., N. Y.) 13 Am. Bankr. Rep. 197, 132 Fed. 883, held that the language of section 9, providing that "a bankrupt shall be exempt from arrest upon civil process," covers not only the case of arrest, but of detention after arrest.

I think great weight attaches to an apparent general policy of the law to give bankrupts personal immunity pending the continuance of the bankruptcy proceedings. The following language of General Order XXX is also significant:

"* * * If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged. * * *"

It may well be argued that this general order, in using the words "or imprisoned," contemplated a release from arrests made during the bankruptcy proceeding and from imprisonment upon arrests whenever made in cases where the debt was dischargeable. Judge Ray, in Matter of Komar (D. C.) 37 Am. Bankr. Rep. 683, 234 Fed. 378, decided only last July in the Northern district, followed Judge Holt in the Taranto Case. Judge Hale, in the case of Turgeon v. Emery, Sheriff (D. C.) 25 Am. Bankr. Rep. 694, 182 Fed. 1016, decided in the district of Maine, likewise followed the Taranto Case. It is interesting also to note that Judge Blatchford, in the case of In re Seymour, Fed. Cas. No. 12,684, reached the same conclusion in construing the Bankruptcy Act of March 2, 1867 (14 Stat. 517, c. 176), as Judge Holt reached in the Taranto Case in construing the present act. As Judge Holt said in the Taranto Case, supra:

"* * * The Bankrupt Act vacates all attachments or other liens, authorizes a stay of all proceedings, and, if the bankrupt is discharged, will discharge the debt or any judgment which might be recovered on it, and I cannot avoid the conviction, in view of the whole scheme of the Bankrupt Act and of the language of the section in question, that the bankrupt in such a case is exempt from imprisonment under civil process."

For the foregoing reasons, the writ is sustained, and the prisoner is discharged.

In re MURPHY BOOT & SHOE CO.

(District Court, D. Massachusetts. July 11, 1917.)

No. 22006.

BANKRUPTCY ⊂=482(3)—COSTS AND FEES—ALLOWANCE OF COUNSEL FEES.

Bankruptcy proceedings in their origin were closely involved with a controversy between contending factions of the stockholders in the bankrupt corporation. The minority faction for the time being held the offices and controlled the company's action, and were thus enabled to authorize their attorney to resist adjudication on behalf of the corpora-

tion. He at all times acted for them quite as much as for the corporation, and after they sold out their stock he withdrew from the case and adjudication was had by consent. *Held*, that if, under Bankr. Act July 1, 1898, c. 541, § 64, subsec. b(3), 30 Stat. 563 (Comp. St. 1916, § 9648), giving priority to the cost of administration, including one reasonable attorney's fee to the bankrupt while performing the duties prescribed by the Bankruptcy Act in involuntary cases, counsel fees can be allowed for resisting adjudication, they should be granted only in extreme cases, where such action is plainly necessary to avoid great hardship and injustice, and the facts did not make a case of that character.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897.]

In Bankruptcy. In the matter of the Murphy Boot & Shoe Company, bankrupt. On petition by Asa P. French for allowance of counsel fees. Order of referee affirmed.

Francis P. Garland and Roy Brackett, both of Boston, Mass., for petitioner.

Henry F. Knight and Johnson, Clapp & Underwood, all of Boston, Mass., for trustee.

MORTON, District Judge. This is a petition by an attorney at law for payment from the estate for professional services rendered to an alleged bankrupt in resisting adjudication. The learned referee ruled that he had no power to make such an allowance. Undoubtedly Pratt v. Bothe, 130 Fed. 670, 65 C. C. A. 48, decides the point here presented adversely to the petitioner. He contends, however, that that case puts too severe a construction on section 64, subsec. b(3), does not give sufficient weight to the general scope and purpose of the Bankruptcy Act, and establishes a rule capable of working gross injustice. I infer that these views are to some extent shared by counsel for the trustee. There is much to be said in favor of construing the administrative portions of a statute so purely commercial in character as the Bankruptcy Act so as to permit just and practical working rules. This must have been the intention of its framers. Its various provisions should be read with this paramount purpose in mind, and, if possible, so construed as not to defeat it. See Collier on Bankruptcy (10th Ed.) pp. 833e, 844b, and 899, where the different sections bearing on this matter are discussed and cases collected.

It is not necessary, however, to decide whether Pratt v. Bothe, supra, ought to be followed in this district, because, even assuming that the court has discretionary power to allow such counsel fees, it seems to me that it ought not to do so in this instance. The present bankruptcy proceedings were, in their origin, closely involved with a controversy between two contending factions of stockholders in the bankrupt corporation. The faction which employed Mr. French were in the minority, but for the time being held the offices and controlled the action of the company. They were thus enabled to authorize their attorney to represent it and to direct its action, properly and honestly so far as appears, in their interest. Mr. French was at all times acting for them quite as much as for the corporation itself. Later the interests which employed him sold out their stock, he withdrew from the case, and adjudication was had by consent.

For obvious reasons, no general practice ought to be established of

allowing counsel fees for services in resisting adjudication. If they can be allowed at all, they should be granted only in extreme cases, where such action is plainly necessary to avoid great hardship and injustice. This case is not of that character, and no allowance should therefore be made for counsel fees in opposing the petition, nor should any allowance be made to counsel for intervening creditors.

Order of referee affirmed.

PICKERING LAND & TIMBER CO. v. WISBY et al.

(District Court, W. D. Louisiana. July 10, 1917.)

No. 1139.

COURTS ⇐296—FEDERAL COURTS—JURISDICTION—SUIT BY GOVERNMENT CONTRACTOR.

That a domestic corporation was operating its sawmill, in the execution of a contract with the government to manufacture and sell to the government its full output of battleship decking, and had pledged to the government the entire use of its sawmill for the manufacture thereof, did not give a federal District Court jurisdiction of a suit to restrain defendants from intimidating and running off the corporation's laborers, under the statute giving the District Court jurisdiction of suits by the United States, or by any officer thereof, authorized by law to sue, as the suit was not brought by the United States, or by its officers or agents, but by an independent contractor, and moreover the statute does not give jurisdiction of suits by agents of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 838.]

In Equity. Suit by Pickering Land & Timber Company against William Wisby, Sr., and others for an injunction. On question of jurisdiction. Bill dismissed.

Plaintiff, alleging that defendants had conspired together to intimidate and run off the negro labor employed at its sawmill, filed petition praying for writs of injunction. The plaintiff is a Louisiana corporation, and this court is claimed to have jurisdiction solely on the ground that it was operating its plant in the execution of a contract with the United States government to manufacture and sell to it its full output of battleship decking, and that it pledged to the government the entire use of its sawmill for the manufacture of such lumber and lumber products as might be needed in the prosecution of the war with Germany, that it is therefore operating its mill as an agent of the United States, and that the threatened acts of the defendants, if not enjoined, will prevent its manufacturing and delivering to the United States the lumber thus contracted for.

Alexander & Wilkinson, W. C. Davis, and J. G. Palmer, all of Shreveport, La., for plaintiff.

JACK, District Judge (after stating the facts as above). The District Courts of the United States have jurisdiction in "all suits of a civil nature, at common law or in equity, brought by the United States,

or by any officer thereof authorized by law to sue * * *" (Judicial Code [Act March 3, 1911, c. 231] § 24, 36 Stat. 1091 [Comp. St. 1916, § 991]); but no jurisdiction is conferred on the federal courts in suits by an "agent" of the United States. This suit is brought neither by the United States, nor by an officer thereof, and this court is therefore without jurisdiction.

Counsel cites the case of Western Union Tel. Co. v. City Council of Charleston et al. (C. C.) 56 Fed. 419, in which an injunction was sought against the defendant, enjoining it from enforcing a license tax of $500 per annum. Motion was made to dismiss the bill for want of jurisdiction, the amount of the license being less than $2,000 (the then minimum jurisdictional amount), to which motion plaintiff replied that by reason of its having accepted the provisions of the act of Congress of July 24, 1866 (14 Stat. 221, c. 230 [Comp. St. 1916, §§ 10072–10077]), putting its lines at the service of the United States for postal, military, and other purposes, and giving precedence to its messages over all other business, at rates to be fixed by the Postmaster General, it thereby became an agent of the United States, and as such entitled to come into United States courts, without regard to the amount involved, in all matters affecting its existence as such agent.

The court sustained the jurisdiction on this ground, but further held that jurisdiction might be maintained on other grounds; that the value of the amount in controversy was not merely the amount of the annual license, but the value to the company of the injunction, which was of much more value than the sum immediately demanded, the right to conduct its business being involved and the value of its franchise threatened. The court clearly had jurisdiction on this latter ground, but I think the cases cited by the court do not sustain its jurisdiction on the ground of plaintiff's being a federal agency.

In Yardley v. Dickson (C. C.) 47 Fed. 835, the first case cited, the plaintiff was receiver of a national bank and was held to be an "officer of the United States"; and in the other case, United States v. Shaw (C. C.) 39 Fed. 435, 3 L. R. A. 232, the government itself was plaintiff, suing on a postmaster's bond.

In the case at bar the plaintiff does not claim to be an officer of the United States (it could not, being a corporation), but it is contended that it is an agent of the government. I think it is not an agent, but an independent contractor, which has engaged to sell its output to the government.

This court is without jurisdiction. The restraining orders heretofore issued are recalled, and plaintiff's bill dismissed.

In re PAN-AMERICAN MATCH CO.

(District Court, D. Massachusetts. July 16, 1917.)

No. 24767.

1. BANKRUPTCY ⟸123—ELECTION OF TRUSTEE—OBJECTIONS TO CLAIMS.
Where objection is made to claims against a bankrupt, it is discretionary with the referee either to delay the election of a trustee and go into the objection sufficiently to determine whether the claims should be voted, or to suspend the claims and go forward with the election without them.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179.]

2. BANKRUPTCY ⟸123—ELECTION OF TRUSTEE—RIGHT TO VOTE—"SECURED CREDITOR."
Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 23, 30 Stat. 544 (Comp. St. 1916, § 9585), defining a "secured creditor" as one who has security for his debt upon property of the bankrupt assignable under that act, or owning such a debt for which other persons secondarily liable have such security, and section 56b (Comp. St. 1916, § 9640), providing that creditors holding secured claims shall not be entitled to vote at creditors' meetings, the holder of a note made by the bankrupt and indorsed by third persons, who put up collateral security belonging to them as security for its payment, was not a secured creditor, and was entitled to vote for trustee, as a claim not secured by property of the bankrupt may eventually be presented as an unsecured claim, and the holder of the note might be assumed to act in behalf of the indorsers.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179.
For other definitions, see Words and Phrases, First and Second Series, Secured Creditor.]

In Bankruptcy. In the matter of the Pan-American Match Company, bankrupt. On review of certain rulings of the referee. Order affirmed.

John B. O'Brien, of Boston, Mass., for petitioners.
George A. Gaskill and Thayer, Smith & Gaskill, of Worcester, Mass., for alleged secured creditor.

MORTON, Jr., District Judge. This is a review of certain rulings of the referee made in connection with the election of a trustee.

[1] As to the Green claims: Objection having been made to them, it was discretionary with the referee, either to delay the election and go into the objections sufficiently to determine whether the claims should be voted, or to suspend the claims and go forward with the election without them. In taking the latter course, it does not appear that he abused his discretion.

[2] As to the Worcester Trust Company claim: The trust company held a note for $15,000, made by the bankrupt and indorsed by certain third persons. The indorsers put up collateral security, belonging to them, with the trust company as security for the note. The collateral and the indorsements were of sufficient value to make payment of the note practically certain. Notwithstanding these facts, the learned referee allowed the trust company, against objection, to prove as an unsecured creditor its full claim on the note. The effect of this ruling was to give the trust company control of the appointment of trustee.

The question is whether the trust company was a "secured creditor." If so, of course, it was not entitled to prove and vote, as it was permitted to do. B. A. § 56b. The expression "secured creditor" is defined in the act as follows:

"(23) 'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt assets."

A creditor's claim may be amply secured, but he is not a "secured creditor," within the meaning of the act, unless the security is on "property of the bankrupt." The reason for such a rule probably is that, when no property of the bankrupt is held as security, the claim is, as to the estate, an unsecured one, and may eventually be so presented against it. It is true that the trust company here has no financial interest in an efficient administration in bankruptcy; but the indorsers have, and the trust company may be assumed to act in their behalf. In re Noyes Bros., 127 Fed. 286, 62 C. C. A. 218 (C. C. A. 1st Cir.); In re Headley (D. C.) 97 Fed. 765; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76; In re Bailey (D. C.) 176 Fed. 990; Collier, Bankruptcy (10th Ed.) p. 724; Remington on Bankruptcy (2d Ed.) § 756.

Order of referee affirmed.

In re CHIN OWN et al.

(District Court, W. D. Washington, N. D. February 15, 1917.)

No. 3513.

ALIENS ⊜32(12)—DEPORTATION PROCEEDINGS—APPEALS—BAIL.

In view of Chinese Exclusion Act May 5, 1892, c. 60, § 5, 27 Stat. 25 (Comp. St. 1916, § 4319), providing that no judge or court shall in the first instance, on application for writ of habeas corpus by a Chinese person denied permission to land, allow such person to go on bail, and rule 33 of the Circuit Court of Appeals for the Ninth Circuit (208 Fed. xvii, 124 C. C. A. xvii) providing that pending an appeal in habeas corpus cases the custody of the prisoner shall not be disturbed, Chinese persons will not be released on bail pending an appeal from an order discharging a writ of habeas corpus and remanding them to the custody of the immigration authorities for deportation, where every contention raised by them has been decided against them by decisions of the appellate courts, and there is nothing in the personal environment prompting favorable consideration of the applications.

Application by Chin Own and another for bail. Application denied.

John J. Sullivan, of Seattle, Wash., for relator.

Clay Allen, U. S. Dist. Atty., and Albert Moodie, Asst. U. S. Dist. Atty., both of Seattle, Wash., for respondent.

NETERER, District Judge. The relator has applied for release on bail pending the hearing of appeal from an order discharging the

writ of habeas corpus issued and remanding the petitioner to the Commissioner of Immigration to carry out the order of deportation issued by the Secretary of Labor. The petition for writ alleges that the relator was born in San Francisco, Cal., in 1876, and removed to Seattle with his parents when he was five years of age, where he resided until 1891, and then removed to Boston, Mass.; that in 1896 his parents returned to China, and the petitioner lived in Seattle until 1900, at which time he went to China on a visit, and on the 29th day of November, 1902, entered the United States at Port Townsend, Wash., on his return to the United States; that after a short stay in Seattle, he went to Boston, where he resided until 1907, in which year he went to China, and is now returning, claiming his right to enter, with his minor son.

I think the application for bail in this case must be denied. Section 5 of the Chinese Exclusion Act (27 Stat. 25) provides that no judge or court shall, in the first instance, on application for writ of habeas corpus by a Chinese person who has been denied permission to land, allow such person to go on bail, and court rule 33 of the Circuit Court of Appeals of this circuit also provides that pending an appeal the custody of the prisoner shall not be disturbed. The inherent right of the court to admit the relator to bail, after the court has affirmed the finding of the Commissioner and denied his right to enter, when the statute expressly prohibits the admission to bail before the court has thus found (Jem Yuen [D. C.] 188 Fed. 350), would seem to be supported by a very slender thread. The status of the relator is not changed. The writ does not disturb the custody, but simply requires his production for the purpose of examining into the legality of his detention. The relator is not, in a legal sense, within the United States. No power is given by the statute to the court to admit an alien by giving bail pending an appeal from a decision of the court finding that he has been accorded a fair hearing by the Immigration Commissioner. U. S. v. Sisson (D. C.) 220 Fed. 538; In re Chin Yuen Sing (C. C.) 65 Fed. 788. The powers of courts are prescribed and limited by the Congress. Congress likewise prescribes the duties and fixes the powers of the Commissioner of Immigration. Ex parte Moola Singh (D. C.) 207 Fed. 780. The findings of the Commissioner are conclusive (Chin You v. U. S., 208 U. S. 11, 28 Sup. Ct. 201, 52 L. Ed. 369), and the power of the court is limited to ascertaining whether a fair trial was accorded.

The courts of the several districts are somewhat at variance on the subject of allowing bail pending an appeal from an order of deportation, and while the court may have inherent power, independent of statute, according to the rules of common law and ancient jurisdiction, to admit to bail (Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948; In re Chin Wah, 187 Fed. 594, 109 C. C. A. 422), under special circumstances, I do not think that as a matter of sound judicial discretion, under the circumstances of this case, that power should be exercised. Every contention raised by the relator has been decided against him by decisions of the Court of Appeals of this circuit and by decisions of the Supreme Court of the United States, and there is

nothing in the personal environment disclosed which prompts favorable consideration of his request.

Application denied.

UNITED STATES v. ONE CERTAIN SIX-PASSENGER, SIX-CYLINDER, FORTY-EIGHT HORSE POWER LOCOMOBILE.

(District Court, W. D. Washington, N. D. April 17, 1917.)

No. 3370.

CUSTOMS DUTIES ⊂⊃132—FORFEITURES—RELIEF FROM FORFEITURE.

Under Rev. St. §§ 3061, 3062 (Comp. St. 1916, §§ 5763, 5764), authorizing searches and seizures of vehicles, etc., for violations of the customs laws, section 3087 (Comp. St. 1916, § 5790), requiring the collector to cause suit for a forfeiture to be commenced, and Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (Comp. St. 1916, § 10132), providing that whenever any person, charged with having incurred any forfeiture, shall present his petition to the judge of the District Court, setting forth the facts and praying for relief, the judge shall, if the case requires, proceed to inquire in a summary manner into the circumstances of the case and transmit the facts appearing on the investigation, with a copy of the evidence, to the Secretary of the Treasury, the District Court cannot take jurisdiction, where no forfeiture has been declared, though an automobile has been seized for an alleged violation of the customs laws.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 335.]

Proceeding by the United States against One Certain Six-Passenger, Six-Cylinder, Forty-Eight Horse Power Locomobile. On petition for return of the automobile. Jurisdiction declined.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash.

Hall & Cosgrove, of Seattle, Wash., for claimant.

NETERER, District Judge. Lucile Gertrude Scharlin has presented a petition in which she alleges that she is the owner of a certain automobile, which is described, which was seized by a special agent of the collector of customs for alleged violation of the revenue laws, and says the exact nature of which is unknown to her, though she is informed by the United States district attorney that it was seized and is being held on the ground that it had been used in the transportation of opium and the derivatives of opium. She denies it was so used, and prays that the car be returned, and—

"that if, in the opinion of this court, the case requires, said court shall proceed to inquire in a summary manner into the circumstances of the case, and that a time certain be fixed by this court and an order issued requiring said district attorney and said collector of customs to appear and show cause, if any they have, why this petition should be refused."

This car was seized under section 3061, Rev. Stat. U. S., and under section 3062, Rev. Stat., it is liable to forfeiture to the United States. It is not alleged in the petition that the car is forfeited, nor does the agreed statement of facts which has been filed disclose a forfeiture. Section 3087, Rev. Stat., provides that when any seizure is made the

collector of customs shall cause suit for a forfeiture to be commenced. Act June 22, 1874, c. 391, § 17, provides that:

"Whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any * * * forfeiture * * * shall present his petition to the judge of the District [Court] in which the alleged violation occurred, or in which the property is situated, setting forth, truly and particularly, the facts and circumstances of the case, and praying for relief, such judge shall, if the case, in his judgment, requires, proceed to inquire, in a summary manner into the circumstances of the case, * * * of which the district attorney and the collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should be refused."

The act further provides that the facts appearing at such summary investigation shall be stated and annexed to the petition, and, together with a certified copy of the evidence, transmitted to the Secretary of the Treasury, who shall have power to remit such forfeiture.

I think, from an examination of the petition, the agreed facts, and the law under which it is presented, that this court cannot take jurisdiction. The relief can only be had when the forfeiture has been declared. No forfeiture is alleged or shown, and without a forfeiture there is no relief which can be granted. The Supreme Court, in U. S. v. Morris, 10 Wheat. (23 U. S.) 295, 6 L. Ed. 314, in discussing this question, said:

"Nor will the remission be granted before condemnation, unless the petitioner will admit the forfeiture has been incurred."

In U. S. v. 150 7/12 Dozen Long Gloves (D. C.) 168 Fed. 1010, and The Princess, Fed. Cas. No. 11,431, it was held that until a forfeiture had been declared the court would not take cognizance of such petition.

In re O. L. WARD & CO. et al.

(District Court, N. D. California, First Division. May 25, 1917.)

No. 9960.

BANKRUPTCY ⇐288(2)—COLLECTION OF ASSETS—SUMMARY PROCEEDINGS.

Where, within four months before bankruptcy, the bankrupt, to release an attachment, deposited money with the constable in lieu of a bond, and after the adjudication, and the election of a trustee, the attachment creditor, with knowledge thereof, procured the entry of judgment and the issuance of an execution, in pursuance of which the constable paid the money in his hands to the attachment creditor, the attachment creditor was not such a bona fide adverse claimant as would compel the trustee to resort to a plenary suit, and a summary order requiring the payment of such money to the trustee was proper.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

In Bankruptcy. In the matter of O. L. Ward & Co., a copartnership, and O. L. Ward, a member of such partnership, individually, bankrupts. On petition to review an order of the referee. Affirmed.

Charles Quayle, of Oakland, Cal., for petitioner.

J. W. Dignan, of Oakland, Cal., for trustee.

DOOLING, District Judge. Review is sought of an order of the referee directing W. E. Dean to pay over to the trustee of the bankrupts the sum of $253.

Within four months before the institution of the bankruptcy proceedings, the petitioner, Dean, had brought suit against the bankrupts and attached certain of their property. To release the attachment they gave to the constable $253 in cash, in lieu of a bond. The constable released the attached property and held in his possession the money, $253, in place of the attached property. After the adjudication of the bankrupts and the election of a trustee, and with knowledge of such adjudication and election, Dean procured a judgment to be entered against them in the action in question, and procured a writ of execution to be issued thereon, and in pursuance of said writ the constable paid over to him the $253 in his hands in satisfaction of the judgment. Upon a petition by the trustee, and notice to Dean, and a hearing on the merits, the referee made the order complained of, directing Dean to pay to the trustee the $253 so received by him from the constable.

The petitioner contends that the referee could not by summary proceedings deprive him of this money, because he was an adverse claimant, in good faith, and having the money in his possession. This claim is disposed of by the language of the Circuit Court of Appeals of this circuit in Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355 as follows:

> "The moment a petition in bankruptcy is filed, the jurisdiction of the bankruptcy court begins, and the petition so filed is lis pendens, and notice to all the world. It has the effect both of an attachment and an injunction, and the adjudication of bankruptcy discharges any attachment levied within four months prior to the filing of the petition, unless the bankruptcy court shall order the lien preserved for the benefit of the bankrupt's estate, and it operates as a seizure of the property, the title to which subsequently passes to the trustee. Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien, which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and must deliver the property upon proper demand, and may be required to do so by summary order issued from the bankruptcy court. He is not an adverse claimant, and his mere refusal to surrender the property does not make him such."

This is not the case of a creditor who has received money from a bankrupt prior to the filing of the petition, but of one who has received money after adjudication, the title to which money had already passed by operation of law to the trustee. Nor is it the case of a constable releasing an attachment upon a bond given him by third parties, which bond would not be invalidated by the bankruptcy proceedings. It is the case of a constable holding the money of the bankrupts themselves, which money was a part of the assets to be marshaled and disposed of by the bankruptcy court, and petitioner, having received the money from the constable after adjudication and after the election of the trustee and with full knowledge of both such adjudication and election, cannot be heard to say that he is such a bona fide adverse claimant as would compel the trustee to resort to a plenary suit. Graessler v. Reichwald, 154 Fed. 478, 83 C. C. A. 304.

The order of the referee is therefore affirmed.

In re WHITE.

(District Court, N. D. California, First Division. February 8, 1917.)

No. 8700.

BANKRUPTCY ⟸415(4)—DISCHARGE OF BANKRUPT—OPPOSITION BY TRUSTEE.
After entry of an order discharging a bankrupt without objection, except by the trustee, who was not shown to have been authorized by the creditors to oppose the discharge, a rehearing will not be granted, to permit the trustee to produce evidence of his authority, which he had full opportunity to do on the hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 726.]

In Bankruptcy. In the matter of H. S. White, bankrupt. On application by trustee for rehearing on application for discharge. Denied.

For former opinion, see 238 Fed. 874.

Wilder Wight, of Oakland, Cal., for bankrupt.

Clarence A. Shuey and W. Dorn, both of San Francisco, Cal., for trustee.

DOOLING, District Judge. On an application made to the court by the bankrupt for a discharge, the trustee appeared and filed specifications in opposition thereto, and the matter was referred for hearing to the referee. The referee reported, and recommended that a discharge be denied. A hearing was thereafter had before the court upon this report, and the court ordered the discharge of the bankrupt, notwithstanding the adverse report of the referee, for the reason that it nowhere appeared that the trustee was authorized to interpose objections at a meeting of creditors called for that purpose, as required by section 14 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. 1916, § 9598]).

The trustee now moves that the discharge be set aside and the matter referred again to the referee, and bases the motion upon the ground that the trustee was in fact authorized by the creditors to oppose the discharge, although the record as brought here shows that whatever authorization the trustee had was by order of the referee. The motion to set aside the discharge is opposed by the bankrupt, who contends that every opportunity was afforded the trustee to make proof of the fact that he was authorized by the creditors to oppose the discharge, if such were the fact, and insists, as he has at all times insisted, that the specifications do not show any authorization at all, while the notice of appearance filed by the trustee contains the recital:

"The trustee having been first duly authorized by the above court to interpose objections to the bankrupt's discharge."

A re-examination of the lengthy record and of the voluminous briefs fails to disclose a single suggestion, prior to the present motion, that the trustee was authorized to make opposition by any one except "by order of the court," or by "order of the referee," which I take to mean the same thing. The trustee was not taken by surprise, for the bankrupt urged from the beginning the insufficiency of the specifications and the lack of authorization, and I see no reason, in view of the con-

flicting affidavits now presented, for disturbing the conclusions heretofore reached.

The petition for a rehearing, and the motion to set aside the discharge, are denied.

HUBBELL et al. v. ROYAL PASTIME AMUSEMENT CO.

(District Court, S. D. New York. May 26, 1917.)

1. COPYRIGHTS ⊜82—INFRINGEMENT—PLEADING.
As a matter of pleading, it may be fairly inferred that, when the composer protects a musical composition with an unlimited copyright notice, he has written the work for the purpose of securing all rights obtainable under the copyright act, including the right publicly to perform it for profit.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73.]

2. COPYRIGHTS ⊜36—RIGHTS ACQUIRED—PERFORMANCE FOR PROFIT.
In Copyright Act March 4, 1909, c. 320, § 1, subd. "e," 35 Stat. 1075 (Comp. St. 1916, § 9517), providing that any person entitled thereto, upon complying with the provisions thereof shall have the exclusive right to perform the copyrighted work publicly for profit, "if it be a musical composition and for the purpose of public performance for profit," a semicolon should precede the words "and for the purpose of public performance for profit"; but even without the semicolon the statute merely protects those who do not in public perform the musical composition for profit, and does not make the benefits acquired by the copyright proprietor dependent upon his purpose or mental attitude when the copyright is obtained.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37.]

In Equity. Suit by Raymond Hubbell and others against the Royal Pastime Amusement Company. On motion to dismiss. Motion denied.

Nathan Burkan, of New York City, for complainants.
J. Robert Rubin, of New York City, for defendants.

MAYER, District Judge. This is a motion to dismiss the bill on the ground that the facts stated therein are insufficient to constitute a cause of action under the Copyright Act of March 4, 1909, as amended. The sole point urged is that the bill is defective, because it fails to allege that the musical compositions involved were written for the purpose of public performance for profit.

[1] As a mere matter of pleading, I am inclined to think that, when the composer composes his composition with an unlimited copyright notice, it may fairly be inferred that he had written the work for the purpose of securing all the rights attainable under the Copyright Act, including the exclusive right publicly to perform it for profit.

[2] But the controversy goes deeper than a mere matter of pleading, for I am entirely satisfied that a semicolon should precede the words "and for the purpose of public performance for profit." This is borne out by a reading of the committee reports and a reading of the statute. See Tyrrell v. Mayor, 159 N. Y. 239, 53 N. E. 1111, as to the rules of construction where punctuation is involved. If the semicolon is not inserted at the place above indicated, subdivision "e" of section 1 does

not seem to make sense. Eliminating the semicolon, the most, however, that the section amounts to is a protection in favor of those persons who do not perform publicly for profit the musical composition—as in the case of street parades, school, educational, or similar public occasions and exhibitions.

Putting the matter another way, the contention of defendant is that the person who becomes entitled to the copyright, by complying with the act, must state what was in his mind at the time that he obtained his copyright. I am unable to see any justification for this view, because the purpose or mental attitude of the composer is immaterial. The procedure is that he complies with the act, and as a result of that compliance certain benefits follow by virtue of the statute. The subject could be further and somewhat elaborately developed, but I see no occasion so to do upon this motion, as the point which defendant makes will be preserved, should a trial be had.

Motion denied.

Ex parte COATZ.

(District Court, W. D. Washington, N. D. February 20, 1917.)

No. 3557.

HABEAS CORPUS ⊜45(5)—FEDERAL COURTS—PERSONS IN CUSTODY OF STATE AUTHORITIES—REMEDY BY WRIT OF ERROR.

Except in cases of great urgency, a federal court will not, on habeas corpus, discharge a person in the custody of the state authorities, charged with a crime under the laws of the state, on the ground that his constitutional rights have been violated, but will leave him to his remedy by writ of error to the United States Supreme Court, after presenting his contention to the highest court of the state.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–44; Courts, Cent. Dig. §§ 804, 805, 990.]

Petition by W. A. Coatz for writ of habeas corpus. Writ discharged.

Robert Welch, of Seattle, Wash., for petitioner.

Alfred H. Lundin, Pros. Atty., and Frank P. Helsell, Asst. Pros. Atty., both of Seattle, Wash., for respondent.

NETERER, District Judge. In response to an order of this court, based upon the petition herein, alleging that petitioner is unlawfully deprived of his liberty by the respondent, the petitioner is produced, together with a return to the order, in which it appears that petitioner was charged under the laws of the state of Washington with being an habitual criminal (section 2286 Rem. & Bal. Codes. of Washington), and was accorded a trial pursuant to the laws of Washington, and that, upon a return by the jurors finding the petitioner guilty of the charge made, he thereupon appealed to the Supreme Court of the state of Washington, and the conviction and judgment of the state superior court was affirmed; that thereupon a petition for rehearing was filed, and the said petition for rehearing was duly considered and disposed of by the Supreme Court of the state of Washington on the 6th day of February, 1917, and the remittitur of the Supreme Court transmitted to

the superior court of the state by virtue of which remittitur the judgment of the trial court was made final. The matter comes before this court in the form of a demurrer to the return of the sheriff of King county, and it is contended by the petitioner that he is sentenced contrary to his constitutional rights; that he is being twice put in jeopardy for the same offense, contrary to the provisions of article 5 of the Amendments to the United States Constitution, and contrary to article 1, § 9, of the state Constitution.

Without discussing the merits of the contention of the petitioner, I think that the Supreme Court of the United States, in Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, has definitely pointed out that the duty of this court is to discharge the writ and dismiss the petition. The petitioner being in the custody of the state authorities, charged with a crime under the laws of the state, his duty, as stated by the Supreme Court in Reid v. Jones, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. Ed. 116, after presenting his contention to the highest court of the state in which judgment could be reviewed, if unsuccessful, is to take it to the Supreme Court of the United States by writ of error, and that only in exceptional cases should the District Court intervene by writ of habeas corpus; and in Drury v. Lewis, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. Ed. 343, the Supreme Court reaffirmed the expression in Reid v. Jones, supra, and stated that, except in cases of peculiar urgency, the federal court should leave the petitioner to his remedy by writ of error to the Supreme Court. The present case is not one of those of great urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations.

The writ will be discharged, and the petition dismissed.

FREY & SON, Inc., v. WELCH GRAPE JUICE CO.

(District Court, D. Maryland. June 21, 1917.)

COSTS ⊂=244—REVERSAL WITH COSTS.

Where the first trial of an action resulted in a mistrial, and the second trial in a verdict for defendant, and the judgment was reversed, "with costs," all of the costs of both trials were taxable against defendant, in view of the long-established custom, both in the federal and in the state courts, that when the mandate is in that form all the costs up to that time incurred in the court below are taxed against the defendant in error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 940–946.]

At Law. Action by Frey & Son, Incorporated, against the Welch Grape Juice Company. On exceptions to the clerk's taxation of costs. Exceptions overruled.

Horace T. Smith, of Baltimore, Md., for plaintiff.

John Hinkley, of Baltimore, Md., for defendant.

ROSE, District Judge. This case has now been tried three times. At the first trial there was a hung jury. The second trial resulted in

a verdict for the defendant. The plaintiff sued out a writ of error, and the Circuit Court of Appeals reversed the judgment with costs. 240 Fed. 114, — C. C. A. —.

Upon receipt of the mandate, the clerk of this court, in accordance with the ordinary practice when a mandate comes down in that form, taxed all the costs for both trials below against the defendant. The defendant excepted to the taxation of any of the costs below against it, and, in the alternative, to the taxation against it of the costs of the first trial. The custom both in the United States and state courts of Maryland, when the mandate from the appellate court is in the form used in this case, is to tax against the defendant in error all the costs up to that time incurred in the court below. The experienced clerks of the state and federal courts say they are not aware in their experience of more than a quarter of a century of any exceptions to this practice, although they are not able to recall whether or not the precise case of a mistrial, and a verdict for the defendant in the second trial, and a reversal of the judgment entered thereon by the appellate court, has ever before arisen.

As the verdict and judgment are now for the plaintiff, defendant's exceptions to the clerk's taxation of the costs will necessarily be overruled; but, had the result of the third trial been different from what it was, I would not have felt justified in sustaining defendant's exceptions, or either of them, in view of the language of the Circuit Court of Appeals, employed, as it was, after the construction of such language in this district was of so long standing.

They will therefore be overruled.

In re UNITED FIVE & TEN CENT STORE, Inc.

(District Court, S. D. New York. February 6, 1917.)

1. BANKRUPTCY ⟸314(6)—CLAIMS PROVABLE—TAXES.
   Where a tax was valid under the laws of the state, and under the rule in that state deductions for debts could not be made, the tax could not be disallowed as a claim against the estate of a bankrupt corporation, on the ground that it was unjust or unlawful.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 486.]

2. BANKRUPTCY ⟸314(6)—CLAIMS—TAXES—REVISION.
   The federal courts have power to revise state taxes presented as claims against the estates of bankrupts.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 486.]

In Bankruptcy. In the matter of the United Five & Ten Cent Store, Incorporated, bankrupt. On application for allowance of a tax as a claim against the estate. Report of special master disaffirmed, and tax allowed.

Blau, Zalkin & Cohen, of New York City, for trustee.

Henry M. Hartman, of Trenton, N. J., for city of Trenton.

AUGUSTUS N. HAND, District Judge. [1] A tax was assessed upon personal property of the bankrupt corporation in the city of Trenton valued at $7,800, amounting to $184.86. It is conceded that the bankrupt had assets in the city of Trenton to that amount, but, because the property belonged to an insolvent corporation, the referee held that the tax was unjust and should be disallowed. I do not find that such a tax was not due under the New Jersey law. It was not seriously argued upon the hearing of the motion, nor in the brief submitted for the trustee, that the ruling of the state board of New Jersey to the effect that deductions for debts from the assessed value of tangible or corporeal personal property cannot be made in New Jersey. If this is so, the tax is valid under the state law, and cannot be regarded as unjust or unlawful in any respect.

In Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, the Supreme Court held that there was nothing in the Bankruptcy Act exempting property in the hands of a trustee in bankruptcy from the state and municipal taxes to which similar property from the same locality is subject. Speaking of the property of the bankrupt, the court said:

"It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality, or which should exempt it from its obligations to either."

[2] There is no doubt that federal courts have power to revise state taxes. In the case of New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, the Supreme Court said:

"The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving a preference to taxes, is a federal question, of ultimate decision in this court."

There can be no doubt that the sum sought to be collected by the city of Trenton is a tax, and that it was based upon an assessment of property to the value found by the assessing officer.

For the foregoing reasons, the special master's report should be disaffirmed, and the amount of the tax allowed.

Ex parte BORCHARDT.

(District Court, E. D. South Carolina. June 28, 1917.)

No. 238.

ALIENS ⇐61—NATURALIZATION—ALIEN ENEMIES—"TIME OF APPLICATION."

Under Rev. St. § 2171 (Comp. St. 1916, § 4362), providing that no alien, who is a native, citizen, subject, or denizen of any country with which the United States are at war at the time of his application, shall be then admitted to become a citizen, the "time of his application" is the time when he presents himself in open court to be admitted, and not the time of filing the petition giving notice of the application, and hence a citizen of Germany cannot be admitted to citizenship, where his application in open court was made after a state of war existed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122.]

Application by William Borchardt for naturalization. Petition denied without prejudice.

SMITH, District Judge. This applicant is a German citizen, who made his declaration of intention on the 15th of May, 1895, in the county court of the county of Multnomah, state of Oregon. He has served almost continuously since as a soldier in the United States army, and has had an honorable discharge certificate. Except for the fact that a state of war now exists between the United States and Germany, he would appear to fulfill the requirements of the statute and would be admitted to naturalization.

The objection is the provisions of section 2171, United States Revised Statutes, that no alien who is a native citizen or subject or a denizen of any country, state, or sovereignty with which the United States are at war at the time of his application shall be then admitted to become a citizen of the United States. In the view of the court the time of his application means when he presents himself to the court in open court to be admitted. The object of filing a petition 90 days before is to give notice of the application. The application is after the expiration of the 90 days, when he presents himself to the court and applies. Under the plain terms of the statute it seems to the court that he is now ineligible. There have been several decisions upon the subject, and the court is of opinion the better weight of the reasoning is with the decisions which have decided adversely to the admission of such applicants.

With the legislative motive and reasoning the court has nothing to do. It may be said, however, that it might well be considered whether or not the view of the Legislature was not that to subject a soldier in the army, such as a citizen of Germany, to the terrible strain to which he would be subjected if he were sent now over to Europe to maintain by force of arms under the requirement of the law the cause of the United States against that of Germany, might be to incur grave perils. However that may be, the meaning of the statute is clear. It seems to this court that the legislative instruction is that no one shall be admitted to be a citizen who at the time of his application in open court for admission is a citizen of a country with which the United States are at war. This decision might be held to await further action of Congress, but inasmuch as the applicant may desire to obtain appellate construction of the statute and review the decision of the court, it is now made.

The petition of the applicant is accordingly refused, but without prejudice to him to renew his application after the conclusion of peace between the United States and Germany.

END OF CASES IN VOL. 242

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